PUBLIC PROCUREMENT AWARD CRITERIA

IN THE EU MEMBER STATES:

A COMPARATIVE STUDY OF THE DISCRETIONARY

POWERS OF CONTRACTING AUTHORITIES

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ABSTRACT

When choosing and applying the award criteria in the context of public procurement procedures, contracting authorities exercise their discretionary powers with a view to selecting the most economically advantageous tender. The importance of the use that contracting authorities make of their margin of discretion is directly related to the result of any public procurement procedure: the level of satisfaction of the contracting authorities' needs provided by the works/supply/ service contract concluded with the winning tenderer.

Despite the tendency for public procurement regulation to focus on procedural rules ('how to buy'), rather than the actual outcome of the procurement activity itself ('what to buy'), there are substantive requirements derived from legislative sources, as well as soft law and jurisprudence, that somehow structure the contracting authorities' decision making freedom.

Although there is no standard unit that allows for the measurement of contracting authorities' margin of discretion and its variation, this thesis aims to identify factors which contribute either to increase or to reduce the said margin. In other words, it is proposed to highlight the elements which determine the expansion or the limitation of the referred discretionary powers.

The thesis concludes that despite the different national regulatory approaches to this topic under the common EU legal framework, the practice in the Member States covered by this thesis seems to indicate that contracting authorities exercise their discretionary powers in a (unknowingly) similar way.

Table of abbreviations

2004 Public Sector Directive	Directive 2004/18/EC [2014] O.J. L 134/114
2014 Public Procurement Directive	Directive 2014/24/EU [2014] O.J. L 94/65
2006 Public Contracts Regulations	Public Contracts Regulations 2006 (SI 2006/5)
2015 Public Contracts Regulations	Public Contracts Regulations 2015 (SI 2015/102)
CMP	*Code des Marchés Publics*, approved by Décret n° 2006-975 du 1er août 2006
CCP	*Código dos Contratos Públicos*, approved by Decreto-Lei n° 18/2008, de 29 de Janeiro de 2008
EU	European Union
MEAT	The most economically advantageous tender
TEU	Treaty on the European Union*
TFEU	Treaty on the Functioning of the European Union*

* This thesis refers to the consolidated versions of the Treaty on European Union (TEU) and of the Treaty on the Functioning of the European Union (TFEU) as they result from the amendments introduced by the Treaty of Lisbon, which was signed on 13 December 2007 and entered into force on 1 December 2009. Where necessary, reference is made to the old numbering of the pre-Lisbon version of the Treaty on European Union and that of the Treaty establishing the European Community.

TABLE OF CONTENTS

PUBLIC PROCUREMENT AWARD CRITERIA IN THE EU MEMBER STATES: A COMPARATIVE STUDY OF THE DISCRETIONARY POWERS OF CONTRACTING AUTHORITIES

Abstract
Table of Abbreviations

Chapter 1 – Introduction
1.1 Introduction
1.2 Scope and purpose of the thesis
1.3 Research questions
1.4 Methodological approach

Chapter 2 - Award criteria: working definitions
2.1 Introduction
2.2 Criteria, sub-criteria and respective weightings
2.3 Evaluation methodologies

Chapter 3 - The European legal context
3.1 Introduction
3.2 Brief historical legislative overview
3.3 Principles and objectives of the European public procurement regulation
- 3.3.1 The internal market freedoms
- 3.3.2 Equal treatment, non-discrimination, transparency and proportionality
  - (a) Equal treatment and non-discrimination
  - (b) Transparency
  - (c) Proportionality
- 3.3.3 Competition, value for money and horizontal policies

(a) Opening-up of public procurement to competition
(b) Value for money
(c) Horizontal policies
3.4 The choice of the award criteria
3.4.1 The most economically advantageous tender (MEAT)
(a) Freedom to choose the best price-quality ratio criterion
(b) Freedom of choice conferred by the best price-quality ratio criterion
(i) First limitation: criteria aimed at identifying the MEAT
(ii) Second limitation: criteria not conferring an unrestricted freedom of choice
(iii) Third limitation: criteria linked to the subject matter of the contract
(iv) Fourth limitation: disclosure of criteria
(v) Fifth limitation: compliance with fundamental principles
3.4.2 Permitted and prohibited award criteria
3.4.3 The price or cost criterion
3.5 Evaluation methodologies
(a) Weightings and scoring systems
(b) Disclosure obligation
(c) The elaboration of award criteria and the changes to evaluation methodologies
(d) Judicial review of award criteria and evaluation methodologies

Chapter 4 - Award criteria and the discretionary powers of contracting authorities in the UK
4.1 Introduction
4.2 The choice of the award criteria

4.2.1 The most economically advantageous tender (MEAT)
4.2.2 Permitted and prohibited award criteria
4.2.3 The price or cost criterion
4.3 Evaluation methodologies
4.4 Illustrations of evaluation models used in practice

Chapter 5 - Award criteria and the discretionary powers of contracting authorities in France
5.1 Introduction
5.2 The choice of the award criteria
5.2.1 The most economically advantageous tender (MEAT)
5.2.2 Permitted and prohibited award criteria
5.2.3 The price or cost criterion
5.3 Evaluation methodologies
5.4 Illustrations of evaluation models used in practice

Chapter 6 - Award criteria and the discretionary powers of contracting authorities in Portugal
6.1 Introduction
6.2 The choice of the award criteria
6.2.1 The most economically advantageous tender (MEAT)
6.2.2 Permitted and prohibited award criteria
6.2.3 The price or cost criterion
6.3 Evaluation methodologies
6.4 Illustrations of evaluation models used in practice

Chapter 7 - Comparative analysis
7.1 Introduction
7.2 Comparative findings
7.2.1 The choice of the award criteria
7.2.1.1 The most economically advantageous tender (MEAT)

7.2.1.2 Permitted and prohibited award criteria
7.2.1.3 The price or cost criterion
7.2.2 Evaluation methodologies
7.2.3 Evaluation models used in practice

Chapter 8 – Conclusions
8.1 Summary of the main conclusions
8.2 Learning from others

CHAPTER 1 - INTRODUCTION

1.1 Introduction

The award criteria play a key role in the public procurement procedures, as they determine who is the procurement's competition winner, i.e. who should be awarded the public contract on account of having submitted the best tender according to the referred criteria.

As regards their function and nature, the award criteria reflect particular needs of the contracting authority and its preferable means of fulfilling them, thus laying the foundation for a reasoned award decision. In fact, the award criteria reveal the reasoning behind the decision making process of the contracting authority when awarding a public contract.

Firstly, the task of drawing up the award criteria urges the contracting authority to think thoroughly about the purchase in question and the contractual conditions attached to it, in order to select the most significant factors to be considered as award criteria. In order to become operational, the award criteria must be translated into a special purpose tool: an evaluating model. This - more or less complex - model allows the contracting authority to turn the contract specifications regarding quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, social requirements, running costs, cost-effectiveness, after-sales service and technical assistance, commitments with regard to spare parts, security of supply, delivery date and delivery period or period of completion, etc. into evaluation parameters, which will render the award stage effective.

Secondly, the disclosure of such procedural information – both the award criteria and the respective evaluation model – provides economic operators (i.e. potential tenderers) with a precise idea of the needs the contracting authority aims at fulfilling through the conclusion of a specific contract and its preferences regarding the contract terms. Thus, transparency enables economic operators to better shape their tenders with a view to meeting the expectations of the contracting authority.

Thirdly, the award criteria and the respective evaluation model permit the contracting authority to measure the value for money offered by each submitted tender, pointing out which one is the most beneficial from the contracting authority's perspective. Hence, the award criteria act as the basis for the ultimate choice – which tenderer the contracting authority will invite to conclude the contract with – as they assist the contracting authority in producing a rational award decision.

Finally, despite enjoying a certain margin of discretion when choosing the award criteria, the contracting authority's choice must not disregard public procurement general principles, such as equal treatment and non-discrimination, as well as the transparency obligation and the competition objective. Non-compliance of the award criteria with these principles is one of the most usual reasons for challenging public procurement procedures.

This thesis aims to investigate the public procurement award criteria in a legal and practical context. The importance of the topic is revealed by its decisive contribution to the procurement outcome and its horizontal role throughout the procedure.

The originality of this thesis rests on its methodological approach. On the one hand, the empirical work allows for a more comprehensive picture of the diversity of rules and practices regarding the award criteria, in spite of the common European public procurement substructure they refer to. This calls for a discussion about the desirability of the convergence towards an increasingly Eurocentric public procurement regime versus the divergence between national rules and practices and its impact in the European single market. On the other hand, the comparative law method, alongside the case study technique, enhances the 'lesson drawing process', which fits in with our beliefs about knowledge: learning and teaching benefit mutually and act as a natural impulse for each other.

"You should only teach what you can learn."

(Ortega y Gasset, 1883-1955).

1.2 Scope and purpose of the thesis

According to the 2004 Public Sector Directive, there were two permitted public procurement award criteria: the lowest price and the most economically advantageous tender (MEAT). The recent 2014 Public Procurement Directive introduced an overriding concept termed "the most economically advantageous tender", which can consist in the so called best price-quality ratio criterion, or the price or cost only criterion. This thesis focuses on each of these approaches at a time, since they are both still in force.

Taking into account its European context, this thesis covers the procedures for the award of the following contracts subject to the 2004 Public Sector Directive and the 2014 Public Procurement Directive: works contracts, supply contracts and services contracts, whose value is equal to or greater than the respective thresholds provided in the referred directives. Such delimitation - excluding other types of contracts, low value contracts and the utilities regime - aims at narrowing down the field of the study to a common legal ground, in order to enhance the comparative approach.

Furthermore on the topic of the delimitation of the research scope, this thesis concentrates on the most significant public procurement procedures, whose procedural features allow the most comprehensive comparability exercise: the open and the restricted procedures. In fact, including other procedures – such as, the negotiated procedure and the competitive dialogue – would jeopardise the feasibility of the comparative study, mainly because they entail rather specific characteristics, which pose very different legal and practical

challenges. However, some case law on other procedures is mentioned whenever it sets a general rule that applies across procedures including to the open and restricted ones.

Finally, no restrictions are imposed on the type of contracting authority for the purposes of this thesis, as it does not seem to be a critical aspect of the delimitation of its scope.

The starting point of this project is the 'double level' regulation about the award criteria with which every European contracting authority must comply: the public procurement directives' rules and the respective case law from the Court of Justice, on the one hand; and the national legislation and domestic court decisions, on the other hand.

The European legal substructure has influenced the public procurement legal framework within the EU Member States in various and different ways: from the technique of reproducing the directive's wording on the award criteri[a], to the incorporation of case law requirements in written rules; from the investment in soft law and guidance on best practices, to the adoption of detailed rules on evaluation models which go beyond the European standard.

The three national legal systems dealt with – UK, France and Portugal – provide not entirely similar legal solutions for the same matter despite the common European source. At least partially, this diversity is most likely the result of the distinct **legal tradition** each system derives from: common law or civil law.

This research project aims at comparing the legal solutions national legislators and judges provide on the topic of public procurement award criteria under the European effort

approximating procurement procedures, namely through the 2004 and 2014 reforms. However, statutory rules and court decisions do not tell the whole story when one looks at the award criteria's picture. "In theory, there is no difference between theory and practice. But, in practice, there is."[1] So, in addition to the legal framework, this thesis seeks to investigate procurement practices on the award criteria carried out by procurement agents on behalf of the contracting authorities and often assisted by legal advisers.

The purposes of this thesis are (i) to show the variety of legal solutions and practical approaches to the same subject under a shared European framework; (ii) to discuss the similarities and the differences considering, on the one hand, the apparent convergence brought about by the EU directives on public procurement and, on the other hand, the apparent divergence between the national implementation measures considerably influenced by the national constitutional traditions they derive from; and (iii) to allow the drawing and sharing of lessons learnt.

In order to achieve its goals, this thesis sets out to answer the following research questions, in accordance with the research methodology explained below.

[1] Jan L. A. van de Snepscheut (1953-1994).

1.3 Research questions

The choice of the research questions determines the unique focal point of this project, acting as Popperian searchlights (a metaphor for the *selectionist* perspective applied to both the individual learning process and the growth of objective knowledge[2]), which leads to its distinctive outcome.

The key element of my thesis' perspective is the ***discretion*** of the contracting authorities when using the award criteria in public procurement procedures. In fact, this is the common denominator to all questions under discussion, and also the comparator to measure the differences between the selected national jurisdictions.

Bearing in mind the "discretion lens" through which this thesis is presented, it is proposed to cover the following issues:

(a) The extent of the contracting authority's freedom to choose the MEAT in the context of public procurement procedures;

(b) The extent of the freedom of choice conferred by the MEAT – this entails an investigation of the five limitations to the discretionary powers of the contracting authority when choosing and applying the criteria under the MEAT: whether those criteria are aimed at identifying the MEAT; whether those criteria confer an unrestricted freedom of choice on the contracting authority; whether those criteria are linked to the subject matter of the contract; whether those criteria need to be disclosed in advance; and, finally, whether those criteria

[2] See KR Popper, *Objective Knowledge: An evolutionary approach* (OUP 1979).

comply with the fundamental public procurement criteria;

(c) An investigation of permitted and prohibited award criteria;

(d) An analysis of the price or cost criterion;

(e) A discussion about evaluation methodologies, including a look at the scoring systems, the obligation to disclose them, the possibility to elaborate the award criteria and change the evaluation methodologies, and finally the scope of the judicial review of award criteria and evaluation methodologies.

1.4 Methodological approach

This thesis starts off with the inescapable study of the law in books. In fact, the **doctrinal legal approach** is a useful starting point (namely because it supplies the operational tools, such as concepts, frameworks, etc.) but it suffers from a "context-stripping syndrome". So, in order to circumvent that, this thesis aims to address the **law as part of the living experience**. In fact, we believe the continuous progress of the public procurement theory relies on a critical analysis of the public procurement practice, i.e. the growth of the procurement knowledge depends on the *constant dialogue process between theory and practice*, which is expected to result in improvements in public procurement considered as a whole.

Despite overrunning legal positivism, *this thesis does not explicitly engage with any particular and ready-labelled theoretical framework* (such as feminism, Marxism, or postmodernism). However, the methodological assumptions, which underpin this thesis, are clear: the development of the public procurement theory is based on a continuous interaction with the reality of procurement practices. So, because it surpasses a strictly rule-based approach to law and legal research, this thesis deserves the generic label of **socio-legal research**. Thus, the contextualization of the research topic represents an added value regarding this project's contribution to the body of knowledge.

As announced by its title, this thesis consists of a comparison between selected case studies. The articulation between the **comparative method** and the **case study technique** is

intended for comparing and contrasting the above mentioned public procurement topic between three EU Member States: the UK, France and Portugal. The interest in identifying differences and similarities between the statutory rules, the case law and the procurement practices regarding the award criteria and the evaluation models belonging to those two jurisdictions lies in the opportunity to assess the balance between the diversity of national procurement realities and the desirable singularity of the European market (pursued by the EU directives on public procurement).

The **choice of the case study domestic jurisdictions** was based on their relevance as representative samples of two typical legal traditions: civil law (characterised by rigid and abstract rules which limit discretion) and common law (known for its pragmatic approach to the particular problems on a case-by-case basis). This is the 'special something' which justifies the choice of the case studies: the UK is an iconic example of the common law system, whereas France and Portugal share a civil law background.

The purpose of this comparative case study is **not to make normative claims** but to: (i) recognize what is similar and what is different (including the extent of the differences); (ii) try to understand and explain the reason behind those similarities and differences; and (iii) draw lessons through a critical appraisal of their specific merit. Therefore, the ultimate goal of this project is to contribute to the future **sharing of lessons learnt**, namely by inspiring future public procurement policy/law/decision makers to pursue improvements regarding the award criteria and the evaluation models.

The use of the comparative law method has always been about escaping parochialism (i.e. our own "backyard") by learning from studying other legal systems and attempting comparisons with ours. However, this method raises a well-known and complex matter: the **transferability/ transplantation of rules**, practices and policies, which is regarded as a limitation of the comparative method. Although the comparative law critique argues that it is neither possible nor desirable to make transfers from our own backyard into other people's and vice versa, this research project attempts to look beyond our backyard's fences and to promote some lesson-drawing as a result of the comparison between the inner-backyard reality and the outer one.

Summing up, regardless of the European harmonisation effort embodied by the EU directives on public procurement, we acknowledge how *enriching national diversity* can prove to be and consider comparative study is worth it, despite the undesirability of 'pure' transferability, and envisage a different conceptual usefulness for the comparative legal results: to *allow the use of lessons learned abroad to create tailor-made domestic solutions, no to photocopy them*.

In order to carry out the above-mentioned study of procurement practices regarding the proposed research questions, this thesis comprises an amount of **empirical work**. Taking into account the contextualization effort, a **qualitative approach** is taken towards the collection and analysis of the data.

The primary method for collecting data is document research and analysis: contract notices published in the Official Journal of the European Union (OJEU), contract

documents and award decisions (whose notices are also published in the OJEU). **Secondarily, the observational method is used** to shadow procurement agents and/or their legal advisers when they make decisions about the award criteria and the evaluation model within public procurement procedures. *All participants expressly consented to be observed and confidentiality was guaranteed*.

Furthermore on the topic of empirical work, the **personal "insider" perspective of the author of this thesis** should be acknowledged. It is a result of the author's previous working experience in providing contracting authorities with legal advice in public procurement procedures, as well as in public procurement law and rule-making. This detail may add some subjectivity to the research, which is surely compensated by the advantages of having an understanding of "the other side".

Having stated above that this thesis does not aim at making any normative claims, we must add that it *does not intend to make any causal claims either*. In fact, investigation of cause-effect relations and generalisation ambitions are *not typical of a qualitative approach*. The latter concentrates on correlation rather than causation, and induction rather than deduction.

While attempting to bridge theory and practice, this thesis engages in some inevitable **interdisciplinary work** where it investigates issues such as: the effects of the award criteria's disclosure on the quality of the tenders, or the consequences of the scoring system's choice on the potential tenderers.

On the other hand, when dealing with evaluating models, this project enters the field of mathematics (the discipline of

research operations), because these models are often based on the so-called “decision support systems”.

It is hoped that allowing for these non-strictly-legal research approaches will add value to the study of public procurement theory and practice about the award criteria, not only on account of their legal significance, but also because they can assist in shaping better procurement rules and practices – despite their instrumental research role.

CHAPTER 2 – AWARD CRITERIA: WORKING DEFINITIONS

2.1 Introduction

This chapter compiles the working definitions of the more technical concepts, which are expressly or implicitly used throughout this thesis.

2.2 Criteria, sub-criteria and respective weightings

For the purposes of this thesis, **award criteria** are the elements chosen by the contracting authority against which to evaluate and compare the tenders, in order to decide which one is the most economically advantageous. These elements reflect the contract conditions (including the specifications), which are put out to competition according to the will of the contracting authority. Award criteria form part of the overriding concept of the **MEAT** as established by art.67 2014 Public Procurement Directive.

The **sub-criteria** form the second level of the evaluation methodology. They reveal the contracting authority's preferred evaluation aspects within each criterion. The quality criterion, for example, is often disaggregated into several component parts, depending on the object of the contract and the needs of the contracting authority.

Both criteria and sub-criteria have **weightings** attached to them. They can be expressed in percentages, points, etc. The weightings represent an indication of the *relative importance*

of (sub)criteria vis-à-vis each other. A full understanding of the said relative importance, however, is only granted by the **scoring method**. The relevance of weightings is particularly evident when it comes to the commonly used methodology known as **weighted sum** or weighted factor score[3] (see below), whereby the allocated scores are multiplied by the weightings of the respective (sub)criteria, and finally the partial scores are added to reveal its *weighted sum* corresponding to the overall score of the respective tender.

2.3 Evaluation methodologies

Evaluation methodologies, also known as **evaluation models**, are tools which assist the contracting authorities in *measuring the level of performance offered by each tender*, in order to facilitate the choice of the tender which best meets the needs targeted by a particular public contract. Those needs are expressed in the contract conditions and specifications. This practical tool is made up of several different elements, which are identified by a variety of terms (often non-legal jargon).

These models act as a **means of structuring the contracting authority's discretion** regarding the award decision - more specifically, the choice of the best tender. From the contracting authority's perspective, the parameterization of its discretionary powers through the use of evaluation models is *determined either externally or internally*. On the one hand, regulatory rules and case law are likely to impose limits on the set-up and application of

[3] See J Telgen and F Schotanus, "The effects of full transparency in supplier selection on subjectivity and bid quality" in *4th International Public Procurement Conference Proceedings* (Seoul 2010).

evaluation models by contracting authorities. On the other hand, contracting authorities may also decide to use evaluation models as a 'self-structuring' technique, often in keeping with existing soft law such as official guidance. The motivation behind the external and the internal modes of adhering to a set of instructions on how to set up and apply an evaluation model tends to vary from jurisdiction to jurisdiction as noted below.

Basic elements

It is argued that evaluation models are composed of basic elements regardless of the type of model or its degree of detail: **criteria + sub-criteria + weightings + scoring method** or system.

The **scoring method** is the core of the evaluation models, and is also known as marking or scoring scheme. There is a variety of different terms which are used to convey the same idea, such as "matrix", "mathematical matrix", "point-system", "calculation formulas", "weighty system", "mathematical matrix/point models", "methodology for evaluation", "weighting/mathematical algorithm". These methods translate the price-quality ratio which the contracting authority envisages in the context of a specific public procurement procedure. Indeed, the design of a scoring method should reflect the *preferences* of the contracting authority, namely the relative importance of aspects of the contract which are taken into account in the (sub)criteria[4]. The application of the scoring method should enable the allocation of **partial scores** to each aspect of the tenders, thereby making it possible to

[4] F Dinni, R Pacini and T Valletti, "Scoring rules" in N Dimitri, G Piga, and G Spagnolo (eds), *Handbook of Procurement*, (CUP 2006) 294.

measure the overall merit of each tender (represented by its total score), which then produces the ranking of all tenders and allows the choice of the best.

There are many methodologies which can be used in order to operationalise the scoring method. The underlying objective is *to convert performance units into scores*. Performance units refer to the aspects, which are evaluated under each (sub) criterion, such as euros (re price), days (re delivery period), centimeters (re dimension of the equipment), or semantic descriptions in the case of non-price qualitative aspects, e.g. an aesthetics characteristic. The said conversion is put in practice via a scale (e.g. 0-10, 0-20, 0-100, etc.).

Methodologies used to operationalise scoring methods can be detailed in numerous ways which may be expressed by formulas, graphs, matrixes, grids, etc.

A current classification of the methodologies used to operationalise scoring methods distinguishes **absolute or independent scoring** from **relative or interdependent scoring**[5]. The latter relies on the best, worst or average aspects of the tenders as reference levels for allocating scores (e.g. lowest price, highest quality, average delivery period, etc.); whilst the former means that the evaluation of each tender depends on its sole merit, which is said to provide an incentive for tenderers to improve their offers[6], taking into

[5] See J Telgen and F Schotanus, "The effects of full transparency in supplier selection on subjectivity and bid quality" in *4th International Public Procurement Conference Proceedings* (Seoul 2010) and GL Albano, F Dinni and R Zampino, "Suppliers' behavior in competitive tendering: Evidence from the Italian Ministry of Economy and Finance's acquisitions of its services" in *3rd International Public Procurement Conference Proceedings* (Amsterdam 2008) 684.

[6] GL Albano, F Dinni and R Zampino, "Suppliers' behavior in competitive tendering: Evidence from the Italian Ministry of Economy and Finance's

account they are able to determine the aspects of their tenders, which are under evaluation, separately from their competitors' behaviour. Absolute or independent scoring methodologies are devised by reference to *plausible* aspects of the tenders under evaluation, while relative or interdependent scoring methodologies are based on *actual* attributes. Because they rely on *potential* aspects of the tenders, which are only known after their submission, this type of methodology introduces an element of chance in the evaluation process.

There is an array of **multi-criteria decision analysis methods**[7] which can be used in order to operationalise scoring methods in the context of public procurement and are explicitly or implicitly built around the basic elements of an evaluation model as described so far.

Besides targeting the calculation of scores, the operationalisation methodologies also have another major goal: *to determine how the criteria relate to each other*, i.e. how the price-quality trade-off judgment should be made. Indeed, after partially scoring price and non-price aspects of the tender, the total score of each tender is dependent on some sort of aggregation of the partial scores. This 'balancing exercise' can be done in many different ways. The most common technique is the abovementioned **weighted factor score**, but there are many other alternatives[8]. An example of

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acquisitions of its services" in *3rd International Public Procurement Conference Proceedings* (Amsterdam 2008) 690.

[7] Linear weighting models, such as AHP; mathematical programming models; statistical models; value models, such as MACBETH; outranking methods, such as ELECTRE; etc. For a review of some of these methods, see L de Boer, E Labro and P Morlacchi, "A review of methods supporting supplier selection" (2001) 7 *European Journal of Purchasing & Supply Management* 75-89.

[8] For a brief explanation and a couple of illustrations of compensatory/non-compensatory/semi-compensatory alternative solutions for the price-

an alternative technique is the *buyer's monetary equivalent for quality (BME)* and the *monetary value of a point (MVP).* This technique provides answers to the following questions: "what amount of money is the buyer willing to pay for quality? What price–quality combinations can be considered equivalent from the standpoint of the buyer? What price discount does the buyer require to award an extra point?"[9]. This is, essentially, a **monetisation approach to price-quality trade-off**: finding out how much money one additional score is worth and what is the equivalent in terms of non-price attributes. In the end, it is possible to know that, according to the contracting authority's preferences in the context of a particular public procurement procedure, 1 score = x € = y quality units.

Additional elements

Evaluation models may also include **aids to evaluation**, which act as *evidence* of aspects of the tenders which have been put out to competition[10]. References, interviews, site visits, samples, models, and tests are examples of aids to evaluation, which can be requested by the contracting authority *for the purpose of verification of the tenders' merit*. Despite the need to be linked to the subject matter of the contract, in order to assist in identifying the MEAT, *aids to evaluation should not be considered (sub)criteria*. In fact, they are not evaluated in themselves: they are used to provide data to support the evaluation of certain qualitative (sub)

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quality trade-off, see L de Boer et al., "An analysis of some mistakes, miracles and myths in supplier selection", *15th IPSERA Conference Proceedings* (San Diego 2006) 6.

[9] F Dinni, R Pacini and T Valletti, "Scoring rules" in N Dimitri, G Piga, and G Spagnolo (eds), *Handbook of Procurement*, (CUP 2006) 296.

[10] Procurement Lawyers' Association, *Issues in evaluating public sector tenders* (June 2010) 3.1.3 and 3.3.2 (available at http://www.procurementlawyers.org/Docs/Evaluation%20Paper.pdf).

criteria. Aids to evaluation which are likely to be associated with the tenderers' qualification (such as references and interviews) should only be used when they prove to be the sole or the best means of evaluating a particular aspect of the tender, in order to avoid the potential overlap between qualification and award stages.

Finally, evaluation models may comprise other **additional elements**, such as a *sensitivity analysis tool* in order to check how robust the scoring method and its outcomes are; a *maximum reserve price or any other maximum or minimum requirement* regarding any of the (sub) criteria, which enable the rejection of tenders whose aspects under evaluation are above or below them; a *threshold price or quality level*, which may refer to the ideal price or quality level in order to guide tenderers as to what the preferences of the contracting authority are; etc. The additional elements may vary depending on the methodology chosen by the contracting authority. *It seems apparent that the more detailed and comprehensive the evaluation model is, the more well-defined the contracting authority's preferences should be, and the more structured the margin of discretion will become.*

CHAPTER 3 – THE EUROPEAN LEGAL CONTEXT

3.1 Introduction

The use of award criteria by contracting authorities has been a central topic of EU public procurement directives and Court of Justice case law. Recital (1) of the 2004 Public Sector Directive illustrates that by stating: "This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibility for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do no confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with fundamental principles mentioned in recital 2."

The conditions attached to the use of award criteria – i.e. the link to the subject matter of the contract, the prohibition of an arbitrary choice, and the compliance with the principles of the TFEU as well as the principles derived therefrom (namely, the principles of transparency, non-discrimination and equal treatment) – show the pertinence of looking into the award criteria topic through the discretion lens. Indeed, EU rules and jurisprudence on award criteria seem to focus on placing limits on contracting authorities' power to decide which award criteria to choose and how to use them.

Besides the conditions mentioned above, the award criteria must assist in identifying the tender which is the most economically advantageous. This requirement dates back to

the judgment on *Beentjes*[11] and has been rephrased in the most recent directives.

This chapter sets the award criteria scene at EU level. It starts by presenting an overview of the historical development of the public procurement directives' rules on the subject, followed by a brief reference to the principles and objectives of the EU regulation on public procurement, in so far as they are relevant from the award criteria's perspective. Then the chapter goes on to explore the current EU rules and applicable case law regarding the choice of the MEAT by the contracting authorities, the necessary linkage of the criteria to the subject matter of the contract, and the use of evaluation methods which render those criteria operative.

[11] Case 31/87, *Beentjes*, EU:C:1988:422, para 19. For a comment of this case, see S Arrowsmith, *A Guide to the Procurement Cases of the Court of Justice* (Earlsgate Press 1992) 73-82.

3.2 Brief historical legislative overview

The first EU provisions on public procurement date back to the Commission Directive 70/32/EEC of 17 December 1969[12], which was followed by Council Directive 71/304/EEC of 26 July 1971[13]. These directives aimed primarily to eliminate barriers to trade regarding the free movement of goods, and to promote the right of establishment and the freedom to provide services, respectively. Therefore, the scope of this legislation as regards public procurement was still rather limited, and no specific reference was made to award criteria.

In fact, it was not before Council Directives 71/305/EEC of 26 July 1971[14] and 77/62/EEC of 21 December 1976[15] that public procurement procedures were given shape, and rules on award criteria were provided. In summary, these directives[16] put forward three provisions. Firstly, contracting authorities should base the award of contract on either the lowest price only or, when the award was made to the MEAT, on various criteria according to the contract in question. This is the

[12] Commission Directive 70/32/EEC of 17 December 1969, on provision of goods to the State, to local authorities and other official bodies (O.J. L 13/1). Note: no English version available.

[13] Council Directive 71/304/EEC of 26 July 1971, concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches (*O.J. L 185/1*). Note: *English special edition - Series I Chapter 1971(II) p. 678.*

[14] Council Directive 71/305/EEC of 26 July 1971, concerning the co-ordination of procedures for the award of public works contracts (OJ L 185, 16/08/1971 p. 5-14). Note: *English special edition - Series I Chapter 1971(II) p. 682.*

[15] **Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (***OJ L 13, 15.1.1977, p. 1–14***).**

[16] See art.29 of Directive 71/305/EEC and art.25 of **Directive 77/62/EEC.**

precursor of the requirement for a link to the subject matter of the contract. Secondly, examples were given of the possible criteria covered by the MEAT: price, period of completion or delivery date, running costs, cost-effectiveness, profitability, quality, aesthetic and functional characteristics, technical merit, after sales service and technical assistance. This non-exhaustive list of criteria made it almost unchanged to art.53 of the 2004 Public Sector Directive, only to be added by art.67 of the 2014 Public Procurement Directive. Thirdly, when using the MEAT, contracting authorities should specify in the contract documents or notice all the criteria they intended to apply to the award (where possible in descending order of importance). This requirement for publicity also survived until today albeit in an extended version.

The distinction between award criteria and criteria for qualitative selection, as well as the meaning of technical specifications, were also introduced by this initial public procurement legislative package[17].

In the following two rounds of directives on public procurement[18], the three provisions highlighted above

[17] See art.23-28 of Directive 71/305/EEC and art.20-24 of **Directive 77/62/EEC for qualitative selection, and** art.10 of Directive 71/305/EEC and art.7 of **Directive 77/62/EEC for technical specifications.**

[18] Firstly, Council Directive 88/295/EEC of 22 March 1988, amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC (OJ L 127, 20.5.1988, p. 1–14); Council Directive 89/440/EEC of 18 July 1989, amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ L 210, 21.7.1989, p. 1–21); Council Directive 92/50/EEC of 18 June 1992, relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24.7.1992, p. 1–24).

Secondly, Council Directive 93/36/EEC of 14 June 1993, coordinating procedures for the award of public supply contracts (OJ L 199, 9.8.1993, p. 1–53); Council Directive 93/37/EEC of 14 June 1993, concerning the coordination of procedures for the award of public works contracts (OJ L

remained largely unaltered[19]. In the meantime, the Court of Justice, contributed to the advancement of the interpretation of the rules on award criteria, in particular with regard to the relationship between the criteria and the contract in question, and to the degree of disclosure of said criteria[20]. This jurisprudence inspired some of the legislative changes introduced by the 2004 public procurement reform[21].

The 2004 reform was carried out after the 1996 Green Paper[22] produced by the Commission set in motion a debate on procurement policy, which was followed up by the 1998 Communication[23] by the Commission and its Proposal[24] for a Public Sector Directive in 2000.

It is clear from these documents that the two main drivers behind the 2004 reform were the need for simplification and the pursuit of flexibility. However, the rules on the award criteria have actually been tightened[25], as is apparent from the

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111, 30.4.1994, p. 54-83); European Parliament and Council Directive 97/52/EC of 13 October 1997, amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ L 328, 28.11.1997, p. 1–59).

[19] See art.20 of Directive 89/440/EEC, art.36 of Directive 92/50/EEC, art.26 of Directive 93/36/EEC, and art.30 of Directive 93/37/EEC.

[20] See judgments referred to in the following sections of this chapter.

[21] Leading to the approval of Directive 2004/18/EC [2014] O.J. L 134/114, which entered into force on 30th April 2004 and had to be implemented by EU Member States by 31st January 2006.

[22] European Commission, Green Paper, Public Procurement in the European Union: Exploring the Way Forward, COM(1996) 583 final.

[23] European Commission, Communication, Public Procurement in the European Union, COM(98) 143 final.

[24] European Commission, Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts, COM(2000) 275 final (*OJ C 29E, 30.1.2001, p. 11–111)*.

[25] S Arrowsmith, "An assessment of the new legislative package on public procurement" (2004) 41 Common Market Law Review 1305.

wording of art.53 of the 2004 Public Sector Directive, which provides that:

> *1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:*
> *(a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or*
> *(b) the lowest price only.*
> *2. Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a) the contracting authority shall specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.*
> *Those weightings can be expressed by providing for a range with an appropriate maximum spread.*
> *Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance.*

This article involves two new elements when compared to its predecessors. Firstly, it explicitly requires a link between the

criteria and the subject matter of the contract in question when the award is made to the MEAT. Secondly, contracting authorities are required to come up with the relative weighting of each criterion in advance and to state that information in the contract notice or contract documents.

The new wording of this rule also points to two additional relevant issues: the MEAT is viewed from the perspective of the contracting authority; and environmental characteristics are added to the non-exhaustive list of award criteria's examples. As regards the latter issue, it should be mentioned that recital (46) of the 2004 Public Sector Directive refers not only to environmental characteristics but also to social requirements.

Indeed, the European legislator relies on several recitals of the 2004 Public Sector Directive[26] in order to state the purposes and reasons behind art.53, as well as to clarify its relationship with other provisions, such as art.23 (technical specifications), 26 (conditions for performance of contracts), and 45-48 (criteria for qualitative selection). It should be noted that the directives' preamble is of no binding legal force[27]. Nevertheless, recitals provide a relevant and frequently used aid to interpretation[28]. The Court of Justice has already ruled against the possibility of recitals prevailing over conflicting directive's articles[29] or derogating from them[30]. In the

[26] Recitals (1), (5), (29), (33), (39), (43) and (46) of the 2004 Public Sector Directive.

[27] R Brent, *Directives: Rights and Remedies in English and Community Law* (1st ed, London 2011) 269.

[28] E.g. Case 107/80, *Adorno* v *Commission*, EU:C:1981:127, para 18.

[29] Case C-412/93, *Leclerc-Siplec v TF1 and M6,* EU:C:1995:26, paras 45-47.

[30] Case C-162/97, *Nilsson and Others*, EU:C:1998:554, para 54.

situation in question, however, the referred recitals seem to enhance the meaning of the provisions on the award criteria and related issues. The preamble of the 2004 Public Sector Directive[31] is particularly revealing with regards to the principles and objectives of public procurement regulation[32], which underpin the regulatory choices made by the EU legislator on the topic of the award criteria.

To sum up, the 2004 Public Sector Directive contributed to the development of the legal framework of the MEAT, mainly by incorporating settled Court of Justice's case law, which is mentioned in the following sections of this chapter. However, some issues remained unclear, namely whether award criteria relating to workforce issues were permitted and whether contracting authorities must disclose the detailed methodology for applying the award criteria[33].

More recently, the 2014 Public Procurement Directive was approved[34] and brought about several changes to the award criteria rules. One of the themes behind this legislative reform was the strategic use of public procurement. This was identified by the European Commission in the Green Paper on the modernisation of the EU public procurement policy[35]. In fact, the Commission views public procurement as a unique

[31] See recitals (1), (2) and (46).

[32] See discussion of principles and objectives in the following sections of this chapter.

[33] S Arrowsmith, "An assessment of the new legislative package on public procurement" (2004) 41 Common Market Law Review 1317 and 1305, respectively.

[34] Directive 2014/24/EU [2014] O.J. L 94/65 entered into force on 17 April 2014. EU member states have to implement it in national legislation by 18 April 2016. Until then the 2004 Public Sector Directive is still applicable.

[35] *Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market*, COM(2011)15 of January 27, 2011.

instrument to pursuit "Europe 2020" objectives[36], namely fostering innovation, protecting the environment and fighting social exclusion[37].

The said Green Paper put forward several ideas aimed at promoting these EU policy objectives through public procurement legislation, including providing for the possibility to consider innovative, environmental and social factors in the context of the award criteria, even if that meant relaxing their link to the subject matter of the contract[38]. The suppression of the lowest price criterion was also suggested, in an attempt to turn the MEAT into the sole mandatory criterion. This was thought to better accommodate considerations related to innovative, environmental and social issues[39].

After the public consultation process, the European Commission translated this more flexible approach to the award criteria into art.66 and art.67 of its proposal for a directive of the European Parliament and of the Council on public procurement[40]. This proposal was subject to several amendments by the European Parliament and comments by various key players in the legislative procedure[41].

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[36] Communication from the Commission, COM(2010)2020 of March 3, 2010.

[37] T Kotsonis, "Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market" (2011) 3 Public Procurement Law Review NA54.

[38] *Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market*, COM(2011)15 of January 27, 2011, 39.

[39] Ibid, p.37.

[40] *Proposal for a directive of the European Parliament and of the Council on public procurement*, COM(2011)896 of December 20, 2011.

[41] The procedural file comprising all the documents produced by the legislative participants is available at http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2011/0438(COD) (last accessed on 10/09/2015).

These two articles were renumbered art.67 and art.68 in the final version of the 2014 Public Procurement Directive. Art.67 (Contract award criteria) reads as follows:

> *1. Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall base the award of public contracts on the most economically advantageous tender.*
> *2. The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question. Such criteria may comprise, for instance:*
> *(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;*
> *(b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or*
> *(c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.*
> *The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.*
> *Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or*

restrict their use to certain categories of contracting authorities or certain types of contracts.

3. Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:

(a) the specific process of production, provision or trading of those works, supplies or services; or

(b) a specific process for another stage of their life cycle, even where such factors do not form part of their material substance.

4. Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. In case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers.

5. The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.

Those weightings may be expressed by providing for a range with an appropriate maximum spread.

Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

Art.68 (Life-cycle costing) of the 2014 Public Procurement Directive, despite not being central to the topic discussed in this thesis, is examined to the extend that it is ancillary to the

measurement of the margin of discretion of contracting authorities when using cost as an award criterion.

The following sections of this chapter cover the novelties introduced by the cited provision, as well as the points that remain unaltered, and relate them to the EU case law on the respective topics. By way of summary of the main changes instituted by the 2014 Public Procurement Directive in the field of award criteria, a couple of issues should be highlighted.

On the one hand, MEAT stands as overarching award criterion, which comprises price (or cost) or the best price-quality ratio. Indeed, cost is put forward as an alternative to price and must be identified by using a cost-effectiveness approach (such as the life-cycle costing provided in art.68). There is a rule addressing fixed price or cost situations, and a provision on the possibility to restrict the use of the price/cost only criterion. The best price-quality ratio replaces what had been termed as MEAT in the previous directives[42].

On the other hand, there is now a legislative definition of link to the subject matter of the contract, which seems more generous than the previous interpretation offered by EU case law. Furthermore, the illustrative list of permitted criteria under the best price-quality ratio has been expanded to expressly include not only social and innovative characteristics and trading and its conditions, but also the organisation, qualification and experience of staff assigned to performing the contract.

From the perspective of contracting authorities' margin of discretion when choosing and applying the award criteria, it

[42] As mentioned in recital (89) 2014 Public Procurement Directive.

appears that some of these changes limit their discretionary powers (e.g. the possibility to restrict the use of the price/cost only criterion), whereas others actually seem to increase their freedom of choice (e.g. the apparent loosening of the requirement for a link to the subject matter of the contract). This is further discussed in the following sections of this chapter, with reference to the relevant 2014 Public Procurement Directive’s recitals.

3.3 Principles and objectives of the European public procurement regulation

It is not proposed to do an in-depth discussion of the objectives and principles of the European public procurement regulation in this thesis. However, these objectives and principles are considered to the extent of their impact on the topic of the award criteria.

Recitals (1), (2) and (46) of the 2004 Public Sector Directive specifically refer to principles and objectives which underpin EU legislation and case law in the field of award criteria. Art.2 of said directive lists equal treatment, non-discrimination and transparency as principles of awarding contracts. Prior to 2004, public procurement directives did not have a specific rule on principles as such[43], although the Court of Justice had already applied those principles when interpreting public procurement directives. The 2014 Public Procurement Directive reiterates and extends the reference to the said principles and objectives in its recitals (1), (2) and (89)-(99), as well as in art.18. The latter provision refers to equal treatment, non-discrimination, transparency, proportionality and competition as principles of procurement.

On a preliminary note, it should be mentioned that compliance with principles is a type of limit imposed on the discretion in general[44]. As regards public procurement in particular, principles can be used not only to place a constraint on contracting authorities in order to make sure their

[43] C Hansen, *Contracts not covered or not fully covered by the Public Sector Directive* (DJøF Publishing 2012) 51.

[44] P Craig, Administrative Law (6th ed, Sweet & Maxwell 2008) 501-502.

discretionary powers are not used illegally, but also to allow for the judicial control of the exercise of said powers. The choice and application of award criteria in the context of public procurement procedures is a typical instance where the exercise of discretionary powers is bound by EU principles, as illustrated in the following sections.

3.3.1 The internal market freedoms

The public procurement directives have repeatedly been adopted under the TFEU's internal market provisions on free movement[45]. Art.53(1), 62 and 114 TFEU constitute the legal basis for both the 2004 Public Sector Directive[46] and the 2014 Public Procurement Directive. The establishment of an internal market is of paramount importance to European integration[47]. The free movement of goods, the freedom of establishment and the freedom to provide services constitute the foundation of the internal market[48] and act as drivers for European integration.

In this context, public procurement has been perceived as an area where barriers to trade are likely to occur, namely for

[45] R Caranta, "The changes to the Public Contracts Directives and the story they tell about how EU law works" (2015) 52 Common Market Law Review 394.

[46] S Arrowsmith, "The purpose of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies", in C Barnard and M Gehring (eds), *Cambridge Yearbook of European Legal Studies* (vol.14, Hart Publishing 2011-2012) 5.

[47] M Trybus, "Public contracts in European Union internal market law: foundations and requirements" in R Noguellou and U Stelkens (dirs), *Droit Comparé des Contrats Publics / Comparative Law on Public Contracts* (Bruylant 2010) 85.

[48] See art.26(2) TFEU.

protectionist reasons[49]. This is clear where case law has decided against the use of geographical award criteria aimed at favouring local tenderers[50] (either at national, regional or municipal level). In line with this jurisprudence, it should be noted that not only public procurement regulations but also administrative decisions made within public procurement procedures[51] (e.g. the award decision) can amount to a restriction on the internal market freedoms[52]. Therefore, contracting authorities shall not choose and apply award criteria in such a way as to restrict access to public contracts

[49] S Arrowsmith, "The purpose of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies", in C Barnard and M Gehring (eds), *Cambridge Yearbook of European Legal Studies* (vol.14, Hart Publishing 2011-2012) 4.

[50] See Case C-234/03, *Contse*, EU:C:2005:644, para 79: "Article 49 EC [current art.56 TFEU] precludes a contracting authority from providing (…) for evaluation criteria which reward, by awarding extra points, the existence at the time the tender is submitted of oxygen production, conditioning and bottling plants situated within 1000 kilometers of that province or offices open to the public in other specified towns in that province". For a comment on this, see A Brown, "Evaluation criteria for the supply of home respiratory treatment services in Spain: a note on C-234/03 Contse SA, Vivisol and Oxigen Salud SA v Insalud" (2006) 2 Public Procurement Law Review NA48-51.

[51] M Trybus, "Public contracts in European Union internal market law: foundations and requirements" in R Noguellou and U Stelkens (dirs), *Droit Comparé des Contrats Publics / Comparative Law on Public Contracts* (Bruylant 2010) 90; P Trepte, *Public Procurement in the EU* (2nd edn, OUP 2007) 8.

[52] Art.34, 49 and 56 TFEU. Justifications for restrictions on free movement, either Treaty based (art.36 and 52 TFEU) or based on the *Cassis* jurisprudence on overriding public interest grounds, also apply to public procurement. As does the proportionality requirement. For a suggested reformulation of the general rule stated by the Court of Justice that "economic aims are precluded as justifications for restrictions on free movement", see S Arrowsmith, "Rethinking the approach to economic justifications under the EU's free movement rules" (article accepted for publication in Current Legal Problems following peer review, 2015 – the pre-copyedited, author-produced version of this article is available online at http://www.nottingham.ac.uk/pprg/documentsarchive/economic-derogations-revised.docx).

market by unduly favouring or disadvantaging certain economic operators[53].

3.3.2 Equal treatment, non-discrimination, transparency and proportionality

It flows from recital (2) of the 2004 Public Sector Directive, as well as recital (1) of the 2014 Public Procurement Directive, that the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency derive from the three freedoms mentioned above. The public procurement directives have been enacted with a view to ensure the effectiveness of these principles at EU level via the coordination of national procedural rules on the award of public contracts. This is believed to contribute to the removal of restrictions to the internal market freedoms and the opening-up of public procurement to competition.

(a) Equal treatment and non-discrimination

The Court of Justice first applied the principle of equal treatment in the context of public procurement in *Storebaelt*[54]. Later, a definition of this principle was offered in *Fabricom*: "the equal treatment principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless that treatment is objectively justified."[55] Finally, the Court of

[53] See art.18(1) 2014 Public Procurement Directive.

[54] Case C-243/89, *Storebaelt*, EU:C:1993:257, para 33.

[55] Joined Cases C-21/03 and C-34/03, *Fabricom*, EU:C:2005:127, para 27.

Justice stated in *Concordia Bus* and several subsequent cases[56] that "the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives"[57].

Non-discrimination is a manifestation of equal treatment but is not limited to the prohibition of discrimination on the grounds of nationality[58]. The judgment in *Contse*[59] is clear about this: "the principle of equality, of which Article 49 EC [art.56 TFEU] is a specific expression, prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing elements, lead in fact to the same result" (para 36).

From the award criteria point of view, *Contse* provides that: "if the national court finds that a criterion is in practice more easily fulfilled by Spanish operators than by those established in another Member State, that criterion infringes the principle of non-discriminatory application" (para 60). In the same case, the Court of Justice examined an award criterion for deciding in case of a tie, which favoured the undertaking which was already supplying the service, and ruled that: "deciding automatically and definitively in favour of the operator already present on the market concerned is discriminatory." (para 78). Therefore, an award criterion that favours the incumbent, as happened with the tiebreaker criterion in *Contse*, represents a non-nationality based discrimination.

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[56] For example, Case C-331/04, *ATI*, EU:C:2005:718, para 22.

[57] Case C-513/99, *Concordia Bus*, EU:C:2002:495, para 81.

[58] S Arrowsmith, "The past and future evolution of EC procurement law: From framework to common code?" (2006) 35/3 Public Contract Law Journal 354-355.

[59] Case C-234/2003, *Contse*, EU:C:2005:644.

As regards the impact of the principle of equal treatment on the use and application of award criteria by contracting authorities, *SIAC* states that "tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the adjudicating authority"[60]. Firstly, this means that, when choosing which award criteria to use, contracting authorities must ensure they are objective and will not result in the illegal favouring of any tenderer. Secondly, this also means that all tenderers must be well informed about the award criteria so that they can interpret them in the same way when preparing their tenders[61]. Thirdly, when applying those criteria to the evaluation of tenders, contracting authorities must do so in an impartial manner so as to assure conditions of effective competition.

(b) Transparency

Transparency flows[62] from the principle of equal treatment. It has been construed as a means to an end rather than an end in itself[63]. Indeed, it has been argued that "transparency is not an objective in itself; it is a mechanism used to achieve other objectives. Transparency is a tool, not an end in itself"[64].

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[60] Case C-19/00, *SIAC*, EU:C:2001:553, para 34. In the same line, see also: Case C-331/04, *ATI*, EU:C:2005:718, para 22; and C-448/01, *EVN*, EU:C:2003:651, para 47.

[61] See the discussion on transparency in the next section.

[62] Case C-340/02, *Commission v France*, EU:C:2004:623, para 34.

[63] S Arrowsmith, "The past and future evolution of EC procurement law: From framework to common code?" (2006) 35/3 Public Contract Law Journal 357.

[64] P Trepte, "Transparency requirements" in R Nielsen and S Treumer (eds), *The New EU Public Procurement Directives* (DJøF Publishing 2005)

Therefore, it is submitted that transparency is an obligation rather than a stand alone principle, whose main function is to prevent discrimination[65], as well as to allow for monitoring of discriminatory behaviour[66]. Furthermore, the public procurement directives impose several transparency requirements on contracting authorities in order to ensure effective competition[67] and allow for control of their discretionary decisions[68]. This has been stated by the Court of Justice in *Telaustria*: "That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to

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50. In the same lie of thought, P Trepte, *Regulating Procurement* (OUP 2004) 392.

[65] S Arrowsmith, "The EC Procurement Directives, National Procurement Policies and Better Governance" (2002) 27(1) European Law Review 5.

[66] S Arrowsmith, "The purpose of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies", in C Barnard and M Gehring (eds), *Cambridge Yearbook of European Legal Studies* (vol.14, Hart Publishing 2011-2012) 8-20.

[67] M Trybus, "Public contracts in European Union internal market law: foundations and requirements" in R Noguellou and U Stelkens (dirs), *Droit Comparé des Contrats Publics / Comparative Law on Public Contracts* (Bruylant 2010) 103: "following the precise requirements emanating from the principle of transparency is a prerequisite for competition". See also C Hansen, *Contracts not covered or not fully covered by the Public Sector Directive* (DJøF Publishing 2012) 61-63, where the author terms this as the principle of transparency's competition function. Furthermore, see R Caranta, "Transparence et Concurrence" in R Noguellou and U Stelken (dirs), *Droit Comparé des Contrats Publics / Comparative Law on Public Contracts* (Bruylant 2010) 145-172, for a suggested combined principle of transparency-competition.

[68] P Trepte, "Transparency requirements" in R Nielsen and S Treumer (eds), *The New EU Public Procurement Directives* (DJøF Publishing 2005) 59. See also C Hansen, *Contracts not covered or not fully covered by the Public Sector Directive* (DJøF Publishing 2012) 61-63, where the author terms this as the principle of transparency's control function.

competition and the impartiality of procurement procedures to be reviewed."[69]

In the context of public procurement in general, and award criteria in particular, the obligation of transparency implies a degree of publicity of the rules laid down by contracting authorities for each procedure. This, in turn, provides an opportunity for monitoring the exercise of discretion by contracting authorities within the rule-based decision making process that leads to the award of each public contract[70].

It has, however, been argued that detailed EU transparency rules in the context of the award of public contracts may bear potential negative impacts on value for money at national level[71]. On the other hand, it has also been acknowledged that "providing relevant information allows firms to participate in the most appropriate manner – for example, disclosing award criteria allows them to match offers to the purchaser's precise

[69] Case C-324/98, *Telaustria*, EU:C:2000:669, para 62 (see also Case C-470/99, *Universale-Bau,* EU:C:2002:746, para 92). It should be noted that *Telaustria* concerned a services concession which was outside of the public procurement directives. However, the Court of Justice derived a positive obligation of transparency from the Treaty via the principle of non-discrimination. For a critical view on this expansive jurisprudence, see S Arrowsmith, "The past and future evolution of EC procurement law: From framework to common code?" (2006) 35/3 Public Contract Law Journal,365-367; P Trepte, *Public Procurement in the EU* (2nd edn, OUP 2007) 17.

[70] S Arrowsmith, "The past and future evolution of EC procurement law: From framework to common code?" (2006) 35/3 Public Contract Law Journal, 358.

[71] S Arrowsmith, "The EC Procurement Directives, National Procurement Policies and Better Governance" (2002) 27(1) European Law Review 8-12. Indeed, the author has even suggested that "a better option is to abandon the requirement for transparent award procedures and to allow entities to focus solely on compliance with the Treaty." (ibid, 21) For a critical appraisal of the relationship between value for money and the equal treatment principle, see F Neumayr, "Value for money v. equal treatment: the relationship between the seemingly overriding national rationale for regulating public procurement and the fundamental E.C. principle of equal treatment" (2002) 4 Public Procurement Law Review 215-234.

needs."[72] Advanced information about the award criteria in particular, i.e. by disclosing the award criteria and their relative weighting in the contract notice, is thus thought to result in the submission of tenders which better respond to the contracting authority's needs addressed by the public contract in question.

As early as *Walloon Buses*[73], the Court of Justice has been ruling about the issue of transparency and the requirement to disclose selection and award criteria. In *Commission v France*[74], the Court of Justice clearly stated that equal treatment and transparency require not only the subject matter of the contract, but also the criteria governing its award to be clearly defined. Ruling on the particular impact of transparency on award criteria, the Court of Justice decided in *SIAC*[75] that "the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified" (para. 41)[76]; "More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way" (para. 42)[77]; "This obligation of transparency also means that the adjudicating authority

[72] S Arrowsmith, "The EC Procurement Directives, National Procurement Policies and Better Governance" (2002) 27(1) European Law Review 8.

[73] Case C-87/94, *Walloon Buses*, EU:C:1996:161. See also Case C-470/99, *Universale-Bau,* EU:C:2002:746, para 98: where the contracting authority has developed a detailed scoring system for weighing the selection criteria, the principle of transparency implies an obligation to disclose to tenderers.

[74] Case C-340/02, *Commission v France*, EU:C:2004:623, para. 34.

[75] Case C-19/00, *SIAC*, EU:C:2001:553. For a comment on this case, see A Brown, "Award criteria under the E.C. Procurement Directives: a note on the SIAC Construction case" (2002) 2 NA25-29.

[76] See also C-448/01, *EVN*, EU:C:2003:651, para 49; and Case C-470/99, *Universale-Bau,* EU:C:2002:746, para 91.

[77] See also C-448/01, *EVN*, EU:C:2003:651, para 57.

must interpret the award criteria in the same way throughout the entire procedure" (para. 43); "when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers" (para. 44)[78].

The *SIAC* judgment offers a comprehensive view of the extent of the effects of equal treatment and transparency on award criteria. Firstly, the award criteria must be clearly formulated and disclosed[79]. Secondly, they must remain unaltered throughout the public procurement procedure. Thirdly, their application must be objective and uniform. Recitals (46) 2004 Public Sector Directive and (90) 2014 Public Procurement Directive reflect this line of jurisprudence by providing that award criteria must be formulated and applied in an objective way, so as to assure the compliance with the principles of transparency, non-discrimination and equal treatment.

As mentioned before, art. 53(2) 2004 Public Sector Directive extended the obligation of transparency regarding award criteria by requiring contracting authorities to disclose not only the criteria underpinning the MEAT, but also their relative weightings. The wording of art.67(5) 2014 Public Procurement Directive remains mostly unchanged when compared to its predecessor. It has been elsewhere submitted[80] that the European legislator could have used this opportunity to clarify

[78] See also C-448/01, *EVN*, EU:C:2003:651, para 48.

[79] In line with this, see also C-513/99, *Concordia Bus*, EU:C:2002:495, para. 62: "it should be noted that the criteria adopted to determine the economically most advantageous tender must be applied in conformity with all the procedural rules laid down in Directive 92/50, in particular the rules on advertising. It follows that, in accordance with Article 36(2) of that directive, all such criteria must be expressly mentioned in the contract documents or the tender notice, where possible in descending order of importance, so that operators are in a position to be aware of their existence and scope". See also C-331/04, *ATI*, EU:C:2005:718, para. 23.

[80] P Bordalo Faustino, "Award criteria in the new EU Directive on public procurement" (2014) 3 Public Procurement Law Review 132.

some relevant issues raised by the case law of the Court of Justice - namely, whether the transparency requirement also applies to the sub-criteria and respective weightings.

Finally, art.67(4) 2014 Public Procurement Directive adds a requirement for effective verification of the information provided by the tenderers "in order to assess how well the tenders meet the award criteria". It includes verifying not only the accuracy of said information, but also the respective proof. This aims to prevent potential breaches of the transparency obligation and the principle of non-discrimination.

In fact, this requirement for effective verification codifies Court of Justice's case law. *EVN*[81] ruling is clear on this point. It starts by stating that "objective and transparent evaluation of the various tenders depends on the contracting authority, relying on the information and proof provided by the tenderers, being able to verify effectively whether the tenders submitted by those tenderers meet the award criteria." (para.50) It then adds that "it is thus apparent that where a contracting authority lays down an award criterion indicating that it neither intends, nor is able, to verify the accuracy of the information supplied by the tenderers, it infringes the principle of equal treatment, because such a criterion does not ensure the transparency and objectivity of the tender procedure." (para. 51) And finally concludes that "therefore, an award criterion which is not accompanied by requirements which permit the information provided by the tenderers to be effectively verified is contrary to the principles of Community law in the field of public procurement." (para. 52)

[81] C-448/01, *EVN*, EU:C:2003:651.

It is submitted that complying with the requirement for effective verification of the information provided by the tenderers also allows contracting authorities to better draft a reasoned award decision, which facilitates its review. It can be said that the supervisory function derived from the transparency requirements entails this requirement for effective verification.

(c) Proportionality

Proportionality is mentioned in art.18 2014 Public Procurement Directive, whereas 2004 Public Sector Directive only refers to it in recital (2). In the context contracting authorities' discretionary powers when choosing and applying award criteria in the context of public procurement procedures, it is submitted that the function of proportionality is to act as a decision-making parameter as well as a ground for review[82] of national measures placing restrictions on one of the internal market freedoms, or infringing the principles derived thereof. Those measure include not only public procurement regulations passed by national legislators, but also administrative decisions taken by contracting authorities, such as the award decisions.

An illustration of the application of the proportionality principle on the topic of award criteria can be found in *Contse*[83]. In this judgement, the Court of Justice actually stipulates that "the evaluation criteria under consideration *go beyond what is necessary*". (emphasis added) This case concerned the

[82] T Tridimas, *The General Principles of EC Law* (OUP 2000) 90, where te author lists the three functions of the proportionality principle.

[83] Case C-234/03, *Contse*, EU:C:2005:644, paras 74 and 76.

allocation of extra points to tenders where a gas production capacity largely exceeded consumption thresholds above the level which appeared to be suitable for ensuring a reliable supply of gas. This was deemed incompatible with the requirements of the relevant EU law[84].

3.3.3 Competition, value for money and horizontal policies

For the purposes of this thesis, it is not proposed to investigate all possible objectives of the public procurement regulation. Taking into account the focus on award criteria, the following objectives are examined: competition, value for money and horizontal policies.

(a) Opening-up of public procurement to competition

It is apparent from the Court of Justice's case law that opening-up of public procurement to undistorted competition in all Member States is considered to be a key objective of the public procurement directives[85]. More recently, *Strong Segurança*[86] clearly asserted that "effective competition constitutes the essential objective of that directive [referring to 2004 Public Sector Directive]". *Concordia Bus*[87] sums it up from the award criteria's perspective: " the duty to observe

[84] Similarly, C-448/01, *EVN*, EU:C:2003:651, para 71.

[85] See, inter alia, Case C-454/06, *Pressetext*, EU:C:2008:351, para 31; and Case C-91/08, *Wall*, EU:C:2010:182, para 48; Case C-336/12, *Manova*, EU:C:2013:647, para 28.

[86] Case C-95/10, *Strong Segurança*, EU:C:2011:161, para 37.

[87] Case C-513/99, *Concordia Bus*, EU:C:2002:495, para 81.

the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition in the fields to which they apply and which lay down criteria for the award of contracts which are intended to ensure such competition."[88]

2004 Public Sector Directive refers to the opening-up of public procurement to competition in recital (2), which is viewed as a result[89] of the effectiveness of the internal market freedoms and the principles deriving therefrom. In terms of the award criteria, recital (46) of the said directive stipulates that "contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition." This illustrates how compliance with the said principles is considered instrumental to ensuring competition as one of the public procurement directives' objectives. 2014 Public Procurement Directive reiterates that objective[90], and relates the guarantee of conditions of effective competition to the objective comparison of the relative value of tenders in the light of the award criteria[91]. Furthermore, art.67(4) 2014 Public Procurement Directive also requires award criteria to be set up and applied in such a way as to ensure the possibility of effective competition. This seems to prevent, for instance, the

[88] See also Case C-243/89, *Storebaelt*, EU:C:1993:257, para 33.

[89] C Viana, *Os princípios comunitários na contratação pública* (Coimbra Editora 2007) 172.

[90] Recital (1) 2014 Public Sector Directive.

[91] Recital (90) 2014 Public Sector Directive.

provision of an award criterion based on a particular feature that can only be offered by a specific economic operator[92].

The fact that effective competition is now expressly mentioned under the 2014 Public Procurement Directive provisions on award criteria mirrors the inclusion of a prohibition of artificially narrowing competition in art.18 of said directive, whose title is "Principles of procurement". This article goes on to explain that "competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators." The above example of an award criterion based on a particular feature that can only be offered by a specific economic operator could configure an artificially narrowing of the competition[93].

The increasing reference to competition in the context of public procurement regulation in general, and award criteria rules in particular, must be noted. The objective of ensuring effective competition conditions made its way from the Court of Justice's case law to the public procurement directives' recitals and, finally, to the 2014 Public Procurement Directive's articles - namely, art.18 and art.67(4). The argument that "the pursuit of this primary [competition] objective has

[92] This logic does not apply to situations such as the one ruled in *Concordia* where the Court of Justice decided that: "the fact that one of the criteria adopted by the contracting entity to identify the economically most advantageous tender could be satisfied only by a small number of undertakings, one of which was an undertaking belonging to the contracting entity, is not in itself such as to constitute a breach of the principle of equal treatment." (Case C-513/99, *Concordia Bus*, EU:C:2002:495, para 85).

[93] It should be noted that the definition of "artificially narrowing competition" offered in art.18 comprises a subjective element where it refers to the intention of the contracting authority to favour or disadvantage certain economic operators. It is submitted that this requirement raises a difficulty in the application of this provision, notably in terms of providing for evidence of said intention.

generated or resulted in the emergence of a *competition principle*"[94] seems to have come out reinforced after the 2014 public procurement reform. It is however outside the scope of this thesis to take part in the discussion of whether the consolidation of a general principle of competition supports a pro-competitive approach to public procurement aimed at, amongst other goals, obtaining value for money[95]; or whether competition to ensure the award to the best supplier should not be considered as a function of the public procurement directives[96]. This thesis focuses on the requirement for ensuring the possibility of effective competition[97] to the extent that it limits the margin of discretion of contracting authorities when choosing and applying the award criteria, notably when interpreted in combination with the prohibition to artificially narrow competition[98].

(b) Value for money

It has been argued that securing value for money is not an objective of the public procurement directives[99]. Economic

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[94] A Sánchez Graells, *Public Procurement and the EU Competition rules* (Hart Publishing 2011) 192.

[95] Ibid.

[96] S Arrowsmith, "The purpose of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies", in C Barnard and M Gehring (eds), *Cambridge Yearbook of European Legal Studies* (vol.14, Hart Publishing 2011-2012) 25-26. According to the author, "the purpose of the competitive procedures is to secure transparency to prevent discrimination, rather than transparency being required to secure competition in general."

[97] Art.67(4) 2014 Public Procurement Directive.

[98] Art.18(1) 2014 Public Procurement Directive.

[99] Inter alia, P Trepte, "The Contracting Authority as Purchaser and Regulator: Should the Procurement Rules Regulate what we Buy?" in Ølykke, Risvig and Tvarnø (eds), *Eu Procurement Directives – Modernisation, Growth and Innovation* (DjøF Publishing 2012) 88.

efficiency is related to budgetary concerns associated with the optimal allocation of resources, which is a matter for the domestic regulatory level[100].

However, 2004 Public Sector Directive mentions value for money in its recitals (5) and (46). It is submitted that, in these instances, the European legislator seems to equate value for money with the *tender which offers the best performance level*, i.e. the ideal outcome of a competitive procurement procedure[101]. Recital (2) 2014 Public Procurement Directive, on the other hand, goes one step further by declaring that public procurement is a key instrument to ensure the most efficient use of public funds[102] within the Europe 2020 strategy. Still this does not imply that value for money or the efficient use of public funds are to be considered objectives of the public procurement directives, but merely that they "reflect the concern for Members States to implement value for money when operating within the directives' framework."[103]

Indeed, it has been argued that the efficiency of public spending is not covered by any of the legislative competences

[100] S Arrowsmith, "The purpose of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies", in C Barnard and M Gehring (eds), *Cambridge Yearbook of European Legal Studies* (vol.14, Hart Publishing 2011-2012) 32.

[101] Ibid.

[102] A reference to the "optimum use of public funds through broad competition" in the context of the dynamic purchasing systems is made in recitals (13) 2004 Public Sector Directive and (63) 2014 Public Procurement Directive.

[103] S Arrowsmith, "The purpose of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies", in C Barnard and M Gehring (eds), *Cambridge Yearbook of European Legal Studies* (vol.14, Hart Publishing 2011-2012) 32; R Caranta, "The changes to the Public Contracts Directives and the story they tell about how EU law works" (2015) 52 Common Market Law Review 403.

of the EU institutions under the Treaties[104]. Furthermore, it is submitted that the Court of Justice's case law does not identify value for money as an objective of the public procurement directives either. Unlike the competition objective, which has acted as rationale for several judgments, value for money is merely referred to in passing and does not seem to determine the decisions of the Court of Justice[105].

In this sense, best value for money appears to be a side effect[106] of EU rules aimed at promoting competition in the context of the award of public contracts. In other words, at European level, value for money is viewed as a consequence of public procurement procedures being held in conditions of effective competition, and not as an objective in itself. It has more precisely been said that value for money or economic efficiency is a benefit that can flow from the creation of an internal market, but conversely it does not *per se* contribute to the internal market[107].

(c) Horizontal policies

[104] S Arrowsmith, "Understanding the purpose of the EU's procurement directives: the limited role of the EU regime and some proposals for reform" in SCA (ed), The Cost of Different Goals of Public Procurement (Västerås 2012) 83; R Caranta, "The changes to the Public Contracts Directives and the story they tell about how EU law works" (2015) 52 Common Market Law Review 403.

[105] Case C-305/08, *CoNISMa*, EU:C:2009:807, para 37; Case C-94/12, *Swm Costruzioni 2*, EU:C:2013:646, para 34.

[106] R Caranta, "The changes to the Public Contracts Directives and the story they tell about how EU law works" (2015) 52 Common Market Law Review 405.

[107] S Arrowsmith, "The purpose of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies", in C Barnard and M Gehring (eds), *Cambridge Yearbook of European Legal Studies* (vol.14, Hart Publishing 2011-2012) 38.

This thesis does not look into the question of whether European public procurement regulation is an adequate tool to pursuit environmental and social policies, nor what would be the best way to do it in this context[108]. Taking into account that "the EU itself has the legal competence under the Treaty to regulate to promote social and environmental objectives"[109], it is proposed to investigate how horizontal objectives may be reflected in the award criteria[110].

Whether environmental and social considerations are permitted conditions or criteria for the award of public contracts is a debate that dates back to *Beentjes*[111]. One of the most controversial issues on this topic regards the admissibility of social award criteria which are not linked to the subject matter of the contract. The European Commission has suggested that "a criterion regarding combating unemployment (and other criteria which are not linked to the subject-matter of the contract) can be taken into account at the award stage only as 'an additional criterion' in order to choose between two equivalent tenders. All other award criteria (other than the additional criterion) must be linked to

[108] For a broader approach to the topic of horizontal policies in public procurement, see S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (CUP 2009); C McCrudden, *Buying Social Justice: Equality, Government Procurement, & Legal Change* (OUP 2007); R Caranta and M.Trybus (eds), *The Law of Green and Social Procurement in Europe* (Djøf Publishing 2010).

[109] S Arrowsmith, "The purpose of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies", in C Barnard and M Gehring (eds), *Cambridge Yearbook of European Legal Studies* (vol.14, Hart Publishing 2011-2012) 46.

[110] The implementation of horizontal policies through technical specifications, contract performance conditions, selection criteria, and variants is outside the scope of this thesis.

[111] Case 31/87, *Beentjes*, EU:C:1988:422.

the subject-matter of the contract."[112] Nevertheless, Art.67(2) 2014 Public Procurement Directive appears to indicate that all award criteria must be linked to the subject matter of the contract, including environmental and social ones[113]. However, as discussed in the following sections, the scope of the said link seems to have been relaxed in the most recent directive, allowing for a greater discretion of contracting authorities wishing to include environmental and social considerations in the award criteria. Actually, it has been argued that the balance to be achieved between value for money and the implementation of horizontal policies in the context of public procurement is, in principle, dealt with at national level[114]. This assertion does not preclude the fact that public procurement directives may impose limits on the pursuit of horizontal policies, namely via the award criteria. This limitation occurs when the criteria are perceived to create barriers to the participation in procurement procedures, or are likely to generate the potential for abuse of discretion to favour national economic operators[115].

[112] European Commission, *Buying Social – A Guide to Taking Account of Social Considerations in Public Procurement*, SEC(2010)1258 final, 40.

[113] This also seems clear from recitals (89)-(99) 2014 Public Procurement Directive. It should also be noted that the requirement of the linkage to the subject matter of the contract is now explicitly stated in art.70 and recital (104) 2014 Public Procurement Directive regarding contract performance conditions which can include environmental, social or employment-related considerations. This requirement is absent from art.26 and recital (33) 2004 Public Sector Directive. On the linkage requirement in the field of horizontal policies, see M Martens and S Margerie, "The link to the subject-matter of the contract in green and social procurement" (2013) 1 European Procurement & Public Private Partnership Law Review 8-18.

[114] S Arrowsmith, "Understanding the purpose of the EU's procurement directives: the limited role of the EU regime and some proposals for reform" in SCA (ed), The Cost of Different Goals of Public Procurement (Västerås 2012) 91.

[115] Ibid.

3.4 The choice of the award criteria

3.4.1 The most economically advantageous tender (MEAT)

2014 Public Procurement Directive has replaced the dichotomy MEAT v lowest price by the MEAT as the sole mandatory rationale behind any award decision. The European Parliament's press release on the occasion of the adoption of its position at first reading states that[116]: "Thanks to the new criterion of the 'most economically advantageous tender' (MEAT) in the award procedure, public authorities will be able to put more emphasis on quality, environmental considerations, social aspects or innovation while still taking into account the price and life-cycle-costs of what is procured. 'The new criteria will put an end to the dictatorship of the lowest price and once again make quality the central issue' Mr Tarabella explained."

The European Commission had not proposed contracting authorities should base the award of public contracts solely on the MEAT. Indeed, art.66 of its proposal for a directive on public procurement comprised two alternatives: the MEAT and the lowest cost. However, the European Parliament made its opinion very clear from the start: the criterion of the lowest

[116] "New EU-procurement rules to ensure better quality and value for money", press release from the European Parliament on January 15, 2014 (available here: http://www.europarl.europa.eu/news/en/news-room/content/20140110IPR32386/html/New-EU-procurement-rules-to-ensure-better-quality-and-value-for-money).

price only should be eliminated and MEAT award criteria should be prescribed for all procedures[117].

Therefore, in the light of the final text, it would seem that the European Parliament's position might have superseded that of the European Commission. However, a closer look at the possible configurations of award criteria under the MEAT reveals that art.67 2014 Public Procurement Directive is the result of a compromise between the not entirely matching views of those two European institutions.

The MEAT has been construed as an overarching award criterion which shall be identified on the basis of the *price or cost*, and may include the *best price-quality ratio* which shall be assessed on the basis of criteria linked to the subject matter of the contract[118]. Thus, it is apparent that price or cost is a mandatory element of the MEAT, whereas the best price-quality ratio is an optional one. This suggests that the MEAT may comprise only one criterion: price or cost[119]; whereas the best price-quality ratio appears not to be able to be used without an accompanying indication of price or cost[120].

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[117] *Working Document on a proposal for a Directive of the European Parliament and of the Council on public procurement*, from the European Parliament's Committee on the Internal Market and Consumer Protection of February 23, 2012, 3. This opinion was consistently voiced in subsequent documents produced by the European Parliament's Committee on the Internal Market and Consumer Protection: the *Draft Report on the proposal for a Directive of the European Parliament and of the Council on public procurement* of May 3, 2012, 65; and the *Final Report on the proposal for a Directive of the European Parliament and of the Council on public procurement* of January 11, 2013, 109.

[118] Art.67(2) 2014 Public Procurement Directive.

[119] Except in the situation of fixed price or cost provided in art.67(2) and recital (93) 2014 Public Procurement Directive.

[120] P Bordalo Faustino, "Award criteria in the new EU Directive on public procurement" (2014) 3 Public Procurement Law Review 125.

Furthermore, this interpretation is corroborated by Recital (90) 2014 Public Procurement Directive, which clarifies that while the best price-quality ratio should always include a price or cost element, the assessment of the MEAT can also be carried out on the basis of either the price or cost-effectiveness *only.* Hence, in practice, the choice between awarding a public contract solely on the basis of price or cost, or on the basis of a combination of the latter with qualitative elements, applies in the same way as it did under 2004 Public Sector Directive and the previous directives.

It may be argued that, by erecting the MEAT to sole overarching criterion, the European legislation is encouraging contracting authorities to procure in a more quality-oriented way[121]. However, in practice, contracting authorities may nevertheless decide that the lowest price is the most suitable criterion for the award of a particular contract.

By turning the MEAT into an overriding concept, the European legislator had to adopt a new terminology – i.e. best price-quality ratio – in order to cover what had been known as the MEAT until the 2014 reform. Therefore, this new term should be interpreted in accordance with the case law relating to the previous understanding of the MEAT[122].

(a) Freedom to choose the best price-quality ratio criterion

As regards the freedom to choose the best price-quality ratio criterion (previously, the MEAT), contracting authorities still

[121] See 2nd paragraph of Recital (90) 2014 Public Procurement Directive.

[122] See Recital (89) 2014 Public Procurement Directive.

retain a wide margin of discretion. According to the *Sintesi* judgment, "the abstract and general fixing by the national legislature of a single criterion for the award of public works contracts deprives the contracting authorities of the possibility of taking into consideration the nature and specific characteristics of such contracts, taken in isolation, by choosing for each of them the criterion most likely to ensure free competition and thus to ensure that the best tender will be accepted."[123] This would have seem to indicate, including under 2004 Public Sector Directive, that Members States could not limit contracting authorities' freedom to choose the then MEAT in favour of the lowest price criterion. Indeed, faced with the case where an Italian provision required that the lowest price be used as the sole criterion for the award of a works contract, the Court of Justice decided that the then applicable public procurement directive "is to be interpreted as meaning that it precludes national rules which (…) impose a general and abstract requirement that the contracting authorities use only the criterion of the lowest price."[124]

It should be noted that there is no jurisprudence about the reverse situation, i.e. the admissibility of a national provision imposing the choice of the best price-quality ratio (previously, the MEAT) for the award of specific public contracts. It is doubtful whether *Sintesi* might be applied by analogy.

However, it has been argued that the decision in *Sintesi* is not justifiable. Taking into account that the decision of what to

[123] Case C-247/02, *Sintesi*, EU:C:2004:593, para 40.

[124] Case C-247/02, *Sintesi*, EU:C:2004:593, para 42. For a comment on this case, see A Brown, "The right to choose between the criteria of lowest price and most economically advantageous tender: Case C-247/02 Sintesi SpA v Autorita per la Vigilanza sui Lavori Pubblici" (2005) 2 Public Procurement Law Review NA15-18.

buy and how to balance value for money and other considerations under the public procurement award criteria falls within the national decision-making discretion, "there are no reasons connected with the internal market to preclude states from making such decisions on a general basis for categories of procurement"[125]. In line with this current of thought, it could be proposed that, instead of applying *Sintesi* by analogy, Member States should be allowed to constrain contracting authorities' discretion to choose either the price or cost only, or the best price-quality ratio, by laying down mandatory award criteria for specific types of contract. The most recent legislative reform at EU level may, however, determine a different conclusion.

Indeed, the opposite situation to the one ruled in *Sintesi* is now provided in art.67(2) 2014 Public Procurement Directive. In the words of the respective explanatory recital (90): "In order to encourage a greater quality orientation of public procurement, Member States should be permitted to prohibit or restrict use of price only or cost only to assess the most economically advantageous tender where they deem this appropriate." If this is to be interpreted in conjunction with the *Sintesi* judgment, then it seems to suggest that while the use of the price or cost only criterion may be prohibited or restricted for certain categories of contracting authorities or certain types of contracts, the use of the same criterion may not be imposed in similar circumstances. The only perceived rationale for this interpretation appears to be the expressly

[125] S Arrowsmith, "The purpose of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies", in C Barnard and M Gehring (eds), *Cambridge Yearbook of European Legal Studies* (vol.14, Hart Publishing 2011-2012) 41.

mentioned legislative aim to encourage a greater quality orientation of public procurement[126].

If, on the one hand, the *Sintesi* ruling seems to have made a contribution towards contracting authorities' freedom of choice between the price or cost only and the best price-quality ratio (then, the MEAT), art.67(2) 2014 Public Procurement Directive, on the other hand, appears to allow that freedom to be limited in certain situations where Member States may determine that contracting authorities must use the best price-quality ratio[127].

Finally, it should also be mentioned that secondary EU law other than the public procurement directives may lead to the mandatory choice of the best price-quality ratio criterion when contracting authorities procure specific goods. The typical example is given in Directive 2009/33/EC[128]. According to this directive, when purchasing road transport vehicles, contracting authorities must take into account the operational lifetime energy and environmental impacts as award criteria. If these impacts are monetised, then the contracting authorities must

[126] On whether this should be ruled at EU level, including the apparent lack of legal basis to do so, see above section on value for money.

[127] The use of the best price-quality ratio criterion is mandatory in the following situations: innovation partnerships (art.31(1) 2014 Public Procurement Directive), competitive dialogue (art.30(1) 2014 Public Procurement Directive; art.29(1) 2004 Public Sector Directive), and variants (art. 45(2) 2014 Public Procurement Directive; art.24(1) 2004 Public Sector Directive), which fall outside the scope of this thesis.

[128] Directive 2009/33/EC of the European Parliament and of the Council on the promotion of clean and energy-efficient road transport vehicles [2009] O.J. L 120/5. Regulation (EC) No 106/2008 of the European Parliament and of the Council on a community energy-efficiency labeling programme for office equipment [2008] O.J. L 39/1 also lays down specify energy-efficiency requirements contracting authorities should comply with when procuring office equipment. However, it does not refer to award criteria in particular, which means the said requirements might be met simply by including the energy-efficiency considerations in the technical specifications.

also follow the directive's common rules for calculating the lifetime costs linked to the operation of vehicles. Therefore, in this situation, in order to include the said impacts in the award criteria, contracting authorities have to choose the best price-quality ratio criterion.

(b) Freedom of choice conferred by the best price-quality ratio criterion

At first sight, it would appear that contracting authorities had a substantial margin of discretion in terms of choosing the award criteria in order to assess the best price-quality ratio. On the one hand, it is for each contracting authority to decide what it considers to be the economically best solution among those offered in the context of each public procurement procedure[129]. In other words, the definition of the MEAT is to be made from the point of view of the contracting authority[130]. On the other hand, the list of criteria provided in art.67(20 2014 Public Procurement Directive and art.53(1)(a) Public Sector Directive, which may be used to assess the best price-quality ratio, is not exhaustive[131]. However, relevant limitations to the contracting authorities' discretion in this field have been decided by the Court of Justice, and some of them have been incorporated in the public procurement directives.

[129] Recital (89) 2014 Public Procurement Directive.

[130] Art.67(2) 2014 Public Procurement Directive; art.53(1)(a) 2004 Public Sector Directive. See Case C-601/13, *Ambisig*, EU:C:2015:204, 28: "Article 53(1)(a) of Directive 2004/18 provides that 'the tender most economically advantageous' is to be identified 'from the point of view of the contracting authority', thereby giving the contracting authority greater discretion in its decision-making."

[131] Recital (92) 2014 Public Procurement Directive; see also, inter alia, Case C-19/00, *SIAC*, EU:C:2001:553, para 35; Case C-513/99, *Concordia Bus*, EU:C:2002:495, para 54; Case C-315/01, *GAT*, EU:C:2003:360, para 63.

(i) First limitation: criteria aimed at identifying the MEAT

The award criteria chosen to assess the best price-quality ratio must be aimed at identifying the most economically advantageous tender[132]. This is sometimes referred to as best value for money[133]. Indeed, the award criteria must be directed at ensuring an objective comparison of the relative value of the tenders in order to determine which one is the most economically advantageous[134]. Conversely, award criteria should not be "essentially linked to the evaluation of the tenderers' ability to perform the contract in question."[135].

(ii) Second limitation: criteria not conferring an unrestricted freedom of choice

The chosen award should not confer an unrestricted freedom of choice on contracting authorities. Following on from established case law of the Court of Justice[136], art.67(4) 2014 Public Procurement Directive now expressly incorporates this requirement, also stated in its recital (92) and previously

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[132] Case 31/87, *Beentjes*, EU:C:1988:422, para 19; Case C-19/00, *SIAC*, EU:C:2001:553, para 35-36; Case C-513/99, *Concordia Bus*, EU:C:2002:495, para 59; Case C-315/01, *GAT*, EU:C:2003:360, para 63-64.

[133] For example, in recital (46) 3rd paragraph 2004 Public Sector Directive. See the above section on value for money for the submitted interpretation of this particular reference.

[134] Recital (90) 2014 Public Procurement Directive.

[135] Case C-532/06, *Lianakis*, EU:C:2008:40, 30. For more on this topic, see following section.

[136] See Case 31/87, *Beentjes*, EU:C:1988:422, para 26; Case C-19/00, *SIAC*, EU:C:2001:553, para 37; Case C-513/99, *Concordia Bus*, EU:C:2002:495, para 61; Case C-331/04, *ATI*, EU:C:2005:718, para 21.

mentioned in recital (1) 2004 Public Sector Directive. This means that, despite the contracting authorities having the right (and obligation) to exercise their discretion in order to choose the award criteria that best suit the objective of selecting the most economically advantageous tender to award a particular contract, this discretionary power should not involve an element of arbitrary choice[137].

This is confirmed in *Beentjes* (37) (ii): "[an award criterion] may be compatible with the directive if it reflects the discretion which the authorities awarding contracts have in order to determine the most economically advantageous tender on the basis of *objective criteria* and thus does not involve an element of arbitrary choice."[138] (emphasis added) Thus, it seems that the objectivity of the award criteria is the key to prevent them from providing contracting authorities with an unrestricted freedom of choice.

It is not however clear what the case law means by objective criteria. It has been argued that "the test might be one of verifiability, so that the award criteria and the way in which they are applied (and however vaguely they may have been defined) will reflect the ability of any potential complainant (and the government or regulator) to assess whether or not they have been applied properly, that is to say in conformity with the provisions of the Directive and the fundamental principles of the Treaty."[139] It is submitted that the verifiability test seems adequate in the light of the ruling in *SIAC* where the Court of Justice decided that "tenderers must be in a

[137] P Bordalo Faustino, "Award criteria in the new EU Directive on public procurement" (2014) 3 Public Procurement Law Review 131-132.

[138] Case 31/87, *Beentjes*, EU:C:1988:422, para 37 (ii).

[139] P Trepte, *Public Procurement in the EU* (2nd edn, OUP 2007) 472.

position of equality both when they formulate their tenders and when those tenders are being assessed by the adjudicating authority"[140] and that "when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers"[141]. Therefore, "if the criteria are drafted in a way which does not allow tenderers to understand how they will or may be applied or enable them, should the need arise, to check that they have been applied fairly (according to the principles of equal treatment and non-discrimination), then it is arguable that they provide to the contracting authority an unrestricted freedom of choice which could give rise to challenge."[142]

Nevertheless, there is a reverse side to the prohibition of conferring an unrestricted freedom of choice to the contracting authorities via the chosen award criteria. That is apparent in *Commission v Italy*[143]. In this case, the Italian Government argued that the criterion based on 'the tender which equals the average tender or is the closest to it' served to determine 'the most economically advantageous tender'. However, the Court of Justice ruled that "in order to determine the most economically advantageous tender, the authority making the decision *must be able to exercise its discretion* in taking a decision on the basis of qualitative and quantitative criteria that vary according to the contract in question and cannot therefore rely solely on the quantitative criterion of the

[140] Case C-19/00, *SIAC*, EU:C:2001:553, para 34.

[141] Case C-19/00, *SIAC*, EU:C:2001:553, para 44.

[142] P Trepte, *Public Procurement in the EU* (2nd edn, OUP 2007) 472.

[143] Case C-274/83, *Commission v Italy*, EU:C:1985:148. For a comment on this case, see S Arrowsmith, *A Guide to the Procurement Cases of the Court of Justice* (Earlsgate Press 1992) 35-37.

average price."[144] (emphasis added) This seems to indicate that the use of the best price-quality ratio criterion entails an obligation to exercise a discretion aimed at identifying the MEAT[145]. This obligation can not be met by an automatic criterion like the one in Commission v Italy, which leaves no room for the discretionary evaluation of tenders by the contracting authorities.

(iii) Third limitation: criteria linked to the subject matter of the contract

The award criteria under the best price-quality ratio must be linked to the subject matter of the public contract in question[146]. This linkage requirement plays a key role in tying down contracting authorities' discretion as regards the choice of award criteria to assess the best price-quality ratio.

By way of illustration, the EVN judgment states that "an award criterion that relates solely to the amount of electricity produced from renewable energy sources *in excess of* the expected annual consumption, as laid down in the invitation to tender, cannot be regarded as linked to the subject-matter of the contract."[147] (emphasis added) Indeed, the supply of an amount of electricity to the contracting authority corresponding to its expected annual consumption constituted the service which was the subject matter of the contract under judgment. Therefore, the award criterion was considered not

[144] Case C-274/83, *Commission v Italy*, EU:C:1985:148, para. 25.

[145] S Arrowsmith, *The Law of Public and Utilities Procurement* (3rd edn, Sweet&Maxwell 2014) 775.

[146] See art.53(1)(a) and recital (1) 2004 Public Sector Directive; art.67(2)(3) and recital (92) 2014 Public Procurement Directive.

[147] Case C-448/01, *EVN*, EU:C:2003:651, para. 68.

to be linked to the subject matter of the contract because it related to the amount of electricity the tenderers had supplied, or would supply to other customers. This obviously fell outside the scope of the contract's object.

Despite confirming previous case law from the Court of Justice[148] by expressly establishing that the award criteria used for the assessment of the best price-quality ratio (then, the MEAT) must be linked to the subject matter of the contract in question, the 2004 Public Sector Directive does not clarify the meaning and extent of this requirement. However, some clues pointing to a restrictive interpretation of the range of the link to the subject matter of the contract can be found.

On the one hand, recital (46) 2004 Public Sector Directive stipulates that the determination of the award criteria depends on the object of the contract, and that the level of performance offered by each tender has to be assessed in the light of the object of the contract, as defined in the technical specifications. On the other hand, according to Annex VI of the said directive, the technical specifications define the characteristics required of works, supplies or services.

Therefore, it could be argued that the subject matter of the contract - also referred to as the object of the contract - is determined by the characteristics of the works, supplies or services as described by the technical specifications. In other words, the subject matter of the contract consists of the works, supplies or services required by the contracting authority in order to meet the needs of the public concerned

[148] See, inter alia, Case C-513/99, *Concordia Bus*, EU:C:2002:495, paras. 59 and 64; Case C-448/01, *EVN*, EU:C:2003:651, paras. 33 and 66-68; Case C-331/04, *ATI*, EU:C:2005:718, para. 21; Case C-368/10, *Commission v Netherlands*, EU:C:2012:284, para. 86; Case C-601/13, *Ambisig*, EU:C:2015:204, para. 30.

and to the precise extent that they are featured in the technical specifications.

More recently, though, the Court of Justice ruled in *Commission v Netherlands*[149] that "there is no requirement that an award criterion relates to an *intrinsic characteristic of a product*, that is to say something which forms part of the material substance thereof". (emphasis added) This seems to imply that the award criteria are still deemed to be linked to the subject matter of the contract even if they do not relate to the respective technical specifications, so long as they relate to the works, supplies or services comprised by the object of the contract in question (including the conditions for its performance). This broader understanding of the linkage requirement favours the admissibility of environmental, social and innovative considerations as award criteria, and expands the discretionary powers of contracting authorities on this point.

Art.67(3) 2014 Public Procurement Directive is clearly inspired by this recent jurisprudence. It provides for the first time a legislative presumption of linkage to the subject matter of the contract by stipulating that: "Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract *in any respect and at any stage of their life cycle*, including factors involved in: (a) the specific process of production, provision or trading of those works, supplies or services; or (b) a specific process for

[149] Case C-368/10, *Commission v Netherlands*, EU:C:2012:284, para. 91; and respective Opinion of the Advocate General, EU:C:2011:840, para. 110.

another stage of their life cycle, even where such factors do not form part of their material substance." (emphasis added)

In the light of this new provision, it is submitted[150] that the concept of the link to the subject matter of the contract goes beyond the mere technical characteristics of the works, supplies or services covered by that contract. It is far-reaching in the sense that it includes factors *connected* to the said works, supplies or services in any respect and at any stage of their life cycle. This is still the case even where such factors do not form part of their material substance – a literal translation of the ruling in *Commission v Netherlands*, as cited above.

This broader interpretation of the link to the subject matter[151] of the contract matches the symmetrical broader scope of the technical specifications, as provided in the new wording of art.42(1) 2014 Public Procurement Directive. Besides defining the characteristics required of works, supplies or services, the technical specifications may also refer to other aspects related to the requested works, supplies or services, namely their specific process or method of production or provision, or a specific process for another stage of their life-cycle even where these aspects do not form part of their material substance. There is, however, a requirement that these aspects are linked to the subject matter of the contract and proportionate to its value and its objectives.

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[150] P Bordalo Faustino, "Award criteria in the new EU Directive on public procurement" (2014) 3 Public Procurement Law Review 131.

[151] For a proposal of a loose link to the subject-matter combined with application of the principles of proportionality and transparency, see A Semple, "The Link to the Subject-Matter: A Glass Ceiling for Sustainable Public Contracts?" (working paper presented at the University of Oslo as part of the European Law Conference 2014, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2565051 and last accessed on 28/09/2015).

A further insight into the link of the award criteria to the subject matter of the contract is provided in recital (97) 2014 Public Procurement Directive. This linkage requirement excludes criteria – namely environmental and social criteria – concerning the general corporate policy of the tenderers, because this aspect does not characterise the specific process of production or provision of the works, supplies or services in question[152]. In fact, it refers to the capability of the tenderers, which is assessed at the selection stage, rather than the award stage of the public procurement procedures.

By adopting a more flexible approach to the linkage requirement, 2014 Public Procurement Directive aims to facilitate and encourage the integration of environmental, social[153] and innovative award criteria under the best price-quality ratio criterion. This, in turn, amounts to an enlargement of the margin of discretion of the contracting authorities when choosing the award criteria.

(iv) Fourth limitation: disclosure of criteria

A further constraint of the margin of discretion of contracting authorities when choosing and applying the award criteria in the context of public procurement procedures derives from the obligation to disclose the said criteria in a timely way, i.e. in the contract notice or in the contract documents. As mentioned above, this transparency requirement also covers the relative weighting of each award criterion since the 2004

[152] See also recital (97) 2nd paragraph 2014 Public Procurement Directive.

[153] For a list of social and environmental considerations contracting authorities should be allowed to use as award criteria, se recital (97) 1st paragraph 2014 Public Procurement Directive.

public procurement reform[154]. The aim of this obligation of disclosure is "to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender"[155]. Moreover, the indication of the criteria and respective weightings should be made "in sufficient time for tenderers to be aware of them when preparing their bids"[156].

The extent of the obligation to disclose the award criteria and said 'arrangements' (eventual sub-criteria, sub-weightings, scoring methods, etc.) is discussed below in the section on evaluation methodologies.

The case law of the Court of Justice has been clear about the need for advanced information about the award criteria to be provided by contracting authorities[157]. It has been decided that "is important that potential tenderers are aware of all the features to be taken into account by the contracting authority in identifying the economically most advantageous offer, and, if possible, their relative importance, when they prepare their tenders"[158]. Hence, the award criteria must be formulated and disclosed in such a way as to "allow all reasonably well

[154] Art.53(2) 2004 Public Sector Directive; art. 67(5) 2014 Public Procurement Directive.

[155] Recital (46) 2nd paragraph 2004 Public Sector Directive. In very similar terms, see recital (90) 3rd paragraph 2014 Public Procurement Directive.

[156] Ibid.

[157] See Case 31/87, *Beentjes*, EU:C:1988:422, paras. 21, 31 and 37(ii); Case C-87/94, *Commission v Belgium*, EU:C:1996:161, para. 88; Case C-225/98, *Commission v France*, EU:C:2000:494, para. 51; Case C-513/99, *Concordia Bus*, EU:C:2002:495, para. 62; Case C-470/99, *Universale-Bau,* EU:C:2002:746, para. 98; Case C-448/01, *EVN*, EU:C:2003:651, paras. 33 and 57; Case C-331/04, *ATI*, EU:C:2005:718, paras. 23-24; Case C-532/06, *Lianakis*, EU:C:2008:40, paras. 36-38; Case C-368/10, *Commission v Netherlands*, EU:C:2012:284, para. 88.

[158] Case C-331/04, *ATI*, EU:C:2005:718, para. 24.

informed tenderers of normal diligence to interpret them in the same way."[159]

By formulating and disclosing the award criteria and respective weightings, the contracting authorities are, in fact, self-structuring their margin of discretion in the sense that they will be bound to apply them throughout the public procurement procedure in the way they have been advertised at the beginning. Despite the disclosure of the award criteria and respective weightings being mandatory according to the Public Procurement Directive, it is submitted that the degree to which the contracting authorities' margin of discretion is restricted depends on the chosen evaluation methodology. This is discussed below in the section on evaluation methodologies.

(v) Fifth limitation: compliance with fundamental principles

Finally, it is clear from the jurisprudence and the public procurement directives that the award criteria must comply with all the fundamental principles of EU law, in particular equal treatment, non-discrimination and transparency, which derive from the internal market freedoms. It suffices, at this point, to refer back to the section above on the principles and objectives of the European public procurement regulation, notably to the cited case law. In short, it should be recalled that the said principles act as parameters of the contracting authorities' decision making process, which is inherent to the choice and application of the award criteria in order to select

[159] Case C-448/01, *EVN*, EU:C:2003:651, para. 57.

the most economically advantageous tender. In this sense, the function of the principles is twofold: to frame the exercise of the discretionary powers by the contracting authorities, and to allow for the supervision of said exercise.

3.4.2 Permitted and prohibited award criteria

The most economically advantageous tender criterion, particularly when it includes the best price-quality ratio, consists of a combination of economic and non-economic criteria of quantitative or qualitative nature[160]. According to recital (92) 2014 Public Procurement Directive, "those criteria should thus allow for the comparative assessment of the level of performance offered by each tender". Hence, it is submitted that *measurability* is the key feature of the award criteria. That is to say that they must be measurable, either in a quantitative or a qualitative way, in order to enable the objective evaluation of each tender's level of performance, as well as the objective comparison of all the submitted tenders.

The best price-quality ratio criterion must be assessed on the basis of numerous criteria which are listed in a non-exhaustive

[160] See, inter alia, Case C-513/99, *Concordia Bus*, EU:C:2002:495, para. 60; Case C-274/83, *Commission v Italy*, EU:C:1985:148, para. 25. This understanding superseded the original position of the European Commission, according to which "criteria used for determining the most economically advantageous tender (…) should generate an economic advantage for the contracting authority", as stated in its Interpretative Communication on the *Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement*, COM(2001) 566 final, 13. For a criticism of the Commission's view, see S Treumer, "The discretionary powers of contracting entities - towards a flexible approach in the recent case law of the European Court of Justice?" (2006) 3 Public Procurement Law Review 77-78. For more recent cases reiterating that the award criteria are not necessarily all required to be quantitative, see also Case T-536/11, *Evropaiki Dynamiki*, EU:T:2015:476, para.134; Case T-461/08, *Evropaiki Dynamiki*, EU:T:2011:494, para. 147.

way under art.67(2) 2014 Public Procurement Directive. As mentioned before, and in line with established case law of the CJEU[161], these criteria do not necessarily have to be of a purely economic nature. In fact, non-economic considerations, such as social and environmental issues, may also influence the value of the tenders from the point of view of the contracting authority.

The illustrative list of possible award criteria features three major changes when compared to its predecessor in art.53(1)(a) 2004 Public Sector Directive.

Firstly, it expressly mentions social and innovative aspects alongside the environmental characteristics[162]. Examples of social considerations can be found in recitals (97)-(99) 2014 Public Procurement Directive: social aspects of the production process[163], including the protection of health of the staff involved; social integration of disadvantaged persons or members of vulnerable groups, including the employment of long-term job-seekers[164] and the implementation of training measures for the unemployed or young persons. However,

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[161] See Case C-513/99, *Concordia Bus*, EU:C:2002:495, para. 55; Case C-448/01, *EVN*, EU:C:2003:651, paras. 31-34.

[162] For a detailed account of the debate about the admissibility of environmental and social considerations in the context of public procurement, namely their use as award criteria, see S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: CUP, 2012); and R Caranta and M Trybus (eds), *The Law of Green and Social Procurement* (DJøF 2010).

[163] In keeping with Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services [1997] O.J. L 18/1.

[164] This was first stated by the Court of Justice in Case 31/87, *Beentjes*, EU:C:1988:422, para. 37(iii); and later also ruled in Case C-225/98, *Commission v France*, EU:C:2000:494, paras. 49-51 and 73. For a critical appraisal of the latter judgment, see J Arnould, "A turning point in the use of additional award criteria?" (2001) 1 Public Procurement Law Review NA13-19.

social and innovative award criteria must also comply with the requirement of the link to the subject matter of the contract.

On the one hand, it could be said that, taking into account that the list of possible award criteria in previous public procurement directives had always been non-exhaustive, contracting authorities could in theory have already used social criteria before the 2014 reform. The difficulty would reside, however, in the compliance with the requirement of the linkage to the subject matter of the contract. On the other hand, as mentioned above, the construct of "additional criteria" by the European Commission[165] curtailed contracting authorities' freedom to use social criteria.

It is, therefore, submitted that the 2014 Public Procurement Directive amplified the contracting authorities' discretionary powers by combining the listing of social considerations as permitted award criteria with the loosening of the concept of link to the subject matter of the contract (as discussed above).

Secondly, trading and its conditions are also listed for the first time as possible award criteria. This seems to be a direct consequence of the already mentioned case *Commission v Netherlands*[166] where the Court of Justice ruled on the admissibility of using a fair trade factor as an award criterion, by deciding that a label that provides information on whether the goods to be supplied are traded fairly is a social aspect in

[165] European Commission, *Buying Social – A Guide to Taking Account of Social Considerations in Public Procurement*, SEC(2010)1258 final, 40.

[166] Case C-368/10, *Commission v Netherlands*, EU:C:2012:284.

connection with a condition relating to the performance of the contract and can, therefore, be used as an award criterion[167].

Recital (97) 2014 Public Procurement Directive follows on from that jurisprudence by clarifying that the award criteria may also include aspects of "the supply or utilisation of fair trade products in the course of the performance of the contract to be awarded. Criteria and conditions relating to trading and its conditions (commercialisation) may for instance refer to the fact that the product concerned is of fair trade origin, including the requirement to pay a minimum price and price premium to producers." Again, the admissibility of trading award criteria depends on their link to the subject matter of the contract, although a connection to a contract performance condition seems to suffice for this purpose.

Thirdly, the organisation, qualification and experience of staff assigned to performing the contract is now expressly listed as permissible award criteria[168]. This is the case where the quality of the said staff can have a significant impact on the level of performance of the contract. The clarification regarding the admissibility of experience of the staff as an award criterion is welcomed taking into account the uncertainties brought about by the *Lianakis* line of jurisprudence[169].

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[167] Case C-368/10, *Commission v Netherlands*, EU:C:2012:284, paras. 85-92; and respective Opinion of the Advocate General EU:C:2011:840, paras. 110-112.

[168] P Bordalo Faustino, "Award criteria in the new EU Directive on public procurement" (2014) 3 Public Procurement Law Review 129.

[169] Case C-532/06, *Lianakis,* EU:C:2008:40; and Case C-199/07, *Commission v Greece*, EU:C:2009:693. See the special issue (2009) 3 Public Procurement Law Review with several articles on the implications of the application of the *Lianakis* decision at national level, namely as regards the separation between selection and award criteria.

An example of a situation where quality of the staff assigned to performing a contract may affect the overall level of performance of the contract and, consequently, have an impact on the value of the tenders is put forward in Recital (94) 2014 Public Procurement Directive: contracts for intellectual services such as consultancy or architectural services. Should contracting authorities make use of this experience criterion, they must ensure that replacements of staff during the contract performance afford an equivalent level of quality.

It should be noted that the Commission intended to maintain the distinction between selection and award criteria regarding the qualification and experience of the staff[170]. However, in practice this distinction may be difficult to draw. On the one hand, art.58(4) 2014 Public Procurement Directive refers to experience of the economic operators in performing similar contracts for the purposes of the selection stage. On the other hand, art.68(2) 2014 Public Procurement Directive allows the experience of the specific staff members assigned to performing the contract to play a role at the award stage.

Should a contracting authority choose to assess the quality and experience of the staff under both selection and award criteria, there is a risk of 'double assessment'. It has been elsewhere submitted[171] that this can be avoided by assessing

[170] See *Non-paper prepared by the Commission services (DG Internal Market) on Cluster 2 (Strategic use of public procurement) of the proposal for a Directive for the European Parliament and of the Council on public procurement, in view of the Working Party on Public Procurement*, of January 20, 2012, p.3 (available at http://register.consilium.europa.eu/content/out?lang=EN&typ=ENTRY&i=SMPL&DOC_ID=ST%205369%202012%20INIT and last accessed on 26/09/2015).

[171] P Bordalo Faustino, "Award criteria in the new EU Directive on public procurement" (2014) 3 Public Procurement Law Review 130.

general or quantitative elements of the economic operator's experience for the purposes of the selection stage (e.g. how many contracts for a similar service the consultancy firm has performed; or whether the consultancy firm has performed at least x number of contracts for similar services), while focusing on specific or qualitative elements of the experience of the staff assigned to performing the contract for the purposes of the award stage (e.g. how successful the team leader has been in delivering similar projects in the past - for instance in terms of meeting deadlines - supported by evidence such as references).

The Court of Justice has had the opportunity to decide on several permitted and prohibited criteria alongside those non-exhaustively listed in the public procurement directives.

In the *Beentjes*[172] judgment, a criterion regarding the employment of long-term unemployed people was deemed legal provided it was compatible with public procurement fundamental principles derived from the Treaty. Following on from the discussion of whether the Court of Justice in *Beentjes* referred to a social contract performance condition or a social award criterion, the ruling in *Commission v France*[173] clarified that the ability to employ long-term unemployed people is a proper award criterion[174].

[172] Case 31/87, *Beentjes*, EU:C:1988:422.

[173] Case C-225/98, *Commission v France*, EU:C:2000:494, para. 52.

[174] Not entirely in agreement with this interpretation, see S Arrowsmith, "An assessment of the new legislative package on public procurement" (2004) 41 CMLR 1318.

As for environmental criteria, the Court of Justice decided in *Concordia Bus*[175] that contracting authorities "may take criteria relating to the preservation of the environment into consideration, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination."[176] In other words, the admissibility of environmental criteria is subject to the same conditions that apply to all other award criteria. A similar take on ecological award criteria can be found in the *EVN* judgment. However, "in the case at issue in the main proceedings, the award criterion applied does *not* relate to the service which is the subject-matter of the contract, namely the supply of an amount of electricity to the contracting authority corresponding to its expected annual consumption as laid down in the invitation to tender, *but* to the amount of electricity that the tenderers have supplied, or will supply, to other customers."[177] (emphasis added) Therefore, the Court of Justice goes on to conclude that such an environmental criterion cannot, in this circumstance, be regarded as linked to the subject-matter of the contract. This line of though regarding environmental criteria was by large subscribed by the European Commission[178].

[175] For a comment on this judgment, see J Arnould, "Environmental criteria and the EC procurement directives: a note on the Concordia Bus Finland case" (2003) 1 Public Procurement Law Review NA3-8.

[176] Case C-513/99, *Concordia Bus*, EU:C:2002:495, para. 64.

[177] Case C-448/01, *EVN*, EU:C:2003:651, para. 67.

[178] See European Commission, *Buying Green! A Handbook on Environmental Public Procurement,* 2011 (available at

As regards using the experience of the staff as an award criterion, the controversial[179] *Lianakis* judgment ruled that "a contracting authority is precluded (…) from taking into account as 'award criteria' rather than as 'qualitative selection criteria' the tenderers' experience, manpower and equipment."[180] It has been argued[181] and is submitted herein that, by deciding that criteria essentially linked to the evaluation of the tenderers' ability to perform the contract in question – namely, experience and qualifications of the tenderer – do not have the status of award criteria, the Court of Justice was not closing the door to the possibility of evaluating the experience of the staff assigned to the performance the contract at the award stage. In fact, selection and award criteria should not overlap nor be duplicated[182]. The former relates to the general suitability and capability of the tenderers, whereas the latter concerns aspects of the tenders which contribute to the evaluation of their level of performance. Thus, it is apparent that, in some circumstances, the 'quality' of the person who will execute the contract determines the 'quality' offered by

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http://ec.europa.eu/environment/gpp/pdf/handbook.pdf and last accessed on 26/09/2015) 37-41.

[179] For a critical view of this judgment, see T Kotsonis, "The nature of award criteria and the subsequent stipulation of weightings and sub-criteria: Lianakis v Dimos Alexandroupolis (C-532/06)" (2008) 4 Public Procurement Law Review NA128-134.

[180] Case C-532/06, *Lianakis*, EU:C:2008:40, para. 32.

[181] P Trepte, "The Contracting Authority as Purchaser and Regulator: Should the Procurement Rules Regulate what we Buy?" in Ølykke, Risvig and Tvarnø (eds), *Eu Procurement Directives – Modernisation, Growth and Innovation* (DjøF Publishing 2012) 103; P Lee, "Implications of the Lianakis decision" (2010) 2 Public Procurement Law Review 55-56; S Arrowsmith, "Modernising the European Union's public procurement regime: a blueprint for real simplicity and flexibility" (2012) 3 Public Procurement Law Review 80.

[182] On this topic, see Case T-39/08, *Evropaiki Dynamiki*, EU:T:2011:721; Case T-169/00, *Esedra*, EU:T:2002:40; Case T-148/04, *TQ3*, EU:T:2005:274; Case T-59/05, *Evropaiki Dynamiki*, EU:T:2008:326.

the tender. This is manifest in respect of service contracts with an intellectual component.

Following on from this, in the *Commission v Greece*[183] judgment, the Court of Justice made an arguably blind application of the *Lianakis* reasoning in the context of the utilities[184]. However, more recently in the *Ambisig*[185] case, it has been finally clarified that the *Lianakis* judgment concerns the staff and experience of the tenderers in general and does not rule out the possibility that contracting authority may, in certain circumstances, use an award criterion enabling evaluation of the teams specifically put forward by the tenderers for the performance of the contract[186]. Moreover, the Court of Justice stated that "the quality of performance of a public contract may depend decisively on the 'professional merit' of the people entrusted with its performance, which is made up of their professional experience and background."[187] The judgment goes on to say that this is especially valid where the performance of the contract is intellectual in nature. It should be noted that the proceedings in this case concerned

[183] Case C-199/07, *Commission v Greece*, EU:C:2009:693, especially para. 56.

[184] See T Kotsonis, "Discriminatory selection criteria and the nature of award criteria - applying the Lianakis ruling in a utilities context: Commission v Greece (C-199/07)" (2010) 3 Public Procurement Law Review NA77-86.

[185] Case C-601/13, *Ambisig*, EU:C:2015:204. The same decision on the experience criterion has been reiterated by the General Court in several cases – see, inter alia, Case T-536/11, *Evropaiki Dynamiki*, EU:T:2015:476, para. 134; Case T-447/10, *Evropaiki Dynamiki*, EU:T:2012:553, para. 42.

[186] Case C-601/13, *Ambisig*, EU:C:2015:204, paras. 25-26. This had already been hinted by the General Court in Case T-4/01, *Renco*, EU:T:2003:37, paras. 68-69. For a comment on this case, see P Braun, "The use of qualitative award criteria and the difference between award and qualification criteria: a note on T-4/01, Renco SpA v Council of the European Union" (2003) 5 Public Procurement Law Review NA116-119.

[187] Case C-601/13, *Ambisig*, EU:C:2015:204, para. 31.

training and consultancy services. Therefore, the Court of Justice concludes that "where a contract of this nature is to be performed by a team, it is the abilities and experience of its members which are decisive for the evaluation of the professional quality of the team."[188] In this type of situation, the 'quality of the team' may be regarded as an intrinsic characteristic of the tender and, therefore, linked to the subject-matter of the contract for the purposes of Article 53(1)(a) 2004 Public Sector Directive.

Hence, it is submitted that the EU jurisprudence considers it is permitted to take into consideration the composition of the team and the experience and academic and professional background of the team members as a qualitative award criterion, where the performance of the contract is determined by this factor. As mentioned above, the exact same approach to the experience award criterion has been established in art.67(2)(b) 2014 Public Procurement Directive, as well as in its recital (94). It could be said that the *Ambisig* judgment was inspired by the forthcoming provision on this topic put forward by the 2014 public procurement reform.

Another award criterion that has incidentally been mention in connection with the experience of the staff assigned to perform the contract is the means of ensuring a proper performance of the contract. It is understandable that contracting authorities wish to somehow assess the means of ensuring a proper performance of the contract, and the experience criterion may be a determinant factor as regards certain contracts[189]. Reliability of supply is another factor that

[188] Case C-601/13, *Ambisig*, EU:C:2015:204, para. 33.

[189] Case C-532/06, *Lianakis*, EU:C:2008:40, paras. 31-32.

can be used to compare the tenders as to the degree of guarantee offered in terms of proper performance of the contract. Indeed, the Court of Justice ruled in *Evans Medical* that "reliability of supplies is one of the criteria which may be taken into account (…) in order to determine the most economically advantageous tender"[190]. It is clear from this judgment that contracting authorities are authorised to award contracts on the basis of the tenderer's proved ability to apply security measures in order to provide reliable and continuous supplies[191].

On this topic, it should also be added that the regime on abnormally low tenders allows contracting authorities the possibility to investigate tenders which are so low in value that they appear to seriously risk non-performance of the contract.

Finally, and more recently, the Court of Justice ruled that contracting authorities are permitted to use "the degree of conformity of the tender with the requirements of the tender documents" as an award criterion in *eVigilo*[192]. It is submitted that it would seem to make more sense to establish minimum requirements in the contract documents with which all tenders had to comply (or otherwise be excluded), and award extra points to tenders offering to improve on those requirements to a certain extent.

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[190] Case C-324/93, *Evans Medical*, EU:C:1995:84, para. 44.

[191] Reliability of supply as a permitted award criteria has also been decided in Case C-19/00, *SIAC*, EU:C:2001:553, para. 39; Case C-448/01, *EVN*, EU:C:2003:651, 70; and Case C-234/03, *Contse*, EU:C:2005:644, paras. 61 and 71.

[192] Case C-538/13, *eVigilo*, EU:C:2015:166, para. 64. See, S Smith, "C-538/13 *eVigilo*: Dealing with Bias and Conflict of Interest, Time Limits for Making a Claim ans Acceptability of Allegedly Abstract Award Criteria", (2015) 4 Public Procurement Law Review NA104-NA108.

On a different note, rather more formal than substantial, the General Court has decided that the overall quality of the presentation of the tenders is an admissible award criterion. The judgment begins by observing that "it is undeniable that the formal and stylistic presentation of a tender necessarily has an impact, either positive or negative, on the level of comprehension, and thus the evaluation of that tender by the body having the task of examining it."[193] It is submitted that, regardless of the impact that formal and stylistic presentation of a tender might have on the evaluators, it does not seem to be linked to the subject of the contract per se, nor determine the level of performance of each tender in order to select the most economically advantageous one. However, in this particular case, the tender specifications appear to request the provision of IT services related to documentation drafting, studies and proof of concept, and elaboration of documentation. In the light of this, the General Court concluded that "the quality of the drafting of a tender could be a pertinent indicator in the context of a contract which includes the completion of such tasks."[194]

As regards prohibited criteria, it is submitted that, rather than indicating individual or categories of award criteria which are - in principle - not admissible, the Court of Justice tends to relate the inadmissibility of certain criteria (regardless of their nature) with a failure to comply with the limitations on the contracting authority's freedom of choice conferred by the MEAT discussed above. In other words, criteria are usually prohibited when deemed not to be aimed at identifying the

[193] Case T-536/11, *Evropaiki Dynamiki*, EU:T:2015:476, para. 78. See also Case T-514/09, *bpost v Commission*, EU:T:2011:689, para. 55.

[194] Case T-536/11, *Evropaiki Dynamiki*, EU:T:2015:476, para. 79.

MEAT; when considered to confer an unrestricted freedom of choice on contracting authorities; when not linked to the subject matter of the contract; when not satisfactorily disclosed in advance; and when not thought to comply with the EU fundamental principles. Thus, it suffices to refer back to the cases and examples discussed above.

In conclusion, despite reiterating the limitations on the contracting authority's freedom of choice conferred by the MEAT, which are viewed as conditions for the admissibility of the award criteria, the trend of the Court of Justice's jurisprudence seems to favour the broadening of the discretionary powers of contracting authorities when choosing and applying the award criteria. This is particularly the case with the admissibility of environmental and social criteria, the possibility to evaluate the experience of the staff assigned to perform the contract at the award stage, and the eligibility of certain factors aimed at assessing the means of ensuring a proper performance of the contract. The 2014 public procurement reform also seems to go in this direction.

3.4.3 The price or cost criterion

According to art.67(2) 2014 Public Procurement Directive, the price or cost is now a mandatory element of the MEAT. This represents a change in terms of the previous interpretation of the possible configurations of the MEAT. Taking into account that art.53(1)(a) 2004 Public Sector Directive listed price side by side with other MEAT factors, it was thought that these

other factors could be part of the MEAT alongside price, or even instead of price[195].

This latter composition of the MEAT seems no longer possible except for the case where price or cost is fixed, which is now expressly referred to in art.67(2) 2014 Public Procurement Directive. In this situation, tenderers will compete on quality criteria only. This may happen, for example, when national provisions determine the remuneration of certain services or set out fixed prices for certain supplies. However, the price-quality assessment remains possible because there is still a price or cost reference (albeit fixed) against which the quality of the tenders can be measured. Examples of quality criteria that can be used in such a scenario are listed in recital (93) 2014 Public Procurement Directive.

The fixed price situation had already been implicit in previous public procurement directives. For example, the introductory sentence to art.53(1) 2004 Public Sector Directive states that "without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services", to which the 2014 Public Procurement Directive added "the price of certain supplies".

Article 67(2) 2014 Public Procurement Directive further establishes a special provision which allows Member States to decide whether to restrict or exclude the use of price or cost only depending on the category of contracting authority or the type of contract. As mentioned above, the *Sintesi* case[196] featured the opposite situation where it has been found that

[195] S Arrowsmith, *The Law of Public and Utilities Procurement* (2nd edn, Sweet & Maxwell 2005) 501.

[196] Case C-247/02, *Sintesi*, EU:C:2004:593, paras. 40 and 42.

national rules, which impose a requirement that contracting authorities use only the criterion of the lowest price, are incompatible with the public procurement directives. This type of rule is believed to prevent contracting authorities from taking into account the specific characteristics of each contract when choosing the most suitable award criteria, thereby unlawfully over-structuring contracting authorities' discretion directed at determining the most economically advantageous tender.

Despite the Sintesi ruling, it remained rather unclear the extent to which the Member States were allowed to restrict use of the lowest price and the MEAT. Therefore, the European Commission took this opportunity to clarify that[197]. It follows from this new provision that, in line with the *Sintesi* case law, Member States are entitled to exclude or restrict the sole use of price or cost but, on the contrary, they do not seem allowed to impose the use of price only or cost only[198].

This interpretation is arguably based on the growing call to limit (if not to eliminate) the use of the lowest price criterion while promoting a vaster use of quality criteria as mentioned above[199]. In fact, the 3rd paragraph of Recital (92) 2014 Public Procurement Directive clearly states that "to identify the most economically advantageous tender, the contract award

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[197] *Non-paper prepared by the Commission services (DG Internal Market) on Cluster 2 (Strategic use of public procurement) of the proposal for a Directive for the European Parliament and of the Council on public procurement, in view of the Working Party on Public Procurement*, of January 20, 2012, p.6 (available here: http://register.consilium.europa.eu/content/out?lang=EN&typ=ENTRY&i=SMPL&DOC_ID=ST%205369%202012%20INIT and last accessed on 26/09/2015).

[198] P Bordalo Faustino, "Award criteria in the new EU Directive on public procurement" (2014) 3 Public Procurement Law Review 126.

[199] See 2nd paragraph of Recital (90) 2014 Public Procurement Directive.

decision should not be based on non-cost criteria only. Qualitative criteria should therefore be accompanied by a cost criterion".

The 2014 public procurement reform also introduced a change in the wording of the directive as regards the cost element. It is now placed alongside price, as an alternative configuration of the mandatory economic criterion. Previously, running costs, maintenance costs and other type of costs would have been regarded as optional criteria under the MEAT (now called best price-quality ratio)[200].

Furthermore, as provided in art.67(2) 2014 Public Procurement Directive, cost shall be assessed through a cost-effectiveness approach. It should be mentioned though that cost-effectiveness has been listed under the non-exhaustive enumeration of MEAT award criteria since Council Directive 77/62/EEC.

Any cost-effectiveness approach may take into consideration internal and/or external costs related to a particular work, supply or service. This includes non-price elements which are likely to bear an economic impact on the overall value of the said work, supply or service from the point of view of the contracting authority or of those who will benefit from it. In order to operationalise a cost-effectiveness approach, all elements should be measurable in monetary terms[201].

Art.68 2014 Public Procurement Directive puts forward life-cycle costing as an example of a cost-effectiveness

[200] See art.53(1)(a) 2004 Public Sector Directive.

[201] See recital (96) 2nd paragraph 2014 Public Procurement Directive.

approach[202]. This was suggested by the European Commission[203] so as to clarify which criteria can be taken into account, thereby creating legal certainty and encouraging the use of this approach. It should, however, be noted that contracting authorities have already been using life-cycle costing as an award criterion before the 2014 public procurement reform, namely to promote green procurement and innovation[204]. In particular circumstances, its use is even mandatory in certain Member States[205].

In the words of recital (96) 2014 Public Procurement Directive, "the notion of life-cycle costing includes all costs over the life cycle of works, supplies or services. This means internal costs, such as research to be carried out, development, production, transport, use, maintenance and end-of-life disposal costs but can also include costs imputed to environmental externalities, such as pollution caused by extraction of the raw materials used in the product or caused by the product itself or its manufacturing, provided they can be monetised and monitored."

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[202] For a detailed analysis of the life-cycle costing method, see D Dragos and B Neamtu, "Sustainable public procurement: Life-cycle costing in the new EU directive proposal", (2013) 1 European Procurement & Public Private Partnership Law Review 19-30.

[203] *Non-paper prepared by the Commission services (DG Internal Market) on Cluster 2 (Strategic use of public procurement) of the proposal for a Directive for the European Parliament and of the Council on public procurement, in view of the Working Party on Public Procurement*, of January 20, 2012, p.3 (available at http://register.consilium.europa.eu/content/out?lang=EN&typ=ENTRY&i=SMPL&DOC_ID=ST%205369%202012%20INIT and last accessed on 26/09/2015), 8.

[204] As suggested in European Commission, *Buying Green! A Handbook on Environmental Public Procurement,* 2011 (available at http://ec.europa.eu/environment/gpp/pdf/handbook.pdf and last accessed on 26/09/2015), 42-45.

[205] W Kahlenborn, C Moser, J Frijdal and M Essig, *Strategic Use of Public Procurement in Europe - Final Report to the European Commission MARKT/2010/02/C* (2010), 11, 31-33, 96, 99-100.

Art.68(1) 2014 Public Procurement Directive lists examples of both the internal costs borne by the contracting authority or other users[206] and the external costs imputed to environmental externalities produced during the life cycle of the product, service or works in question[207]. Only environmental externalities though are expressly mentioned in this provision, so it is unclear whether other types of externalities, namely social costs, can also be included in the life-cycle costing. It has been argued that social and employment criteria appear to be excluded from the life-cycle costing, taking into account its apparent limitation to environmental external costs[208].

The European Commission's opinion also points in the direction of this restrictive interpretation of the scope of the life-cycle costing. On the one hand, the Commission considers that the requirement of the link of the said externalities to the product, service or works excludes conditions or criteria that are only remotely linked to the production process (for example, a fair trade premium)[209]. On the other hand, the use

[206] Art.68(1)(a): (i) costs relating to acquisition; (ii) costs of use, such a consumption of energy and other resources; (iii) maintenance costs; (iv) end of life costs, such as collection and recycling costs.

[207] Art.68(1)(b): such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

[208] D Dragos and B Neamtu, "Sustainable public procurement: Life-cycle costing in the new EU directive proposal", (2013) 1 European Procurement & Public Private Partnership Law Review, 25.

[209] *Non-paper prepared by the Commission services (DG Internal Market) on Cluster 2 (Strategic use of public procurement) of the proposal for a Directive for the European Parliament and of the Council on public procurement, in view of the Working Party on Public Procurement*, of January 20, 2012, p.3 (available at http://register.consilium.europa.eu/content/out?lang=EN&typ=ENTRY&i=SMPL&DOC_ID=ST%205369%202012%20INIT and last accessed on 26/09/2015), 4.

of social considerations is considered by the Commission[210] to be further limited by the Government Procurement Agreement's rules on market access of third country economic operators[211], and by the need to ensure coherence with Directive 96/71/EC concerning the posting of workers in the framework of the provision of services[212].

Moreover, the European Parliament expressly suggested social externalities should be covered by the life-cycle costing approach[213], but that has not been included in the final text of the 2014 Public Procurement Directive.

Having said that, should the contracting authority choose a cost-effectiveness approach other than the life-cycle costing, it would seem that considerations of any nature, including social considerations, could be taken into account as external costs insofar as two conditions are met: they are directly or indirectly[214] linked to the product, service or works in question; their monetary value can be determined and verified. It only seems logical that these conditions,

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[210] Ibid, 5-6.

[211] See relevant exceptions under art.III(2)(b) and (d) of the most recent version of the GPA following the formal adoption of the Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement by the Parties of the WTO Agreement on Government Procurement on 30 March 2012 (GPA/113 of April 2, 2012).

[212] Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services [1997] O.J. L 18/1.

[213] See European Parliament's Committee on the Internal Market and Consumer Protection, *Final Report on the proposal for a Directive of the European Parliament and of the Council on public procurement* of January 11, 2013, 111.

[214] The requirement for a direct link between the environmental externalities and the product, service or works during its life cycle - which had been put forward by the European Commission in art.67(1)(b) of the *Proposal for a directive of the European Parliament and of the Council on public procurement*, COM(2011)896 of December 20, 2011 - did not make it to the final approved text of the 2014 Public Procurement Directive.

established by art.67(1)(b) 2014 Public Procurement Directive regarding the environmental externalities, should also apply to other type of externalities[215]. On the one hand, the link to the product, service or works is a requirement that applies to every award criteria under the MEAT. On the other hand, the monetisation requirement appears to be a condition for the operationalisation of any cost-effectiveness approach bearing in mind its economic nature.

Taking into account that life-cycle costing is just an example of a possible cost-effectiveness approach, it is submitted that contracting authorities retain the freedom to decide whether to use life-cycle costing or any other form of cost-effectiveness approach in order to assess the cost element of the MEAT[216].

Furthermore, it follows from art.68(3) 2014 Public Procurement Directive that where common methods for the calculation of life-cycle costs for specific categories of supplies or services are developed at EU level[217], their use should only be made mandatory when contracting authorities have decided to use the life-cycle costing approach. In other words, the said common methods are not mandatory when contracting authorities opt to use a custom-made cost-effectiveness approach. This seems to reflect the legislative intention of the European Commission when drafting its proposal[218] and is

[215] P Bordalo Faustino, "Award criteria in the new EU Directive on public procurement" (2014) 3 Public Procurement Law Review 128.

[216] This interpretation is corroborated by *Non-paper prepared by the Commission services (DG Internal Market) on Cluster 2 (Strategic use of public procurement)* of January 20, 2012 (see above, fn.16), p.10.

[217] This is the case with Directive 2009/33/EC of the European Parliament and of the Council on the promotion of clean and energy-efficient road transport vehicles [2009] O.J. L 120/5.

[218] See *Non-paper prepared by the Commission services (DG Internal Market) on Cluster 2 (Strategic use of public procurement) of the proposal for a Directive for the European Parliament and of the Council on public*

corroborated by recital (40) 2014 Public Procurement Directive.

Finally, art. 68(2) 2014 Public Procurement Directive specifies requirements regarding the setting up and disclosure of the life-cycle approach, in order to ensure that transparency and non-discrimination obligations are complied with.

It is not proposed to look into life-cycle costing in more detail in this thesis. On the topic of price or cost, taking into account the focus on the discretionary powers of the contracting authorities when choosing and applying the award criteria, it is submitted that 2014 Public Procurement Directive's provisions entail both restrictions and expansions of the said discretionary powers.

On the one hand, contracting authorities' margin of discretion appears to be constrained by the rule establishing that price or cost is a mandatory element of the MEAT. That is to say, if a contracting authority wishes to award a contract based on one criteria only, it is clear that it would have to be price or cost. Another limitation of the contracting authority's discretion has to do with the mandatory use of common European methods for the assessment of the life-cycle costing, where they exist. On the other hand, contracting authorities' margin of discretion seems to be extended by the fact that cost is an alternative to price, so it is apparent that various elements of cost can be taken into consideration instead of price only. Moreover, it looks as if contracting authorities are free to

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procurement, in view of the Working Party on Public Procurement, of January 20, 2012, p.3 (available at http://register.consilium.europa.eu/content/out?lang=EN&typ=ENTRY&i=SMPL&DOC_ID=ST%205369%202012%20INIT and last accessed on 26/09/2015), 10.

choose a custom-made cost-effectiveness approach in order to assess the cost only criterion.

One last note is due to draw attention to the fact that the price criterion seems not to compulsorily refer to the lowest price. In fact, there is no mention to lowest price in 2014 Public Procurement Directive. This begs the question as to whether the *Commision v Italy*[219] case would be decided differently under the new directive. As discussed above, this case concerned a statutory average price criterion which was deemed incompatible with the concept of most economically advantageous tender at the time. It is, therefore, submitted that, in principle, contracting authorities could now use such a criterion under the new formulation of the MEAT, and the role that price or cost plays therein. However, the main argument in *Commission v Italy* appears to remain valid: that such a statutory criterion deprives contracting authorities of their discretion to assess what the most economically advantageous tender consists of in the context of each contract award.

[219] Case C-274/83, *Commission v Italy*, EU:C:1985:148.

3.5 Evaluation methodologies

The public procurement directives do not provide specific rules regarding the setting up and application of evaluation methodologies. The 2004 Public Sector Directive introduced the sole provision that relates in any way to evaluation methodologies, which is reiterated in the 2014 Public Procurement Directive: the obligation for contracting authorities to specify the relative weighting of each of the award criteria, except where the contract is awarded on the basis of price only[220]. As explained above, evaluation methodologies comprise much more than mere weightings.

This section is about the Court of Justice's case law, which directly or indirectly touches upon the topic of evaluation methodologies, namely their setting up and application, the respective disclosure, and potential changes to their elements.

(a) Weightings and scoring systems

To start with, it should be recalled that the objective evaluation of tenders requires award criteria to be measurable, that is to say, capable of being quantifiable according to the rules of the scoring system set up by the contracting authority. This does not mean all award criteria have to be quantitative. They can be qualitative as long as they are applied in such a way that renders them capable of being measured and the result of that measurement to be associated with the scores allocated to the quantitative criteria, so that the relative value of each tender is calculated.

[220] Art.53(2) 2004 Public Sector Directive; art.67(5) 2014 Public Procurement Directive.

Some evaluation methodologies are based on monetisation tools, which allow different degrees of quality criteria to be matched with a range of pecuniary value units[221].

By using evaluation methodologies, contracting authorities are structuring the exercise of their discretionary powers as regards the application of the award criteria and the evaluation of tenders, in order to select the most economically advantageous one. This facilitates the justification of the award decision and enables monitoring of the respective decision-making process.

Regarding the weighting of the award criteria under the MEAT, the Court of Justice has had the opportunity to decide in the *EVN* judgment that "contracting authorities are free not only to choose the criteria for awarding the contract but also to determine the weighting of such criteria, provided that the weighting enables an overall evaluation to be made of the criteria applied in order to identify the most economically advantageous tender."[222] Hence, in this particular case, the fact that an environmental criterion had been allocated a weighting of 45% was not deemed as an obstacle[223] to an overall evaluation of the criteria under the MEAT, taking into account the importance of the objective pursued by the said criterion in the context of the contract award.

As regards the weighting of the price criterion, the General Court was faced with a situation where the European Investment Bank (EIB) had applied the following weightings to the award criteria for the purchase of an IT application

[221] P Trepte, *Public Procurement in the EU* (2nd edn, OUP 2007) 473.

[222] Case C-448/01, *EVN*, EU:C:2003:651, para. 39. Similarly, Case C-234/03, *Contse*, EU:C:2005:644, para. 68.

[223] Case C-448/01, *EVN*, EU:C:2003:651, para. 42.

supporting its lending activities: 75% of the points for the technical criteria and 25% of the points for the financial criterion, which reveals that, from the EIB's perspective, the price, while not insignificant, was of secondary importance vis-à-vis technical merit. Following on from the EIB's own acknowledgment that the weighting of the price criterion had been underestimated, the judgment stated that "where a contract is to be awarded to the most economically advantageous tender, the contracting authority should set the weightings to be applied to the award criteria by ensuring that the 'price effect' is not neutralised or minimised in such a way that the tendering procedure might lead to the award of a public contract that is unreasonably costly in relation to the actual needs of the administration."[224]

Despite the fact that this case was decided under the financial rules of the EIB, it is submitted that the underpinning logic is also applicable to award criteria covered by the public procurement directives. Actually, taking into account the mandatory nature of the price criterion in the 2014 Public Procurement Directive (as discussed above), it seems adequate that its weighting should ensure its relative importance in the context of the MEAT. However, it is also submitted that, as regards all other non-price criteria, there is similarly little point in allocating them such irrelevant weightings that their 'effect' in the overall evaluation of the criteria under the MEAT is 'neutralised' or 'minimised'. In fact, if the choice of specific award criteria is in any way related to the importance of the objectives pursued by them, then it makes sense that the allocated weightings reveal how

[224] Case T-461/08, *Evropaiki Dynamiki v EIB*, EU:T:2011:494, para. 184.

determinant those criteria are in proportion one to another within the MEAT.

Furthermore, the Court of Justice has decided on the proportionality of the award criteria and respective scoring system. Thus, as mentioned above, the *Contse* judgment states that the (environmental) evaluation criteria under consideration in the proceedings go beyond what is necessary because the maximum number of points, according to the scoring system in question, would be allocated to tenders which offered a production capacity largely exceeding the consumption expected in the context of the contract to be awarded[225]. Hence, such a scoring system sits outside the boundaries of the subject matter of the contract, and fails to comply with the linkage requirement discussed above.

According to these rulings, the margin of discretion contracting authorities enjoy as regards the choice of the award criteria's weightings, as well as the respective scoring system, seems to be ample. As usual, there are limits since "the CJEU has also required that all 'conditions and detailed rules' must be drawn up in a manner that is 'clear, precise and unequivocal', so that tenderers can understand them and interpret them in the same way and purchasers can ascertain whether tenders satisfy the criteria."[226] This is cleared stated in *Commission v Netherlands*[227]. This requirement for a degree of precision when setting up scoring systems is meant to allow for the

[225] Case C-234/03, *Contse*, EU:C:2005:644, para. 76.

[226] S Arrowsmith, "The purpose of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies", in C Barnard and M Gehring (eds), *Cambridge Yearbook of European Legal Studies* (vol.14, Hart Publishing 2011-2012) 19.

[227] Case C-368/10, *Commission v Netherlands*, EU:C:2012:284, para. 109.

monitoring of the exercise of discretion by contracting authorities. The cited judgments are, indeed, an example of the judicial review made possible by the said requirement.

(b) Disclosure obligation

The issue at stake is the extent of the contracting authority's obligation to disclose advanced information about the evaluation methodologies. It is clear that under both the 2004 Public Sector Directive and the 2014 Public Procurement Directive the award criteria and respective weightings must be disclosed in the contract notice or contract documents. This leaves the discussion open as to whether sub-criteria, respective weightings and scoring systems are also covered by the said disclosure obligation.

In *Universale-Bau*[228], the Court of Justice ruled that where a contracting authority has laid down in advance the rules for the weighting of the criteria for selecting the candidates who will be invited to tender, it is obliged to state them in the contract notice or the tender documents. In order to reach this expansive interpretation of the disclosure requirement applicable to the selection criteria, the Court of Justice draw on the principle of equal treatment, the obligation of transparency and the objective of opening-up of the public procurement market to competition.

It could be said that the same logic would apply to the evaluation methodologies set up by contracting authorities in

[228] Case C-470/99, *Universale-Bau,* EU:C:2002:746, para. 100.

order to operationalise the award criteria[229]. Indeed, the *Lianakis* judgment establishes that "that potential tenderers should be aware of *all the elements* to be taken into account by the contracting authority in identifying the economically most advantageous offer, and their relative importance, when they prepare their tenders"[230] (emphasis added). It goes on to add that "potential tenderers must be in a position to ascertain the *existence and scope* of those elements when preparing their tenders"[231] (emphasis added). Finally, it concludes that "a contracting authority cannot apply weighting rules *or sub-criteria* in respect of the award criteria which it has not previously brought to the tenderers' attention"[232] (emphasis added). By referring to the disclosure of the existence and scope of the all the elements taken into account in identifying the MEAT, including the sub-criteria, it would seem that the *Lianakis* judgment was walking in the footsteps of *Universale-Bau*. However, the extent of the disclosure obligation ruled by *Lianakis* is not entirely clear.

It has been elsewhere submitted[233] that the European legislator could have used the 2014 public procurement reform

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[229] Case T-4/01, *Renco*, EU:T:2003:37 seems to suggest not. Moreover, it has already been argued that *Universale-Bau* is "ill-founded" – see M Dischendorfer, "The EBS case: definition of a "body governed by public law", limitation periods, and publicity requirements for scoring methods" (2003) 2 Public Procurement Law Review NA34-40.

[230] Case C-532/06, *Lianakis*, EU:C:2008:40, para. 36. Similarly, Case C-87/94, *Commission v Belgium*, EU:C:1996:161, para. 88; Case C-470/99, *Universale-Bau,* EU:C:2002:746, para. 98; Case C-331/04, *ATI*, EU:C:2005:718, para. 24.

[231] Case C-532/06, *Lianakis*, EU:C:2008:40, para. 37. Similarly, Case C-513/99, *Concordia Bus*, EU:C:2002:495, para. 62; Case C-331/04, *ATI*, EU:C:2005:718, para. 23.

[232] Case C-532/06, *Lianakis*, EU:C:2008:40, para. 38. See, by analogy, Case C-470/99, *Universale-Bau,* EU:C:2002:746, para. 99.

[233] P Bordalo Faustino, "Award criteria in the new EU Directive on public procurement" (2014) 3 Public Procurement Law Review 132.

to clarify the issue of whether the transparency requirement also applies to the sub-criteria and respective weightings, and the scoring systems where they exist[234]. However, this remains an unanswered question under art.68(5) 2014 Public Procurement Directive.

On this topic, it should also be noted that regardless of the transparency requirement to disclose the evaluation methodology for the award criteria, "this does not necessarily entail an obligation to *formulate* such a methodology; these cases do not preclude the possibility that decision-makers will merely exercise a general discretionary judgment"[235].

Finally, is has been argued[236] that disclosing of award criteria weightings and scoring systems may prevent their illegal manipulation but does not contribute to reducing the subjectivity of tenders evaluation. However, it makes the criteria more verifiable and enables tenderers to identify their discriminatory application.

(c) The elaboration of award criteria and the changes to evaluation methodologies

[234] For a comparative view of the interpretation and application of the transparency requirement in a number of EU Member States, see P Bordalo Faustino, "Evaluation models in public procurement: A comparative law perspective" in M Comba and S Treumer (eds), *Award of contracts in EU procurements* (DøJF 2013) 352-354.

[235] S Arrowsmith, "The purpose of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies", in C Barnard and M Gehring (eds), *Cambridge Yearbook of European Legal Studies* (vol.14, Hart Publishing 2011-2012) 18. See also Case C-470/99, *Universale-Bau,* EU:C:2002:746, para. 85.

[236] P Trepte, *Public Procurement in the EU* (2nd edn, OUP 2007) 474.

The Court of Justice has reiterated that the principles of equal treatment and transparency imply an obligation on the part of contracting authorities to interpret the award criteria in the same way throughout the whole procurement procedure[237]. This implies that the award criteria must not be amended in any way during the tender procedure[238]. Furthermore, contracting authorities have also been deemed precluded from stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or contract notice[239].

It would seem, therefore, that contracting authorities lack the discretion to elaborate award criteria once they have been advertised. This would also include weightings, sub-criteria and possibly evaluation methodologies where they existed. Notwithstanding, the *ATI* case[240] has ruled that the said award criteria elaboration is allowed provided that three conditions are met: (a) the criteria for the award of the contract set out in the contract documents are unaltered; (b) there is no addition or change of elements which, if they had been known at the time the tenders were prepared, could have affected that preparation; (c) the changes are not motivated by matters likely to give rise to discrimination against one of the tenderers.

There was an attempt by the Council to include the *ATI* conditions in art.67 2014 Public Procurement Directive, but it

[237] Case C-19/00, *SIAC*, EU:C:2001:553, para. 43; Case C-448/01, *EVN*, EU:C:2003:651, para. 92.

[238] Case C-448/01, *EVN*, EU:C:2003:651, para. 93;

[239] Case C-532/06, *Lianakis*, EU:C:2008:40, para. 45.

[240] Case C-331/04, *ATI*, EU:C:2005:718, para. 32. For a comment on this case, see M Dischendorfer, "Attaching specific weight to the subheadings of an award criterion under the EC Public Procurement Directive: a note on Case C-331/04" (2006) 2 Public Procurement Law Review NA55-58.

did not make it to the final text[241], which means that the issue about award criteria elaboration and changes to the evaluation methodologies remains rather unclear and can only find some sustenance on the *ATI* judgment[242]*.* However, it is submitted that condition (b) of the *ATI* ruling is, in reality, difficult to meet because it implies a 'posthumous prognosis', i.e. it requires evidence of something that might have happened in the past but in fact did not. This might, incidentally, open a window of discretion for contracting authorities, since the burden of proof of said condition falls upon the tenderer who complains about an allegedly illegal elaboration of the award criteria.

(d) Judicial review of award criteria and evaluation methodologies

It is interesting to realise how willing the Court of Justice and the General Court are to investigate the cases on award criteria, including the detailed examination of the evaluation methodologies. On the one hand[243], it is often reiterated that contracting authorities enjoy a broad margin of discretion with

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[241] See the *Final compromise text (four columns document) of the proposal for a Directive of the European Parliament and of the Council on public procurement with the view to reaching a first-reading agreement with the European Parliament* of July 10, 2013, 453 (available at http://www.europarl.europa.eu/committees/en/imco/subject-files.html?id=20120214CDT38033 and last accessed on 28/09/2015).

[242] For a comparative view of how several EU Member States deal with the elaboration of award criteria and their weightings, see P Bordalo Faustino, "Evaluation models in public procurement: A comparative law perspective" in M Comba and S Treumer (eds), *Award of contracts in EU procurements* (DJøF 2013), 354-355.

[243] See, inter alia, Case T-148/04, *TQ3,* EU:T:2005:274, para. 47; Case T-300/07, *Euvropaiki Dynamiki*, EU:T:2010:372; para. 77; Case T-461/08, *Evropaiki Dynamiki v EIB*, EU:T:2011:494, para. 137; Case T-536/11, *Evropaiki Dynamiki*, EU:T:2015:476, paras. 33 and 85.

regards to the choice of the award criteria, as well as the determination of both the content and the application of the rules which constitute the evaluation methodology. Therefore, judicial review is deemed to be limited to checking compliance with the procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers[244].

On the other hand, several judgments in cases involving *Evropaiki Dynamiki*[245] seem to suggest a paradox: while asserting the contracting authorities' broad discretion and the judicial review's limitation to deciding on the manifest error of assessment, the General Court embarks on a very detailed examination of the evaluation methodologies used by the contracting authorities, including an investigation of the scoring systems and a discussion on the allocation of points per criteria regarding each submitted tender.

In the light of these rulings, it is submitted that the contracting authorities' margin of discretion on this topic is inversely proportional to the intensity of the judicial review the courts claim to themselves[246].

[244] Ibid.

[245] See fn.225.

[246] See, for instance, Case T-169/00, *Esedra*, EU:T:2002:40, paras. 136-143, where the General Court did not hesitate to stepping in and checking the method for the evaluation of the tenders overall prices by multiplying unit prices.

CHAPTER 4 – AWARD CRITERIA AND THE DISCRETIONARY POWERS OF CONTRACTING AUTHORITIES IN THE UK

4.1 Introduction

Against the background provided in the EU chapter, it is proposed to investigate UK's regulations and case law regarding the discretionary powers of contracting authorities when choosing and applying award criteria in the context of public procurement procedures falling within the scope of the European directives.

It should be noted that domestic law and case law under this chapter is mostly concerned with the Westminster jurisdiction. It is not proposed to cover Scotland, Wales & Northern Ireland in a comprehensive way. However, mention may be made to Scottish, Welsh or Northern Irish case law that is deemed paradigmatic within the topics covered by this thesis. In fact, much of what is discussed is applicable throughout the UK and therefore the term UK is used for convenience.

The current public procurement legislative framework in force consists of the 2015 Public Contracts Regulations[247], which transposed the 2014 Public Procurement Directive into the UK jurisdiction and repealed the 2006 Public Contracts Regulations[248], which had implemented the 2004 Public Sector Directive. Despite having opted for detailed implementation of the public procurement directives into national regulations, the

[247] Public Contracts Regulations 2015 (SI 2015/102).

[248] Public Contracts Regulations 2006 (SI 2006/5).

UK legislator tends to simply repeat the directives' text in the national provisions[249]. This is noticeable as regards the most relevant provisions on award criteria: art.30(1)-(4) 2006 Public Contracts Regulations and art.67 and 68 2015 Public Contracts Regulations. The former provides, in the relevant part for the purposes of this thesis, that:

> *"**30.**—(1) Subject to regulation 18(27) and to paragraphs (6) and (9) of this regulation, a contracting authority shall award a public contract on the basis of the offer which—*
>
> *(a) is the most economically advantageous from the point of view of the contracting authority; or*
>
> *(b) offers the lowest price.*
>
> *(2) A contracting authority shall use criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous including quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period and period of completion.*
>
> *(3) Where a contracting authority intends to award a public contract on the basis of the offer which is the most economically advantageous it shall state the weighting which it gives to each of the criteria chosen in the contract notice or in the contract documents or, in the case of a competitive dialogue procedure, in the descriptive document.*
>
> *(4) When stating the weightings referred to in paragraph*

[249] S Arrowsmith (ed), *EU Public Procurement Law: An Introduction* (available at http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf and last accessed on 28/09/2015) 29.

(3), a contracting authority may give the weightings a range and specify a minimum and maximum weighting where it considers it appropriate in view of the subject matter of the contract."

This provision is a faithful reproduction of art.53 2004 Public Sector Directive. It contains all its elements: MEAT or lowest price as alternatives; non-exhaustive list of possible award criteria under the MEAT; requirement for the criteria to be linked to the subject matter of the contract; first time mention of environmental characteristics; and disclosure obligation, including the award criteria's weightings. It is, therefore, submitted that all that has been discussed in the previous chapter as regards these elements at EU level, including the relevant case law of the Court of Justice, is applicable to the interpretation of art.30(1)-(4) 2006 Public Contracts Regulations.

Art.67 2015 Public Contracts Regulations reads as follows:

*"**67.**—(1) Contracting authorities shall base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority.*
(2) That tender shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with regulation 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, such as qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.
(3) Such criteria may comprise, for example—
(a) quality, including technical merit, aesthetic and

functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;

(b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or

(c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

(4) The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

(5) Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in—

(a) the specific process of production, provision or trading of those works, supplies or services, or

(b) a specific process for another stage of their life cycle, even where those factors do not form part of their material substance.

(6) Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority.

(7) Award criteria shall—

(a) ensure the possibility of effective competition; and

(b) be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.

(8) In case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers.

Weighting

(9) The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.

(10) Those weightings may be expressed by providing for a range with an appropriate maximum spread.

(11) Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance."

This provision replicates art.67 2014 Public Sector Directive ipsis verbis, except for its (2) last paragraph regarding the possibility to provide that contracting authorities may not use price or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts. It is apparent that the UK legislator decided not to make use of this possibility offered to Member States by the 2014 Public Procurement Directive. In fact, "following public consultation, the UK Government decided not to rule out price-only criteria in the UK's implementing regulations, to provide more flexibility to UK contracting authorities."[250] That is to say, broader discretion for contracting authorities.

[250] Crown Commercial Services, *The Public Contracts Regulations 2015 – Guidance on Awarding Contracts* (available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417934/Guidance_on_Awarding_Contracts.pdf and last accessed on 28/09/2015) 3.

All other features of art.67 2014 Public Sector Directive, as discussed above, apply to the interpretation of the cited provision, namely: MEAT as overriding award criterion; price or cost as mandatory economic criteria; cost-effectiveness as the approach for assessing the cost criterion; best price-quality ratio instead of the previous concept of most economically advantageous tender; reference to social aspects alongside environmental ones, as well as a illustrative list of possible award criteria under the best price-quality ratio; express inclusion of the criterion regarding the qualification and experience of the staff assigned to perform the contract in question; provision for fixed price or cost situations; first time definition of the link to the subject matter of the contract in a way that seems to loosen the linkage requirement; explicit allusion to the unrestricted freedom of choice restriction, as well as to the objective of effective competition; stipulation of a requirement for effective verification of the information provided by the tenderers; and disclosure obligation, including the award criteria's weightings.

As for art.68 2015 Public Contracts Regulations on life cycle costing, it suffices to say that it imports the wording of art.68 2014 Public Procurement Directive, and therefore calls for all the issues examined in the previous chapter. This includes the clarification that life cycle costing is an example of a cost effectiveness approach to the cost criterion, but that contracting authorities are free to use other approaches[251].

[251] Crown Commercial Services, *The Public Contracts Regulations 2015 – Guidance on Awarding Contracts* (available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417934/Guidance_on_Awarding_Contracts.pdf and last accessed on 28/09/2015) 5.

In terms of principles applicable to UK public procurement in general, and award criteria in particular, art.18 2015 Public Contracts Regulations mirrors art.18 2014 Public Procurement Directive. Despite already being applied before (as noted below), equal treatment, non-discrimination, transparency, proportionality and conditions of effective competition are now expressly provided.

As regards value for money, this is clearly a public procurement objective at domestic level. On the one hand, in the light of the 2006 Public Contracts Regulations, MEAT was considered to be "synonymous with the UK concept of awarding contracts that provided for the best Value for Money"[252]. On the other hand, according to the 2015 Public Contracts Regulations, the concept of best price-quality ratio "means price or cost plus other criteria and equates to value for money."[253] In fact, securing value for money is said to be the UK Government policy on public procurement. In other words, the public procurement priority at national level is to obtain the best combination of quality and effectiveness for the least life cost of the required goods or services[254]. This approach is also aimed at assuring 'longstanding flexibilities' for contracting authorities, as well as promoting additional flexibility to take into account a wider range of characteristics as award criteria, such as: social aspects, experience of the staff assigned to the contract (where relevant), and fair trade criteria.

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[252] Crown Commercial Services, *The Public Contracts Regulations 2015 – Guidance on Awarding Contracts* (available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417934/Guidance_on_Awarding_Contracts.pdf and last accessed on 28/09/2015) 3.

[253] Ibid.

[254] "It is not about minimising the upfront prices." Ibid.

There are, however, other legislative acts worth mentioning, whose effects may limit the exercise of contracting authorities' discretion in the field of public procurement, especially as regards the choice of award criteria. On the one hand, the Public Sector Equality Duty under the Equality Act 2010 determines that equality-related issues be taken into account in the context of public procurement procedures. The degree of relevance of equality varies depending on the subject matter and the conditions for the performance of the contract in question. In case of great relevance, equality-related considerations might be included in the award criteria from a value for money perspective[255]. On the other hand, the Public Services (Social Value) Act 2012 places a requirement on contracting authorities awarding public services contracts, whose value is above the 2015 Public Contracts Regulations thresholds, to take into considerations economic, environmental and social benefits when designing their public procurement procedures, including at the award criteria level bearing in mind the value for money approach[256].

[255] See, Crown Commercial Service, *Procurement Policy Note – Public Procurement and the Public Sector Equality Duty* (Information Note 1/13, 28 January 2013).

[256] See, Crown Commercial Service, *Procurement Policy Note – The Public Services (Social Value) Act 2012* (Information Note 10/12, 20 December 2012). On this topic, see also S Brunning, "United Kingdom - Cabinet Office provides advice to contracting authorities: Public Services (Social Value) Act 2012" (2013) 3 Public Procurement Law Review NA84-87.

4.2 The choice of the award criteria

4.2.1 The most economically advantageous tender (MEAT)

By way of introduction to this section, the ruling on *McLaughlin & Harvey*[257] should be cited to the extent that it offers a otherwise non-existent notion of award criteria: "In the absence of any definition of criteria or sub criteria in either the European Directive or the 2006 Regulations one should look for the ordinary meaning of the word. According to Chambers 20th Century dictionary a criterion is a means or standard of judging; a test; a rule, standard or canon… The Shorter Oxford Dictionary defines it as a canon or standard by which anything is judged or estimated, or a characteristic attaching to a thing, by which it can be judged or estimated… They are being used to evaluate the tender bids i.e. to judge them."[258] Indeed, it is submitted that award criteria are yardsticks by which the relative value of each tender is measured and compared, i.e. their function is to determine the level of performance of each tender taking into account the preferences of the contracting authorities in terms of meeting the needs targeted by the public contract in question.

As regards the ***choice of award criteria*** under the MEAT, the ruling in *Clyde Solway*[259] court confirms that contracting authorities have a wide discretion to do so, including the choice of the means for the assessment of those criteria.

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[257] *McLaughlin & Harvey Ltd v Department of Finance & Personnel* [2008] NIQB 91.

[258] Ibid [42].

[259] *Clyde Solway v Scottish Ministers* [2002] SLT 1455.

Limitations like the ones listed in the previous chapter (e.g. the prohibition of conferring an unrestricted freedom of choice; and the principles of equal treatment, non-discrimination and transparency) are said to apply. Moreover, it is stated that "where the matter is one of the lowest price alone, the discretion of the contracting authority is inevitably fettered"[260]. The judgment also focuses on the requirement to disclose the award criteria as a condition for the fair exercise of contracting authorities' discretion.

The limitation on discretion imposed by the ***disclosure requirement*** is also ruled in *Federal Security Services*[261], where the court found that the contracting authority had failed to formulate and express the award criteria in the contract documents in such a way as to allow all reasonably well informed and normally diligent tenderers to interpret them uniformly[262]. This judgment clearly draws on the Court of Justice's jurisprudence examined in the previous chapter. In fact, it specifically refers to "the principle of transparency and the associated principle of equal treatment, *as explained in the European jurisprudence*"[263] (emphasis added), which had apparently not been complied with. In the *Harmon*[264] case the court also decided that criteria must be stated in a transparent way.

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[260] Ibid [37].

[261] *Federal Security Services Ltd v The Northern Ireland Court Service* [2009] NIQB 15.

[262] Ibid [52].

[263] Ibid [55].

[264] *Harmon CFEM Facades Ltd v Corporate Officer of the House of Commons* [1999] AII ER 1178. For a comment of this case, see S Arrowsmith, "The procurement rules in the UK: An analysis of the Harmon case" (2000) 9 Public Procurement Law Review 120.

On the subject of the requirement that award criteria must be ***linked to the subject matter of the contract***, the *Harrow*[265] judgment ruled that the award criterion regarding 'capability of accepting ownership transfer', in the context of a services contract for the managing of social housing stock, did not relate to the object nor the performance of the contract to be awarded, but rather to the future possible transfer of the housing stock to the private sector (which the contracting authority was planning to do sometime in the future). In fact, the tenderer's ability to own the housing stock in the future was not linked to the subject matter of the contract in question. This interpretation of the linkage requirement seems consistent with the EU approach discussed in the previous chapter.

On the application of the ***fundamental principles*** deriving from the internal market freedoms (as examined in the previous chapter), *Regina (Law Society) v Legal Services Commission*[266] is an emblematic judgment. The court noted that "The principle of equal treatment of service providers, laid down in (…) the Directive and the principle of transparency which flows from it (…) require the subject matter of each contract *and the criteria governing its award* to be clearly defined."[267] (emphasis added) The court also explained that the rationale behind the principle of transparency is to enable the contracting authority to satisfy itself that the principles of equal treatment and non-discrimination on the grounds of nationality have been observed; that competition is facilitated; that impartiality of procurement procedures is capable of being

[265] *R v Secretary of State for the Environment ex parte Harrow* LBC (1996) 160 L.G.Rev. 401, [1997] 3 C.M.L.R. 870, QBD.

[266] *Regina (Law Society) v Legal Services Commission* [2008] 2 WLR.

[267] Ibid [34].

reviewed; and that any risk of favouritism or arbitrariness on the part of the contracting authority is precluded. The influence of the Court of Justice's jurisprudence on this matter is clearly determinant.

This judgment also added that "where amendments to the tender criteria or to the contract are made after an award to one party, such amendments are liable to infringe the principles in that, had the other tenderers been aware in advance of the terms of the contract actually put in place, this might have affected the terms of their tenders. Such amendments can violate the principle of transparency and of equality of treatment."[268]

4.2.2 Permitted and prohibited award criteria

Domestic case law provides an interesting judgment on ***permitted award criteria*** which reveals a rather flexible approach to the topic. Indeed, in *Health Care at Home*[269], criteria such as 'creative and innovative response', 'value added areas', 'comprehensive response', 'good understanding of NHS requirement' and 'adequate and complete evidence of ability to exceed NHS requirement' were deemed objective enough regardless of their qualitative nature. More importantly, the court did not consider that they conferred an unrestricted freedom of choice. This flexible approach clearly

[268] Ibid [45].

[269] *Health Care at Home v The Common Services Agency* [2012] Scots CS CSOH 75. For a comment on this case, see S Brunning, "Clarity of tender requirements and errors in evaluation: Healthcare At Home Ltd v The Common Services Agency" (2013) 4 Public Procurement Law Review NA101-NA105.

contributes to the broadening of the contracting authority's margin of discretion when choosing the award criteria.

Other permitted criteria, which have been expressly accepted by the UK case law, include: the relative likelihood of delivery in *ALSTOM*[270], and the relative risk of tenderers not complying with their obligations taking into account their financial stability in *Varney*[271].

On the subject of prohibited award criteria, it should be noted that the *Lianakis* ruling regarding the inadmissibility of taking into account the ***qualification and experience*** of the tenderer's staff at the award stage was applied in the *Lightways*[272] case. The judgment was concerned with the question of qualification criteria related - to the tenderer's health and safety policy, for example – being unlawfully used as award criteria. It is submitted that both these cases adopted a very liberal approach to the admissibility of award criteria, which clearly favours contracting authorities' discretionary powers.

More recently, the judgment in *WDP*[273] offered an opportunity to consider the correct ***distinction between selection and award criteria***. According to this ruling, "it is permissible for an authority to stipulate a desire to change the way in which services are provided without necessarily evaluating the past performance of an incumbent contractor. The judgment suggests that an authority is entitled to enquire at the award

[270] *ALSTOM Transport v Eurostar International Ltd* [2010] EWHC 2747.

[271] *J Varney & Sons Waste Management v Hertfordshire County Council* [2010] EWHC 1404.

[272] *Lightways v North Ayrshire Council* [2008] CSOH 91.

[273] *Willmott Dixon Partnership Ltd v Hammersmith and Fulham LBC* [2014] EWHC 3191.

stage as to whether there is a sufficiently managed supply chain in place."[274]

4.2.3 The price or cost criterion

On the topic of price, *Henry Brothers (No.2)*[275] ruled that it is a ***mandatory element of the MEAT*** (now, best price-quality ratio). It was said that "unless the cost or price of the relevant goods or services is fixed (…), it would be very difficult to reach any objective determination of what was or was not economically advantageous without some reasonably reliable indication of the price or cost in relation to which other non price advantages might be taken into account." This is in line with the judgment in *Harmon*[276] where it is asserted that "price is the starting point for the exercise" of assessing and comparing the tenders at the award stage. This actually matches the current mandatory nature of the price or cost criterion under the 2014 Public Sector Directive (as discussed in the previous chapter), as well as the 2015 Public Contracts Regulations. It also anticipates the recent provision on situations where price or cost is fixed.

On a different note, in *Firebuy*[277], ***whole life costing*** was considered to be a lawful way of assessing price. This is an example of how contracting authorities, in the exercise of their

[274] P Henty, "The rules on selection and award criteria and the margin of discretion for contracting authorities: Willmott Dixon Partnership Limited v London Borough of Hammersmith and Fulham" (2015) 5 Public Procurement Law Review NA181.

[275] *Henry Brothers v Department of Education for Northern Ireland* (No.2) [2008] NIQB 105.

[276] *Harmon CFEM Facades Ltd v Corporate Officer of the House of Commons* [1999] AII ER 1178.

[277] *Lion Apparel Systems Ltd v Firebuy Ltd* [2007] EQHC 2179.

discretionary powers, have been using life cycle related award criteria deemed eligible in the context of the illustrative list of possible award criteria which has been transposed from the public procurement directives. Therefore, despite welcomed from the point of view of clarity and legal certainty, it is submitted that the new provision on life cycle costing is hardly innovative.

4.3 Evaluation methodologies

On the subject of the discretion enjoyed by contracting authorities when ***choosing the criteria weightings***, the *Traffic Signs*[278] judgment seems to suggest that there is a requirement for justification of the use of certain weightings attached to certain criteria. In these proceedings, the allocation to quality criteria of 40% of the scores was deemed neither objective nor transparent unless a justification was provided. This was arguably related to the subjective nature of the said criteria. Moreover, the court considered that an analysis of the impact of using such a 40% weighting for quality should be undertaken.

It is submitted that this ruling significantly curtails the exercise of discretion by contracting authorities when setting up evaluation methodologies, at least where it refers to the choice of criteria weightings. Besides, it places a disproportionate burden of evidence on the contracting authority. It might be argued that this case is distinguished on its facts since a more recent one[279] has been dismissed because its facts were considered to differ markedly from *Traffic Signs* and there was no apparent abuse of discretion.

Regarding the ***requirement to disclose award criteria and***

[278] *Traffic Signs and Equipment Ltd v Department for Regional Development* [2010] EWHC NIQB 25. For a comment on this case, see P McGovern, "Bias and error in the evaluation of tenders: the substantive hearing in Traffic Signs and Equipment Ltd v Department For Regional Development and Department of Finance and Personnel" (2011) 4 Public Procurement Law Review NA144-148

[279] *Rutledge Recruitment and Training v Department for Employment and Learning* [2011] NIQB 61.

respective weightings, in the *Letting International*[280] case, the contracting authority failed to disclose the sub-weightings to be applied to the five published sub-criteria. The assessment of a criterion weighed at 50% was to be conducted by reference to disclosed five elements to each the contracting authority had allocated a certain percentage of the overall score applicable to the criterion in question. These percentages varied between 5% and 17% but had not been published in the tender documents.

The court appears to have built on the conditions laid down by the *ATI* case, discussed in the previous chapter, by deciding that the there was an obligation to disclose the weightings for the said sub-criteria if knowledge of those weightings not only *would* but also *could* affect the preparation of the tenders. It has been argued that this threshold is very easily met and that "it is hard to conceive of many situations in which knowledge of sub-criteria would not affect the way in which a tender is prepared"[281]. Indeed, the court found that tenderers should know the relative importance that contracting authorities attach to the different sub-criteria in order to better formulate their tenders. Lack of advance information on the sub-criteria is capable of frustrating their objective. The circumstances of the case will dictate the verdict.

The judge in *Letting International* rejected the argument that proper disclosure would not have changed the outcome of the tenders' evaluation. He goes on to add that "the rationale of

[280] *Letting International Ltd v London Borough of Newham* [2008] EWHC 1583 (QB).

[281] Procurement Lawyers' Association, *Issues in Evaluating Public Sector Tenders* (2010) (available at http://www.procurementlawyers.org/Docs/Evaluation%20Paper.pdf and last accessed on 29/09/2015) [3.2.2].

requiring a contracting authority to state its award criteria in advance is to ensure that tenderers will not have to second guess what the award criteria are and how they will be weighted".[282] This was thought to be "an inevitable consequence of the overarching principles of transparency and equal treatment"[283].

Furthermore, by analogy with *Letting International*, it is submitted that, despite the contracting authority having no apparent obligation to come up with a scoring system, it should be disclosed where it exists. This seems to derive from the transparency logic underpinning *Letting International*: disclosure is required where, if known in advance, the scoring system could have changed the way in which tenders are drafted.

Having said this, it should be noted that in *Firebuy* the court was satisfied with the disclosure of the criteria and respective weightings, not having deemed necessary for the contracting authority to have provided advanced information on the scoring system used. It is assumed that, in the latter case, the scoring system was such that it would have actually passed the *Letting International* test regarding its impact on tenders' preparation. This seems to have also been the case in the *Varney*[284] judgment, where the court found there was no obligation to disclose the scoring scheme because it could not have affected the tenders.

[282] Ibid [79].

[283] Ibid [87].

[284] *J Varney & Sons Waste Management v Hertfordshire County Council* [2010] EWHC 1404.

The *McLaughlin & Harvey*[285] judgment followed in the footsteps of *Letting International* by ruling that the contracting authorities should disclose in advance all elements and weightings of the award criteria that could affect the preparation of tenders, including 5th level sub-criteria and respective weightings as was the case in the proceedings. Furthermore, the court considered that 6th level elements of the award criteria decomposition, which had no attached weightings, should be regarded as 'pieces of evidence'. It is submitted that these constitute aids to evaluation rather than proper criteria.

The more recent *Mears*[286] case, which concerned a complex evaluation methodology for the award of a contract in the field of social housing via a competitive dialogue, the court rules on the difference between 'model answers' given to the evaluators that consisted in mere guidance and were under no obligation to be disclosed, as opposed to two specific types of 'model answers' which were deemed to function as a template against which tenders would be evaluated and scored. The latter were considered to be proper sub-criteria which must be disclosed in advance.

As for the ***admissibility to elaborate the award criteria and change the evaluation methodologies***, the *Firebuy*[287] judgment mentioned - in passing - that changes are allowed

[285] *McLaughlin and Harvey v Department of Finance and Personnel* (No.2) [2008] NIQB 91.

[286] *Mears v Leeds City Council* (No.2) [2011] EWHC 1031. For a comment on this case, see P Henty, "Time limits for proceedings and prior disclosure of material relating to the award" (2011) 5 Public Procurement Law Review NA213-221.

[287] *Lion Apparel Systems Ltd v Firebuy Ltd* [2007] EQHC 2179. Similarly, *Henry Brothers v Department of Education for Northern Ireland* (No.2) [2008] NIQB 105.

only if express reference to that possibility is disclosed alongside the original criteria. This situation could be equated to the provision for a range of weightings with an appropriate maximum spread to be materialised at a later stage, or the exercise of the discretionary right to reject tenders whose scores fall below a certain threshold. Even if advance information on these issues is provided, it is submitted that there is a risk that these decisions might be challenged on the basis of conferring an unrestricted freedom of choice to the contracting authorities.

Less risky and already ruled as lawful is the establishment of ***quality thresholds***[288]. Failure to meet a minimum quality threshold determines the rejection of the respective tender with no need to proceed with its evaluation in the light of the remaining award criteria. It is submitted that the same logic applies to the establishment of maximum price thresholds. Establishing these thresholds falls under the exercise of discretion by contracting authorities. However, as a result of fixing these thresholds, the contracting authorities are also self-limiting their discretionary powers to accept tenders which do not meet the said thresholds, unless they reserve themselves the right to do so, at the risk of being challenge as explained above.

In terms of the ***extent of the judicial review*** that UK courts allow themselves, it was clearly decided in the *Firebuy*[289] case that contracting authorities have discretion to decide on the

[288] See, *Irish Waste Services Limited v Northern Ireland Water Limited* [2013] NIQB 41. For a comment on this case, see P McGovern, "Issues relating to award criteria and limitation periods: the case of Irish Waste Services Limited v Northern Ireland Water Limited and others" (2013) 5 Public Procurement Law Review NA133-NA135.

[289] *Lion Apparel Systems Ltd v Firebuy Ltd* [2007] EQHC 2179.

scoring system they wish to use and that the court would only interfere in case that decision appears to be "manifestly wrong"[290]. Again, this mirrors the Court of Justice's approach to judicial review of evaluation methodologies (as discussed in the previous chapter) and grants contracting authorities a rather broad margin of discretion in terms of modeling the scoring schemes in the light of the nature and complexity of the public contract in question. However, it should be added that by modeling the scoring schemes the contracting authorities are in fact self-structuring their margin of appreciation as regards the evaluation of tenders. It is, nevertheless, submitted that modeling may assist contracting authorities in thinking through the relative importance of the award criteria in advance, and support the obligation to give reasons regarding the award decision.

Finally, the very recent judgment in *Woods Building Services*[291], despite reiterating the wide discretion contracting authorities enjoy while applying the award criteria and respective evaluation methodologies for the scoring of tenders, as well as the manifest error parameter of the judicial review of such issues, the court then goes on to check in detail all questions asked of tenderers, and all scores allocated to the answers in the light of the award criteria. The court effectively changes several scores, which lead to substantial alterations of the tenders' evaluation results. In the end, the award decision is set aside and the claimant's tender is declared to be most economically advantageous.

[290] This has also been decided in *JB Leadbitter & Co Ltd v Devon County Council* [2009] EWHC 930 (Ch).

[291] *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 (TCC).

This is a startling *cross of the judiciary line* into the realm of technical administrative discretion: the court effectively replaces the contracting authority in its evaluative job – which begs the question: where does the procurement function finish and where does the judicial power begin? The future will tell whether this is the beginning of a trend in the UK case law. Notwithstanding, it is submitted that such interference of the courts in the evaluative discretion of contracting authorities in the context of the award stage of public procurement procedures challenges the essence of the contracting authorities' function, which relies on judgments of opportunity and convenience. This does not appear to be a desirable outcome of the judicial control of award decisions.

4.4 Illustrations of evaluation models used in practice

The empirical research into the use of evaluation models by contracting authorities in the UK comprised *not only* **document research**, *but also* **human observation**. In fact, contract documents in the context of the UK's public procurement bureaucracy proved to be less accessible than in other jurisdictions. So, the author of this thesis collected data by observing procurement officers and the respective lawyers making decisions about the choice of award criteria and their respective application to the actual evaluation of tenders.

As regards the **evaluation of price**, the empirical data reveals a variety of methods in use, which take into account different aspects of price such as price certainty, internal costs, volume discounts, etc. However, there is a noticeable tendency for using *evaluation models which allocate the highest score to the price offered by one of the tenders*[292]. The following are illustrations of this[293]:

The "standard differential" method

A common way in the UK of evaluating price is via the use of a "standard differential" method. This assumes that the lowest price (excluding abnormally low bids) will attract full marks. The other bids are then ranked comparatively to that lowest bid.

There are a number of options in UK procurement practice for implementation of this method. The most common options are:

[292] Procurement Lawyers' Association, *Issues in Evaluating Public Sector Tenders* (2010) 2.3 (available at http://www.procurementlawyers.org/Docs/Evaluation%20Paper.pdf and last accessed on 29/09/2015).

[293] Ibid, 2.4.1 and 2.4.2.

• to give each tenderer 100% of the available marks less the percentage by which their tender is more expensive than the lowest (e.g. if the lowest bid is £100,000 and the next lowest bid £108,000 that bid would score 92% of the available marks);

• to give a fixed percentage of the available marks to each ranked bid (e.g. 100% for the lowest bid, 80% for the second lowest bid, 60% for the third lowest bid, 40% for the fourth lowest bid etc); or

• to give a fixed percentage of the available marks for tenders within a specified percentage of the cheapest (e.g. if the lowest tender is £100,000, tenders within 5% of that score 90%, and within 10% of that score 70%, so that bids at £102,000 and £104,000 both score 90% and one at £106,000 scores 70%).

The "mean average" method

A further method is the "mean average" method that is implemented as follows:

The price element of the quotation will be scored as follows:

(a) Calculate the mean price of the bidding suppliers (e.g. sum of three year prices).

(b) Calculate the % difference between the actual price and mean (e.g. Three Year Price – Mean Price x 100).

(c) The mean is given the value of 50.

(d) One point is deducted from the score of each bidder for each percentage point above the mean.

(e) One point is added to the score of each bidder for each percentage point below the mean (e.g. % Difference x –1 (Round to nearest whole number) + Mean Value (50)).

(f) Multiply price score by the agreed weighting for price (eg. Points Score x [30]%).

In both these price evaluation models the scores allocated to each tender depend on a price (the lowest or the mean average), which is not identified by the contracting authority and depends on the spread of the tenders actually submitted for that specific public procurement procedure. It is argued that such models lack transparency and do not promote the best possible competition in terms of price optimization, as discussed below in Chapter 7.

On this topic, it has been suggested by one of the participants in the empirical data collection that contracting authorities seem suspicious about disclosing information on price, namely their affordability threshold. However, the use of a 'highest acceptable price' appears to be a common parameter within the data collected for the purposes of this thesis.

It should be added that the same scoring technique is reported to be used for the evaluation of non-price (sub)criteria. In other words, the highest quality is allocated the highest score. Then there is a pro-rata distribution of the remaining scores aimed at reflecting the difference between the quality of the other tenders and that of the highest scoring one.

From the contracting authorities' discretionary powers perspective, the use of this type of relative or interdependent scoring models means that the baseline price or quality is not determined by the contracting authority but by the closed universe of tenderers who participate in each public procurement procedure. *This amounts to a certain loss of control over the evaluation process by the contracting authority, which results in a limitation of its margin of*

discretion. Setting and disclosing a highest acceptable price and/or a lowest acceptable quality may mitigate such a result. However, the automatic allocation of scores by reference to the lowest price or highest quality, be it a linear or non-linear one, significantly reduces contracting authorities' ability to exercise their discretion as regards the evaluation of each individual feature of each individual tender.

Regarding the **evaluation of non-price aspects**, the empirical data seem to suggest that (sub)criteria related to *mandatory requirements* are assessed on a pass/fail basis (where failure leads to the rejection of the tender), whilst the remaining are usually evaluated according to a scoring scheme of the following type:

Evaluation of the qualitative criterion X	
Detailed description of level of performance A	100 marks or 100%
Detailed description of level of performance B	66 marks or 66%
Detailed description of level of performance C	33 marks or 33%
Detailed description of level of performance D	0 marks or 0%

The description of the possible levels of performance for each tender's non-price aspect under evaluation can be done in varying degrees of detail, which does not seem to impede reasonably well-informed tenderers to interpret them in a uniform way. These scoring schemes can also be accompanied by an even more detailed evaluation guidance, which is intended for the use of the evaluation team and aims to further explain how scores should be allocated. This guidance is not disclosed to the tenderers.

This type of scoring scheme constitutes an example of self-structuring of their margin of discretion by contracting authorities. And although that might entail a limitation of contracting authorities discretionary powers to a certain extent, the exercise of contracting authorities discretion still plays an essential role in interpreting the description of the various levels of performance, in measuring the value of the respective performances offered by the tenders, and in deciding on a score mainly when a tender sits in-between two levels of performance in the light of their description.

There are, however, illustrations of scoring schemes where the description of the levels of performance for each (sub)criterion is done as follows:

Evaluation of the qualitative criterion X	
Exceptionally important OR Excellent	V marks
Very important OR Very good	W marks
Important OR Good	X marks
Significant OR Satisfactory	Y marks
Standard OR Poor	Z marks

This type of scoring scheme affords contracting authorities the widest possible margin of discretion as regards the evaluation of non-price aspects of tenders. This is not necessarily positive. On the one hand, the lack of detail prevents tenderers from knowing contracting authorities' preferences and trying to match them to the best of their abilities. On the other hand, the lack of structure may lead to a more random and less justifiable allocation of scores, which can have a negative impact in terms of the reasons given for the award decision, as well as its justiciability.

The empirical data collected also reveals the common use of minimum quality thresholds or minimum scores regarding non-price aspects used as rejection criteria. There are also examples of negative scores, i.e. levels of (poor) performance which result in a deduction of scores rather than an rejection of the respective tender.

Finally, in terms of **overall score of tenders**, all collected illustrations seem to use some sort of *weighted sum*. And in case of a tie as regards the overall score, a common tie-breaker seems to be the lowest price.

CHAPTER 5 – AWARD CRITERIA AND THE DISCRETIONARY POWERS OF CONTRACTING AUTHORITIES IN FRANCE

5.1 Introduction

Again against the EU backdrop, it is proposed to investigate the French regulations and case law concerning the discretionary powers of contracting authorities when choosing and applying award criteria in the context of public procurement procedures falling within the scope of the European directives.

The current domestic regulations on public procurement are comprised in the 2006 *Code des Marchés Publics* (CMP)[294]. The CMP covers not only procedural rules about the award of public contracts, but also rules on the performance of administrative contracts. Despite the codification effort by the CMP on the occasion of implementing the 2004 Public Sector Directive, there are several assorted legislative pieces, which complement the CMP or apply to special contracts not cover by it, but do not concern the topic of this thesis.

As regards the transposition of the 2014 Public Procurement Directive, the French Government opted for a phased implementation which begun with the approval of specific rules on simplification of public procurement procedures and facilitation of market access for SMEs. By the deadline of the implementation of the 2014 Public Procurement Directive, it is expected that a new comprehensive set of regulations, currently under public consultation, will replace the 2006 CMP.

[294] Approved by Décret n° 2006-975 du 1er août 2006.

In terms of soft law in the field of public procurement, the French system is very fertile. The following examples are guidance documents issued by the Government and freely available on the Economy and Finances Ministry's website[295]: "Guide de l'acheteur public – Achat de dispositifs médicaux de diagnostic in vitro" (guidance on the procurement of medical devices for in vitro diagnosis); "Guide de l'achat public d'energie" (guidace on the procurement of energie); "Guide de la commande publique et accès à l'emploi des personnes qui en sont éloignées" (guidance on public procurement and employment of unemployed people); "Guide pratique de l'achat public innovant" (guidance on procuring innovation); "Guide de l'achat public d'articles d'habillement" (guidance on the procurement of clothing) - just to name a few which explicitly comprise advice and recommendations on the use and application of award criteria specific to the type of purchases in question.

For the purposes of this thesis, however, the most relevant soft law documents are: "2014 Guide des bonnes pratiques en matière de marchés publics" (guidance on public procurement best practices), "2013 Le prix dans les marchés publics – Guide et Recommandations" (guidance on price in public procurement) and "2015 Vade-mecum des marchés publics" (guidebook on public procurement). The latter includes a section on award criteria for the procurement of legal services, including qualification and experience of the staff.

The CMP provision on award criteria is art.53, which reads as follows, for the part that matters to this thesis:

[295] Direction des Affaires Juridiques - Ministère de l'Économie et des Finances: http://www.economie.gouv.fr/daj/marches-publics (last accessed on 29/09/2015).

“I.-Pour attribuer le marché au candidat qui a présenté l'offre économiquement la plus avantageuse, le pouvoir adjudicateur se fonde :

1° Soit sur une pluralité de critères non discriminatoires et liés à l'objet du marché, notamment la qualité, le prix, la valeur technique, le caractère esthétique et fonctionnel, les performances en matière de protection de l'environnement, les performances en matière de développement des approvisionnements directs de produits de l'agriculture, les performances en matière d'insertion professionnelle des publics en difficulté, le coût global d'utilisation, les coûts tout au long du cycle de vie, la rentabilité, le caractère innovant, le service après-vente et l'assistance technique, la date de livraison, le délai de livraison ou d'exécution, la sécurité d'approvisionnement, l'interopérabilité et les caractéristiques opérationnelles. D'autres critères peuvent être pris en compte s'ils sont justifiés par l'objet du marché;

2° Soit, compte tenu de l'objet du marché, sur un seul critère, qui est celui du prix.

II.-Pour les marchés passés selon une procédure formalisée autre que le concours et lorsque plusieurs critères sont prévus, le pouvoir adjudicateur précise leur pondération.

Le poids de chaque critère peut être exprimé par une fourchette dont l'écart maximal est approprié.

Le pouvoir adjudicateur qui estime pouvoir démontrer que la pondération n'est pas possible notamment du fait de la complexité du marché, indique les critères par ordre décroissant d'importance.

Les critères ainsi que leur pondération ou leur hiérarchisation sont indiqués dans l'avis d'appel public à la concurrence ou dans les documents de la consultation. III.-Les offres inappropriées, irrégulières et inacceptables sont éliminées. Les autres offres sont classées par ordre décroissant. L'offre la mieux classée est retenue.

The key elements of this provision are the following:

1. In order to award a contract on the basis of the MEAT, the contracting authority may take into consideration the following:

a) either various non-discriminatory criteria linked to the subject matter of the contract, such as quality, price, technical merit, aesthetic and functional characteristics, protection of the environment, promotion of direct supplies of agricultural products[296], professional integration of disadvantaged persons, running costs, life cycle cost, cost-effectiveness, after-sales service and technical assistance, delivery date, delivery period or period of completion, security of supply, interoperability and operational characteristics – amongst others, as long as they justified by the object of the contract;

b) or, taking into account the subject matter of the contract[297], a sigle criterion: price.

2. Where the contracting authority chooses to award a contract based on more that one criterion, it should indicate

[296] This criterion was added to the list by Decret no. 2011-1000 du 25 aout 2011. It is said to be an important novelty which aims to promote 'short circuits' in respect of agricultural products. See, A Ménéménis, *Code des Marches Publics et Autres Contrats – Commenté* (6th edn, Dalloz 2013), 177.

[297] In the particular case of simple/standardized goods, according to the "2013 Le prix dans les marchés publics – Guide et Recommandations".

the respective weightings. The weightings may be expressed by providing for a range with an appropriate maximum spread. Where the contracting authority believes it can demonstrate that weighting is not possible in particular due to the complexity of the contract in question, it shall indicate the criteria in descending order of importance.

3. The criteria and respective weightings or ranking shall be specified in the contract notice or the contract documents.

4. After irregular or unacceptable tenders are rejected, the remaining ones shall be ranked in discending order. The highest-ranking tender is selected for award.

It is, therefore, apparent that the CMP retrieves the most relevant aspects of the award criteria rules under the 2004 Public Sector Directive. Firstly, it provides for the dual possible composition of the MEAT: either a combination of criteria, or price only. It should be noted, however, that contrary to the wording of the French version of the 2004 Public Sector Directive, the CMP does not refer to 'lowest price' but simply to 'price only'. This begs the question of whether the French legislator had in mind any alternative ways of assessing price for the purposes of comparing tenders in the context of public procurement procedures.

Secondly, the CMP reiterates the illustrative nature of the list of possible award criteria under the MEAT. Nevertheless, it should be pointed out the novelty of some criteria if compared to the ones listed in the French version of the 2004 Public Sector Directive. Indeed, the CMP expressly refers to life cycle cost, a social consideration which consists in the professional

integration of disadvantaged persons, and security of supply[298].

Thirdly, the CMP also mandates the allocation of weightings to the award criteria, as well as the respective disclosure.

As regards the public procurement principles, art.1 CMP clearly states that contracting authorities must comply with the principles of freedom of access to the public procurement market, equal treatment and transparency. It also clarifies that compliance with these principles assures the objectives of public procurement efficiency and the proper use of public funds, which correspond to the notion of value for money as discussed above. These principles are said to derive from the internal market rules, namely the principle of non-discrimination on grounds of nationality[299].

On the one hand, and similarly to what has been decided by the European jurisprudence, the principle of equal treatment has also been invoked by the French case law where discriminatory award criteria were deemed to have been unlawfully used, e.g. a geographical criterion[300]. On the other hand, it is argued by some authors – in line with what was submitted above - that transparency is a tool to enable the goal of effective competition[301]. Moreover, impartiality is also often added to the list of public procurement principles[302], not

[298] In line with the rulings in Case C-19/00, *SIAC*, EU:C:2001:553, para. 39; Case C-448/01, *EVN*, EU:C:2003:651, 70; and Case C-234/03, *Contse*, EU:C:2005:644, paras. 61 and 71 (as mentioned in Chapter 3).

[299] 2014 Guide des bonnes pratiques en matière de marchés publics (39).

[300] CE, 14/01/1998, Ste Martin-Fourquin, no. 168688.

[301] C Lajoye, *Droit des Marchés publics* (5th edn, Lextenso Éditions 2012) 121.

[302] Ibid, 114.

least because it is a general principle in the light of French administrative law.

According to the French judicial review system, the public procurement principles serve the function of allowing monitoring of the award decisions[303], in the same way as happens at the EU level.

Finally, sustainable public procurement is an objective pursued by the CMP. This clearly results from its art.5. In the context of the award criteria, this objective poses the question of the admissibility of environmental and social criteria[304].

[303] See C Ribot, *La passation des marchés publics* (Le Moniteur 2007) 32, referring specifically to the equal treatment principle.

[304] L Richer, *Droit des contrats publics* (9th edn, LGDJ 2014) 404.

5.2 The choice of the award criteria

5.2.1 The most economically advantageous tender (MEAT)

The CMP provides the MEAT as an **umbrella concept** that is capable of being configured in two alternative ways. This does not entirely match art.53 2004 Public Sector Directive where the lowest price is not a configuration of the MEAT, but rather a parallel alternative. This difference, however, does not seem to be relevant from a practical perspective[305]. Besides, this idea of the MEAT is consistent with art.67 2014 Public Procurement Directive. There is one rationale for awarding public contracts – i.e. the MEAT – which can be constructed as a combination of different criteria ('mieux-disant'), or as price only ('moins-disant').

The MEAT is, therefore, regarded as the drive behind the search for the tender which responds to the contracting authority's needs in the best possible way, in the light of the contracting authority's preferences as expressed in the award criteria[306].

As for the **freedom to choose the MEAT vis-à-vis the price criterion**, it must be noted that should the contracting authority wish to choose only one criterion on which to base the award of the contract in question, then that would have to

[305] C Lajoye, *Droit des Marchés publics* (5th edn, Lextenso Éditions 2012) 188.

[306] C Lajoye, *Droit des Marchés publics* (5th edn, Lextenso Éditions 2012) 185.

be the price[307]. Otherwise, the contracting authority enjoys a wide margin of discretion as regards the choice between the MEAT and the price criterion. However, there seems to be limitation to this discretion, which imposes the choice of the MEAT in a particular situation. In fact, it has already been decided that it is illegal to use the sole criterion of price where the subject matter of the contract is complex.[308] No definition is provided of 'complex contract' though. It is argued that, in the case of opting for the sole criterion of price, the contracting authority should justify its decision by reference to the subject matter of the contract, in order to enable the judicial review of said decision, by allowing the judge to verify whether the subject matter of the contract was such as to legitimize the choice of the price alone as an award criterion[309]. It is submitted that this appears to be the case where the subject matter of the contract is sufficiently simple and straightforward, this allowing the contracting authority to identify the best tender in a precise and objective manner, by focusing on the lowest price only (e.g. repeat supplies of standardised goods).

Conversely, if the subject matter of the contract is complex, or the quality features on offer are varied, or the characteristics of the works, services or goods depend on the technical ability of the tenderers, the choice of the lowest price should be considered illegal.[310]

In terms of the **freedom of choice provided by the MEAT**, there is no mandatory rule that must be followed where the

[307] L Richer, *Droit des contrats publics* (9th edn, LGDJ 2014) 402.

[308] CE, 06/04/2007, Dep. de l'Isere, no. 298584.

[309] C Ribot, *La passation des marchés publics* (Le Moniteur 2007) 280.

[310] S Nicinski, *Droit Public des Affaires* (4th edn, LGDJ 2014) 611-612.

contracting authority opts for a combination of award criteria. This could mean that if the contracting authority bases the award of the contract on more than one criteria, price does not necessarily have to be among them. Altough this might not be a common practice, it seems to have already been accepted by the French courts[311]. Nevertheless, it should be added that the *2013 Le prix dans les marchés publics – Guide et Recommandations* clearly states that price is an inevitable criterion under the MEAT (except where it is fixed or regulated under special circumstances).

Both art.53 CMP and the relevant French case law[312] seem to acknowledge contracting authorities have a wide margin of discretion in terms of deciding which criteria are more suitable for identifying the best way to satisfy the needs targeted by a particular contract via the pre-defined award criteria. On the one hand, this entails a prior, comprehensive and clear definition of the said needs, in accordance with art.5 CMP. On the other hand, it also assumes the contracting authority has or is capable of getting a good knowledge of the alternative solutions available in the market (namely via the pre-commercial technical dialogue).

Similarly to what was discussed in the EU chapter, the French legislation and jurisprudence also place limitations on the contracting authorities' freedom of choice conferred by the MEAT. The criteria must be **non-discriminatory**; must be **linked to the subject matter of the contract**; and must be **disclosed in advance**. In order words, the criteria under the MEAT may not confer an **unrestricted freedom of choice**

[311] CE, 28/04/2006, Cne de Toulouse, no. 280197.

[312] Ibid.

based on subjective judgements whose decision-making guidelines have not been disclosed by the contracting authority[313].

Still on the topic of limitations to the contracting authority's discretionary powers when choosing the award criteria, art.75 CMP provides for a mandatory environmental criterion applicable to the purchase of road transport vehicles. This requirement is imposed by Directive 2009/33/EC as referred to in Chapter 3.

Finally, in line with art.5 CMP, which proclaims **sustainable public procurement** as an objective of the French regulatory framework, the courts have already had the opportunity to rule on the duty for contracting authorities to reconcile environmental and social considerations with the award criteria capable of selecting the MEAT[314]. Having said this, it was also ruled in the same judgment that there is no legal obligation for contracting authorities to use an environmental criterion in the context of the award of a contract for the provision of waste treatment services.

As regards the **linkage requirement**, it has been argued that the subject matter of the contract stands for the "material object"[315] of the contract, i.e. the nature of the required works, supplies or services which enable the contracting authority to meet the needs of the public concerned. However, when art.53 CMP goes on to admit that other criteria, besides those listed there in a non-exhaustive way, may also be adopted as long as they are 'justified by the object of the

[313] CE, 05/11/2008, Cne Saint-Nazaire, no. 310484; and CE, 15/12/2008, Communaute urbaine de Dunkerque, no. 310380.

[314] CE 23/11/2011, Communauté urbaine de Nice Côte d'Azur, no. 351570.

[315] L. Richer, *Droit des contrats administratifs* (9th edn, LGDJ 2014) 350.

contract', it is submitted that the French legislator seems to have introduced some flexibility in the interpretation of the linkage requirement. Actually, this might now be appropriate in the light of the notion of link to the subject matter of the contract established in art.67 Public Procurement Directive, which is deemed to have loosened this requirement as discussed above.

On a different point, the **requirement to disclose** the award criteria and respective weightings is said to derive from the fundamental principles of public procurement, and would therefore apply even if there were no written rule imposing such disclosure[316].

Finally, it is argued that the function of the **fundamental principles of public procurement** is to guide the exercise of discretion by contracting authorities when choosing the award criteria, rather than to impose limitations on said exercise[317].

5.2.2 Permitted and prohibited award criteria

The non-discriminatory nature of the award criteria comes hand-in-hand with the required link to the subject matter of the contract. Hence, it has been argued that where the link is missing, the criterion at stake is probably discriminatory, and vice versa[318]. The inadmissibility of certain award criteria is thus frequently due to the failure to comply with the linkage requirement.

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[316] CE sect. 30/01/2009, Agence Nationale pour l'Emploi, n° 290236.

[317] C Ribot, *La passation des marchés publics* (Le Moniteur 2007) 20.

[318] L Richer, *Droit des contrats publics* (9th edn, LGDJ 2014) 404.

As regards **social criteria**, the French case law tended to be strict when deciding about the required degree of linkage to the subject matter of the contract[319]. It was argued that the French case law favours the usage of social considerations as contract performance conditions rather than award criteria[320]. However, more recently, social aspects of the offers have been deemed permitted award criteria[321], which have passed the test of the link to the subject matter of the contract, notably the criterion for the professional integration of disadvantaged persons[322]. In the latter case, the criterion was deemed capable of being linked to the subject matter of a works contract whose performance was susceptible of being carried out, at least partially, by persons in need of professional integration**.** This new trend of the French case law to view the linkage requirement in a more flexible way when ruling on the admissibility of social award criteria seems to have been triggered by the case *Commission v Netherlands*[323] decided by the Court of Justice and discussed above in Chapter 3.

Furthermore, the French case law has provided examples of **prohibited criteria**. Firstly, the 'geographical' criterion[324] has been considered inadmissible because it tends to favour local economic operators, unless is it directly or indirectly connected to a criterion regarding the reliability of supply[325]. In the latter

[319] CAA Douai, 29/11/2011, Région Nord-Pas-de-Calais, no. 10DA01501; and CE 25/07/2001, Commune de Gravelines, no. 229666.

[320] M Guibal and N Charrel, *Code commenté des marches publics* (6th edn, Le Moniteur 2013) 146.

[321] CE, 15/02/2013, Sté Derichebourg Polyurbaine, no. 363921.

[322] CE, 06/04/2007, Dep. de l'Isere, no. 298584.

[323] C-368/10, *Commission v Netherlands*, EU:C:2012:284.

[324] CE 29/07/1994, Cne de Ventenac-en-Minervois, no. 131562; CE, 14/01/1998, Ste Martin-Fourquin, no. 168688.

[325] CE, 09/07/1975, Ville des Lilas, no. 89534; CAA Bordeaux, 25/05/2004, Sté Probinord, no. 00BX02265

situation, the geographical localization is considered to be an objective criterion linked to the subject matter of the contract. This implies an aggravated duty to give reasons, in order to allow scrutiny as regards the genuine motivation of said 'geographical' criterion: whether is consists in a covert attempt to discriminate on grounds of nationality; or whether it embodies an authentic tool to assess a criterion related to the reliability of supply.

Secondly, the criterion that favours the particular experience of the incumbent[326] has also been considered prohibited. Thirdly, criteria related to the experience and professional capacity of the tenderers[327] have been put on the list of prohibited criteria.

As for permitted criteria, the French jurisprudence has also provided some illustrations. Firstly, the age of vehicles for transporting school children[328] was deemed an admissible criterion. Secondly, the aesthetic criterion as regards the supply of street furniture supplies[329] was also permitted. Thirdly, a criterion related to energy consumption or the use of renewable energy in the context of the assessment of the running cost of equipments[330] was ruled acceptable.

5.2.3 The price or cost criterion

[326] CE, 01/04/1994, SA Éts Richard Ducros.

[327] CAA Lyon, 09/06/2005, no. 99LYO1130; CE 01/06/2005, Dep de la Loire, no. 274053; CE, 29/12/2006, Ste Bertele SNC, no. 273783 + CAA Nantes, 30/10/2009, Ste Soletanche Bachy, no. 09NT00334.

[328] CE, 17/07/2013, Dép de la Guadeloupe, no. 366864.

[329] CE 28/04/2006, Cne de Toulouse, no. 280197.

[330] CE, 15/02/2013, Ste SFR, no. 363854-363857.

It has been argued[331] that, in practice, price remains the determinant criterion in the context of the award of public contracts in France. Contracting authorities, notably in local government, award most of their public contracts on the basis of the lowest price. The choice of other criteria will otherwise attract criticism and even suspicion. This practice means that the evaluation of tenders is an automatic process where the discretion of contracting authorities is almost non-existant.

It should be noted that in France the issue of the remuneration of a tenderer who is awarded a contract where there is actually no price has been very debated. Contracts for the supply of street furniture constitute the typical example of this situation, where economic operators do not charge a price but benefit from profits generated by the display of publicity in the said furniture[332].

[331] L Richer, *Droit des contrats publics* (9th edn, LGDJ 2014) 408.

[332] CE, 04/11/2005, Sté Jean-Claude Decaux, no. 247299; CE 28/04/2006, Cne de Toulouse, no. 280197. See also, C Guettier, *Droit des contrats administratifs* (3rd edn, PUF 2011) 458.

5.3 Evaluation methodologies

The CMP is silent as regards the **setting up of evaluation methodologies**. It has been argued that is the case because this is considered a non-legal matter that concerns the exercise of the procurement function[333]. However, in recent times, an increasing legal framework has been developed on this topic, regardless of the broad margin of discretion that contracting authorities in this regard.

On the topic of **sub-criteria**, it should be noted that, contracting authorities are under no obligation to break down the award criteria into sub-criteria and to allocate weightings to them[334].

As regards **weightings**, it is clear from art.53 CMP that all award criteria must have weightings attached to them and that advanced information on those weightings must be disclosed[335]. In terms of the choice of the said weightings, contracting authorities are free to do so, as long as equal treatment and transparency are observed[336].

It should also be added that the CMP does not refer to sub-criteria nor their respective weightings. In fact, it is argued that French courts tend to consider sub-criteria as aids to evaluation[337]. Should it become apparent that they actually

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[333] L Richer L, *Droit des contrats publics* (9th edn, LGDJ 2014) 403.

[334] TA Montpellier, 28/09/2006, Ste Philips Freres, no. 0605115.

[335] Inter alia, CE 29/06/2005, Cne de La Seyne-sur-Mer, no. 267992.

[336] CE, 10/05/2006, Ste Schiocchet, no. 286644; CE, 28/04/2006, Cne de Toulouse, no. 280197.

[337] C Lajoye, *Droit des Marchés publics* (5th edn, Lextenso Éditions 2012) 203.

determine the choice of the MEAT, then they must be qualified as 'proper' criteria, must be weighted and disclosed[338].

In an interesting case[339] regarding **scoring systems**, which has been critised[340], the court ruled that contracting authorities could not choose a scoring system which produced negative scores when evaluating one or more award criteria because it was thought that the impact of those negative scores on the overall score of each tender might distort the relative weighting of the criteria as disclosed in advance.

On the subject of **disclosure of the award criteria and evaluation methodologies**, the French Competition Authority has already criticized the obligation to disclose award criteria and respective weightings because it it considered to be capable of promoting collusion[341].

Following on from what had been said before, if sub-criteria are qualified as 'proper' criteria, and not just aids to evaluation, then they must be disclosed[342]. Furthermore, it is clear from the French case law[343] that the disclosure of sub-criteria weightings is subject to the *ATI* test (referred to in Chapter 3) by reference to their potential impact on the

[338] Ibid.

[339] CE, 18/12/2012, Dep de la Guadeloupe, no. 362532.

[340] See, M Jacob and J Pictet, "A propos des notes negatives dans l'analyse des offes", (2013) 131 Contrats Publics 73-75.

[341] L Richer, *Droit des Contrats Administratifs* (9th edn, LGDJ 2014), 402.

[342] Inter alia, CAA Lyon, 17/02/2011, Ste Crystal, no. 09LYO1511.

[343] CAA Bordeaux, 14/05/2009, Communaute d'agglomeration du territoire de la cote Ouest, no. 07BX00650.

preparation of tenders. Scoring systems, on the other hand, have been repeteadly ruled[344] not require advance disclosure.

As regards the **possibility to elaborate award criteria or change the evaluation methodologies**, it has been argued[345] that once the award criteria and respective weightings are disclosed to the potentially interested economic operators, it is no longer possible to elaborate the award criteria nor change their weightings.

However, taking into account that the case law clearly states that scoring systems do not need to be disclosed, any changes made to them would seem admissible[346]. Nevertheless, should a contracting authority decide to disclose the scoring system either partially (e.g., price formula) or totally, then the transparency obligation seems to prevent it from being changed, namely after the expiry of the deadline for submission of tenders.

Last but not least, on the topic **of judicial review of award criteria and evaluation methodologies**, it is submitted that the breach of the principle of equal treatment and non-compliance with transparency obligations are the most common reasons for judicial review[347].

In a similar way to what was observed at EU and UK level, the judicial review of award criteria and evaluation methodologies

[344] Inter alia, CE 31/03/2010, Collectivité territorial de Corse, no. 334279; CE, 23 mai 2011, Cne d'Ajaccio, n° 339406. Similarly, *Le Guide de bonnes pratiques en matiere de marches publics* [15.1.1.2].

[345] C Ribot, *La passation des marchés publics* (Le Moniteur 2007).

[346] CE, 27/04/2011, President du Senat, no. 344244.

[347] Similarly, M Guibal M and N Charrel N, *Code commenté des marches publics* (6th edn, Le Moniteur 2013) 52.

in France is based on the test of the '**manifest error**'[348]. This type of control is said to allow a broad margin of discretion to contracting authorities[349], who therefore enjoy a wide range of justifications for their award decisions.

Having said this, it should be noted that there are examples in the French case law which show the courts' willingness to take their supervisory power as far as possible. Indeed, in the case CAA Lyon, 09/06/2005, Sté Chantelauze, no. 99LYO1130, for the purposes of assessing a tenderer's chance of having been awarded a contract, in the context of an action for damages prompted by an illegal exclusion of a tender, the court evaluates the excluded tender by applying the award criteria set by the contracting authority. In the process of doing that, the court rules that one the criteria is actually illegal ('garantie professionnel' or professional capacity), and therefore should not have been taken into consideration while evaluating the tenders. So, the court proceeds to compare the winning tender and the excluded one based on the remaining criteria. Ultimately, the court reaches the conclusion that the excluded tender should have been chosen as the most economically advantageous one, and hence decides in favour of *damages* for 'perde de chance'.

The extent to which the court exercised its judicial review power in the *Sté Chantelauze* case is probably only comparable to the recent UK judgment in *Woods Building Services* (mentioned in the previous chapter), where the judge also proceeds to apply the award criteria and respective weightings in order to *re-score* the tenders and 'amend' the

[348] Inter alia, CAA Versailles, 08/12/2011, Ste Reflechi'son, no. 09VE03024.

[349] F Linditch, *Le Droit des Marches Publics* (5ht edn, Dalloz 2009) 94.

evaluation result the contracting authority had previously achieved. It is submitted, however, that the judgment in *Woods Building Services* appears to be more extreme vis-à-vis the judgment in the *Sté Chantelauze* case, since the latter results in damages, whereas the former actually entails a replacement of the award decision.

Finally, and apart from the more extreme cases of judicial review such as the one described above, the French jurisprudence typically exercises its control over the scoring systems under one of the following **grounds**[350]: in order to assure that the functioning of the scoring system will not result in unlawful discrimination[351]; so as to make sure the scoring system id directed at identifying the MEAT[352]; and for the sake of guaranteeing that the scoring system does not entail a change of the disclosed criteria weightings[353].

[350] L Richer, *Droit des contrats publics* (9th edn, LGDJ 2014).

[351] CE 11/04/2012, Syndicat Ody, req. 354652.

[352] CE 15/02/2013, Societe SFR, no. 363854.

[353] CE 18/12/2012, Dep. De la Guadaloupe, no. 362532.

5.4 Illustrations of evaluation models used in practice

The empirical research into the use of evaluation models by contracting authorities in the France was *only* based on **document research**. This was possible due to the fact that contract documents regarding French public procurement procedures are freely available online.

As regards the **evaluation of price**, the "2013 Le prix dans les marchés publics – Guide et Recommandations" (guidance on price in public procurement) puts forward practical advice concerning the scoring of the price element. Far from imposing evaluation models, this guidance stresses the margin of discretion contracting authorities are provided with in this particular area, and makes suggestions about good practices that contracting authorities may wish to consider, for example: not using a relative or interdependent scoring method based on the lowest price; not using scoring schemes that may result in negative scores[354].

The guidance goes on to explore the more common formulae for scoring price, namely those whose use is not recommended: formulae solely based on the lowest price; formulae that include both the lowest and the highest price; formulae that take into consideration the average price. Notwithstanding this guidance, in practice, all the illustrations of evaluation models collected for the purposes of this thesis use either the lowest price or an average price[355] as the basis for the assessment of the price criterion. The respective

[354] "2013 Le prix dans les marchés publics – Guide et Recommandations", 51-52.

[355] For example, the average price per km in the context of a transportation service contract.

scoring system often consists of a linear or non-linear distribution of scores by reference to said lowest or average price. Comments made in the previous chapter as regards the use of relative or interdependent scoring methods and its impact on the discretionary powers of contracting authorities apply here.

Regarding the **evaluation of non-price aspects**, it should be noted that the highest quality is also used as an evaluation parameter in the same way as the lowest price, which then leads to a ranking of the remaining tenders by reference to the one that scored the highest in terms of quality. This is another version of a relative or interdependent scoring method.

Minimum quality scores determining the rejection of tenders, which do not meet them, seem to be frequently used.

The most relevant observation, however, has to do with the level of detail as regards the description of the non-price aspects under evaluation. The methodology for the evaluation of non-price aspects seems less detailed than in the UK case, in the sense that the respective (sub)criteria are only just named and allocated a maximum number of scores. None of the illustrations extracted from the empirical data collected for the purposes of this thesis is actually structured in different levels of performance with the associated scoring scale.

In fact, the more common practice seems to be to enunciate the non-price (sub)criteria, to list of the elements that should be taken into account when evaluating each of them, and to attach either an interval or the maximum possible scores that each criterion is capable of attracting. For example, the (sub)criterion of customer service may comprise "dealing with

complaints in less than 48 hours" (amongst other features), but the contracting authority does not spell out how many more scores a tender may achieve if it proposes to deal with a complaint in less than 24 hours.

This type of evaluation model only conveys contracting authorities' preferences to a certain extent, failing to be more specific in terms of allocating separated scores to detailed levels of performance which fall under the same (sub)criterion's description. By doing so, contracting authorities are retaining a much wider margin of discretion as to what they will value - and, therefore, score higher – once the tenders are submitted. However, they are risking getting tenders which meet their needs in a rather poor way because contracting authorities' preferences might have not been made clear. This is particularly the case where (sub)criteria are related, for instance, to the ergonomics of the equipment to be purchased, or to the comfortableness of a uniform.

On a different note, there is an example of how to evaluate an environmental criterion that might prove adequate in many situations, including where assessing a social consideration:

Environmental criterion X = Max. 20 marks	
Should the fleet comprise at least 70% of vehicles compliant with the Euro 6 norm	20 marks
Should the fleet comprise 50% to 69% of vehicles compliant with the Euro 6 norm	10 marks
Should the fleet comprise less than 50% of vehicles compliant with the Euro 6 norm	0 marks

On the one hand, less than 50% compliance with the environmental objective does not mean a tender should be

excluded. But on the other hand, there is no incentive for a tender to propose more than 50% (and less than 69%) compliance in order to get 10 marks, nor more than 70% compliance in order to get 20 marks. This is often the issue with this type of scoring methods that use intervals rather than a linear distribution of scores.

Illustrations can also be found of attempts at levels of performance which hardly contribute to clarifying contracting authorities' preferences:

Criterion "signaling of the job site" = 10%	
Poor offer	4/10
Satisfactory offer	6/10
Good offer	8/10
Very good offer	10/10

In all the reported examples extracted from the empirical data, contracting authorities seem to give precedence to retaining discretion rather than to structuring it. A paradox, however, can be observed: French contracting authorities make the evaluation models freely available online from the very beginning of each public procurement procedure. This would appear to be a pose a limitation on their discretionary powers, at least to a greater extent than in the UK where this information is only usually made available to the tenderers who succeed in the qualification stage. However, a closer look at the content of what is disclosed might suggest that the lack of detail regarding the possible performance levels under each non-price (sub)criterion actually contributes towards preserving contracting authorities' margin of discretion to be exercised at the moment of evaluating each tender. The

drawbacks of such a model are mainly two: (i) little relevance conferred to the relative importance of the possible configuration of tenders with a view to better match contracting authorities' preferences under each (sub)criterion; (ii) less support provided for compliance with the obligation to give reasons regarding the award decision, since the description of the each (sub)criterion is sufficiently vague to enable the widest possible margin of discretion to be exercised by contracting authorities at the moment of assessing tenders.

Finally, in terms of **overall score of tenders**, the "2013 Le prix dans les marchés publics – Guide et Recommandations" (guidance on price in public procurement)[356] mentions *weighted sum* as a common method for the calculation of the overall score of tenders. That is the case with all the illustrations of evaluation models extracted from the empirical data collected for the purposes of this thesis. The Guide then goes on to add that it is apparent that contracting authorities have more recently started using monetization scoring systems whereby the scores allocated to all (sub)criteria are transformed in a price-equivalent unit, i.e. the contracting authority decides on the economic value of each score to be distributed when evaluating qualitative aspects of the tenders. This type of scoring system is usually base on the idea of trade-off: how many currency units is the contracting authority willing to pay for each additional score allocated to a non-price (sub)criterion?

A minimum overall quality score and/or a minimum score in individual non-price aspects as rejections criteria also appears to be a common practice.

[356] "2013 Le prix dans les marchés publics – Guide et Recommandations", 54-55.

CHAPTER 6 – AWARD CRITERIA AND THE DISCRETIONARY POWERS OF CONTRACTING AUTHORITIES IN PORTUGAL

6.1 Introduction

Once more against the EU backdrop, it is proposed to investigate the Portuguese regulations and case law concerning the discretionary powers of contracting authorities when choosing and applying award criteria in the context of public procurement procedures falling within the scope of the European directives.

The current domestic regulations on public procurement are comprised in the 2008 *Código dos Contratos Públicos* (CCP)[357]. The CCP covers not only procedural rules about the award of public contracts, but also rules on the performance of administrative contracts. Despite the codification effort by the CCP on the occasion of implementing the 2004 Public Sector Directive, there are some assorted legislative pieces, which complement the CCP, namely on the topic of e-procurement. These, however, do not concern the subject of this thesis.

As regards the transposition of the 2014 Public Procurement Directive, the Portuguese Government published a list of proposed amendments to the CCP[358], which has been subject to public consultation. It is expected that a definite version of these will enter into force in early 2017. The Azores islands, on the other hand, have already passed a partial transposition of

[357] Approved by Decreto-Lei n° 18/2008, de 29 de Janeiro de 2008.

[358] Available at http://www.portugal.gov.pt/media/20858186/20160802-mpi-cpp.pdf and last accessed on 30/12/2016.

the 2014 Public Procurement Directive[359], making use of their devolved powers. However, this piece of legislation only applies regionally and does not cover the topic of this thesis.

In terms of soft law, there are no recommendations or guidelines or any similar instruments in the field of public procurement in Portugal.

The CCP contains provisions on award criteria and evaluation models. These are comprised in art.74 and 75, and art.139 respectively. They read as follows:

> *"Artigo 74.º*
> *Critério de adjudicação*
>
> *1 - A adjudicação é feita segundo um dos seguintes critérios:*
> *a) O da proposta economicamente mais vantajosa para a entidade adjudicante;*
> *b) O do mais baixo preço.*
> *2 - Só pode ser adoptado o critério de adjudicação do mais baixo preço quando o caderno de encargos defina todos os restantes aspectos da execução do contrato a celebrar, submetendo apenas à concorrência o preço a pagar pela entidade adjudicante pela execução de todas as prestações que constituem o objeto daquele.*
>
> *Artigo 75.º*
> *Fatores e subfatores*

[359] Approved by Decreto Legislativo Regional n° 27/2015/A, de 29 de Dezembro de 2015.

1 - Os fatores e os eventuais subfatores que densificam o critério de adjudicação da proposta economicamente mais vantajosa devem abranger todos, e apenas, os aspectos da execução do contrato a celebrar submetidos à concorrência pelo caderno de encargos, não podendo dizer respeito, direta ou indiretamente, a situações, qualidades, características ou outros elementos de facto relativos aos concorrentes.
2 - Apenas os fatores e subfatores situados ao nível mais elementar da densificação do critério de adjudicação, denominados fatores ou subfatores elementares, podem ser adoptados para a avaliação das propostas.
3 - O disposto na parte final do n.º 1 não é aplicável quando se tratar de um procedimento de formação de um contrato cujo objeto não abranja prestações típicas de contratos de empreitada de obras públicas, de concessão de obras públicas, de concessão de serviços públicos, de locação ou de aquisição de bens móveis ou de aquisição de serviços.
4 - Quando, por força do disposto no número anterior, fatores e eventuais subfatores que densificam o critério de adjudicação se refiram a elementos de facto relativos aos concorrentes, são-lhes aplicáveis, com as necessárias adaptações, as regras do presente Código respeitantes aos aspectos da execução do contrato a celebrar submetidos à concorrência pelo caderno de encargos.

Artigo 139.º
Modelo de avaliação das propostas

1 - No caso de o critério de adjudicação adoptado ser o da proposta economicamente mais vantajosa, o modelo de

avaliação das propostas deve ser elaborado de acordo com o disposto nos n.os 2 a 4.

2 - A pontuação global de cada proposta, expressa numericamente, corresponde ao resultado da soma das pontuações parciais obtidas em cada fator ou subfator elementar, multiplicadas pelos valores dos respetivos coeficientes de ponderação.

3 - Para cada fator ou subfator elementar deve ser definida uma escala de pontuação através de uma expressão matemática ou em função de um conjunto ordenado de diferentes atributos suscetíveis de serem propostos para o aspecto da execução do contrato submetido à concorrência pelo caderno de encargos respeitante a esse fator ou subfator.

4 - Na elaboração do modelo de avaliação das propostas não podem ser utilizados quaisquer dados que dependam, direta ou indiretamente, dos atributos das propostas a apresentar, com exceção dos da proposta a avaliar.

5 - As pontuações parciais de cada proposta são atribuídas pelo júri através da aplicação da expressão matemática referida no n.º 3 ou, quando esta não existir, através de um juízo de comparação do respetivo atributo com o conjunto ordenado referido no mesmo número."

The six key elements of these provisions are the following:

1. There are two alternatives for the award of public contracts: the MEAT and the lowest price. The latter can only be used when all other conditions for the contract's performance are fixed in the contract documents, i.e. tenderers are solely competing on price.

2. When awarding a contract on the basis of the MEAT, the award criteria and sub-criteria must cover *all – and only – the conditions for the performance of the contract* (including the specifications), which have been put out to competition by the contracting authority. The said conditions must not draw on the qualities or features of the tenderers. This limitation appears to translate the more radical interpretation of the *Lianakis* line of jurisprudence as explained in Chapter 3. It should be noted, however, that the wording of art.75 (1) *in fine* refers to the qualification of tenderers in general, and not the experience of the staff assigned to perform the contract in particular.

3. Only the most disaggregated level of the (sub)criteria of the MEAT can be used to evaluate and compare the tenders via the allocation of partial scores. The partial scores are converted in an overall score through the evaluation methodology chosen by the contracting authority. The overall score must be a numerical result of the sum of the partial scores multiplied by the respective weightings[360].

4. The marking scheme for each criteria or sub-criteria at their most disaggregated level must consist of either:

a) a mathematical formula, which typically applies to the evaluation of quantitative aspects of the tenders, such as price; or

b) a grid with different levels of semantic descriptions of typically (but not necessarily) qualitative aspects of the tenders, which match different units of performance in the

[360] See J Amaral e Almeida and P Fernández Sánchez, *Temas de Contratação Pública I* (Coimbra Editora 2011) 372.

light of each criteria and sub-criteria. Performance units are converted into scores via a scale[361].

5. When setting up the mathematical formula and/or the grid of semantic descriptions, the contracting authority must not invoke the best/worst/average aspects of the potential tenders as reference points for allocating scores. This clearly means that relative or interdependent scoring methodologies, as defined in Chapter 2, are considered illegal in Portugal[362].

6. Finally, art.132 (1) (n) CCP sets out that the whole evaluation methodology must be disclosed in the contract documents. This legal requirement applies to the criteria and sub-criteria, and respective weightings, as well as the marking scheme (mathematical formula and/or the grid of semantic descriptions), and the scale for converting the evaluation of qualitative aspects into scores.

It is, therefore, apparent that the CCP not only retrieves the most relevant aspects of the award criteria rules under the 2004 Public Sector Directive, but it goes far beyond them.

Firstly, it provides for the dichotomy MEAT vs lowest price. It should, however, be noted that there is no illustrative list of possible award criteria for contracting authorities to choose from under the MEAT. Furthermore, there is also no specific mention to the requirement for the criteria to be linked to the subject matter of the contract. These are two novelties introduced by the 2008 CCP, in contrast with the repealed legislation. They are justified by the legal requirement that criteria and sub-criteria must cover *all – and only – the*

[361] Ibidem.

[362] Idem, 374.

conditions for the performance of the contract (including the specifications), which have been put out to competition by the contracting authority (see point 2 above). So, on the one hand, any contract condition can be turned into a criterion or sub-criterion regardless of their nature (including environmental and social conditions). On the other hand, as a result of restricting criteria and sub-criteria to contract conditions, the Portuguese legislator has secured the link to the subject matter of the contract by forbidding 'foreign' aspects to be taken into account for the purposes of the evaluation of tenders.

Secondly, the CCP also mandates the allocation of weightings to the criteria and sub-criteria. However, the Portuguese provisions impose rules on how to set up evaluation methodologies that include not only the weightings but also the marking scheme (mathematical formula and/or the grid of semantic descriptions) and the respective scoring scale. By doing so, the Portuguese legislator is clearly structuring – hence, reducing - the contracting authorities' margin of discretion. Notwithstanding, it should be noted that contracting authorities retain the freedom to shape the form and content of each evaluation model provided in the contract documents, so long as they comply with the legal requirements set in the CCP. When applying the said evaluation model, mathematical formulae do not allow for the exercise of discretion by contracting authorities. However, the grid with different levels of semantic descriptions still requires a degree of judgment, which is based on the comparison of the qualitative aspects of the tenders with the said levels[363].

[363] Idem, 375.

This is the last bastion of contracting authorities' discretionary powers as regards the evaluation of tenders.

Making use of the "insider" perspective of the author of this thesis, as per disclaimer in Chapter 1, it would seem appropriate to clarify that the more detailed rules on evaluation methodologies were introduced by the Portuguese legislator as a result of the comments contributed during the CCP's consultation period by contracting authorities and other parties interested in public procurement procedures. It appears that there was a consensus regarding the need to elucidate how the evaluation of tenders should be made, as well as the need to set limits on contracting authorities' discretionary powers as regards the award stage of public procurement procedures. This can only be understood in the light of the Portuguese positivist legal culture that places very little - if any - relevance in soft law as a means of guiding contracting authorities' behaviour.

Thirdly, the CCP rules on disclosure of award criteria also go beyond the 2004 Public Sector Directive's requirement, by covering all elements of the evaluation methodology adopted by the contracting authority, not just the criteria's weightings (see point 6 above).

As regards the public procurement principles, art.1 CCP states that contracting authorities must comply with the principles of equal treatment, transparency and competition. These principles are specific to public procurement procedures despite being part of a broader set of general principles of Portuguese administrative law. Similarly to what happens in other jurisdictions and at the EU level, these principles serve

the function of allowing the monitoring of the award decisions by the judicial review system[364].

According to the **proposed amendments to the CCP**, in view of the transposition of 2014 Public Procurement Directive, the wording of art.74 and 75 CCP will be changed. The new proposed wording appears to replicate art.67 and 68(1) 2014 Public Procurement Directive almost ipsis verbis, except for art.67 (2) last paragraph regarding the possibility to provide that contracting authorities may not use price or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts. This legislative option affords contracting authorities a broader margin of discretion.

The vast majority of the novelty features of art.67 2014 Public Sector Directive seem to have been imported to the new proposed wording of the above mentioned CCP articles, namely: MEAT as overriding award criterion; price or cost as mandatory economic criteria; cost-effectiveness as the approach for assessing the cost criterion; best price-quality ratio instead of the previous concept of most economically advantageous tender; reference to social aspects alongside environmental ones, as well as a illustrative list of possible award criteria under the best price-quality ratio; express inclusion of the criterion regarding the qualification and experience of the staff assigned to perform the contract in question; provision for fixed price or cost situations; definition

[364] On the topic of judicial review, note that only a selection of judgments by administrative courts (appeal and supreme courts only – not first instance) is available to the public via an online repository. So, cases are only referred to as examples for the purposes of this thesis. Tendencies in case law are hard to draw, also because the legal precedent does not exist in the Portuguese jurisdiction.

of the link to the subject matter of the contract; explicit allusion to the objective of effective competition.

As for art.68 2014 Public Procurement Directive on life cycle costing, the new proposed wording of the said CCP articles only literally transposes its 1st paragraph. It can be argued that the 2nd paragraph is already implied in CCP's disclosure requirements; and that the 3rd paragraph comprises an obligation imposed at EU level which is directly applicable, hence requires no transposition. However, it would be desirable to clarify both these issues, as per discussion in Chapter 3, rather than omitting any reference to them. Notwithstanding, it seems clear that life cycle costing is an example of a cost effectiveness approach to the cost criterion, but that contracting authorities are free to use other approaches.

The rules on evaluation methodologies provided in art.139 CCP, including those regarding the mathematical formula and the grid of semantic descriptions, as well as the scoring scale, remain unchanged. The wide-ranging disclosure requirement imposed in art.132 CCP also remains unchanged.

In terms of the principles applicable to Portuguese public procurement, the introduction of a new art.1-A has been proposed. According to this, special emphasis should be placed on the principles of legality, public interest, competition, publicity and transparency, equal treatment and non-discrimination, impartiality, proportionality, good faith, legal certainty, sustainability and accountability. This enumeration of principles goes far beyond those listed in art.18 2014 Public Procurement Directive. In the light of the wording of the new proposed article, it might seem that this is a mere compilation

of the applicable administrative law principles, also mentioned in the Portuguese Constitution and derived from the EU Treaties. However, the specific provision of certain principles (for example, sustainability and accountability) in the context of public procurement may lead to interpretation issues by the courts, which could be prevented by adhering to the current list of principles provided in the original wording of the 2008 CCP.

6.2 The choice of the award criteria

6.2.1 The most economically advantageous tender (MEAT)

The 2008 CCP, as mentioned before, considers MEAT and lowest price to be alternative ways of choosing the tender which is the most responsive to contracting authority's needs when concluding a public contract. The level responsiveness of each tender is assessed in the light of the contracting authority's preferences as expressed in the award criteria and respective evaluation model. The proposed amendments to the CCP, as explained above, aim to turn the MEAT into an encompassing notion, which can be set up in a **mono-criterion** (price or cost only) or a **multi-criteria** (best price-quality ratio) shape, in order to match art.67 2014 Public Procurement Directive. This terminological change does not appear to cause significant alterations in practice.

As regards the **freedom to choose the MEAT vis-à-vis the price criterion**, it seems clear that the Portuguese legislator allows contracting authorities full discretion when deciding whether to award a public contract based on the MEAT or on the price criterion.

Concerning the **choice of award criteria under the MEAT**, contracting authorities enjoy a wide margin of discretion to pick and combine different award criteria[365]. In the original wording of the 2008 CCP, there is not even a list of possible award criteria to choose from. The proposed amended version

[365] See P Gonçalves, *Direito dos Contratos Públicos* (Almedina 2015) 310-311. See also, Acórdão do STA, de 04-12-2012, Proc. 857/12.

of the CCP has sought to reintroduce the said list, but it remains a merely illustrative one. Both the original and the proposed amended version of the CCP, however, limit the choice of award criteria to **aspects covered by the conditions for the performance of the contract** (including the specifications). By turning contract conditions into award criteria, contracting authorities are said to *put these conditions out to competition*. This also applies to the price to be paid by the works/supplies/services under the contract.

In line with this limitation to the contracting authority's discretionary powers when choosing the award criteria, the proposed amended version of the CCP adds the legal requirement that the **award criteria be linked to the subject matter of the contract**. This linkage is defined in the exact same terms as in the 2014 Public Procurement Directive. It is submitted that this proposed new legal requirement adds little to the limitation referred to in the previous paragraph. Taking into account the flexible approach to the linkage requirement adopted at EU level, as discussed in Chapter 3, it may even be the case that limiting the choice of award criteria to aspects covered by the conditions for the performance of the contract results in a stricter limitation to contracting authorities' margin of discretion.

In fact, it is argued that the broad interpretation of the link to the subject matter of the contract amounts to an enlargement of the discretionary powers of contracting authorities, namely by allowing the choice of award criteria related to aspects which do not form part of the material substance of the requested works, supplies or services. According to both the original and the proposed amended wording of the CCP, this is only possible if the said aspects are *capable* of being

formulated as contract conditions and provided in the contract documents, with a view to be included in the concluded contract's clauses. Therefore, the Portuguese approach to this issue seems to result in contracting authorities' margin of discretion being narrower.

On a different point, the **requirement to disclose** the award criteria and respective weightings, as well as their evaluation methodology, is far more demanding than the parallel disclosure requirement at EU level. It is, therefore, apparent that this requirement also leads to a decrease in contracting authorities' margin of discretion.

Finally, it is argued that the **principles applicable to public procurement** should be regarded as guidance to contracting authorities on how to exercise their margin of discretion, rather than limitations on said exercise. The Portuguese legislator has provided a set of mandatory rules on the topic of award criteria based on the balancing of the applicable public procurement principles. So, it should not be for the courts to create or reinvent new rules by invoking those principles, but to apply the rules laid down in the CCP.

6.2.2 Permitted and prohibited award criteria

Since the 2008 CCP limits the choice of award criteria to **aspects covered by the conditions for the performance of the contract** (including the specifications), only aspects which can adequately be drawn up as contract conditions and later imposed on the winning tenderer as contractual obligations are permitted. This issue – of whether certain aspects are *capable* of being formulated as conditions for the

performance of the contract – has dominated the discussion about permitted and prohibited award criteria in Portugal.

This is a rather different approach to that taken at EU level. It aims to provide a general criterion to decide about the legality of the award criteria, regardless of their nature. For example, environmental, social and innovative aspects are considered permitted award criteria if they can be turned into legal obligations included in the contract to be concluded with the winning tenderer – otherwise, they are prohibited.

As mentioned before, this understanding of the distinction between permitted and prohibited award criteria does not appear to be altered by the proposed introduction of the requirement that award criteria be **linked to the subject matter of the contract**. In the light of the flexible notion of this link, it is submitted that failure to comply with the linkage requirement is likely to coincide with failure to comply with the 'contract conditions' requirement - whereas the opposite may not necessarily happen.

As regards the admissibility of award criteria related to the **qualification and experience of the tenderers**, the CCP provides that the qualities or features of the tenderers shall not be included in the conditions for the performance of the contract. Hence, this led to an initial interpretation by the courts whereby any aspect connected to the qualification and experience of the tenderers was considered a prohibited award criterion[366]. This conclusion seemed supported by the desirable distinction between the selection stage and the award stage, which has been reiterated in the 2014 Public Procurement Directive, as discussed in Chapter 3.

[366] See Acórdão do TCAS, de 20/03/2014, Proc. 10782/14.

However, the most recent case law has been interpreting art.75 (1) CCP as referring to the qualification of tenderers in general, and not the experience of the staff assigned to perform the contract in particular[367]. In other words, the prohibition to take into account qualities or features of the tenderers as award criteria does not preclude the admissibility of award criteria related to the staff specifically put forward by the tenderers for the performance of the contract. The evolution of the Portuguese case law on this topic mirrors that of the Court of Justice from the *Lianakis* to the *Ambisig* case, as discussed in Chapter 3.

Finally, it should be noted that the proposed amended version of the CCP imports art.67 (2) (b) 2014 Public Procurement Directive on this topic and includes the safeguard provided in Recital (94). According to this, where contracting authorities use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, they "should ensure, by appropriate contractual means, that the staff assigned to contract performance effectively fulfill the specified quality standards and that such staff can only be replaced with the consent of the contracting authority which verifies that the replacement staff affords an equivalent level of quality." In a way, this echoes the idea that award criteria must be capable of configuring conditions for the performance of contracts.

[367] See, for example, Acórdão do STA, de 22/04/2015, Proc. 835/13; Acórdão do STA, de 30/04/2015, Proc. 840/13; Acórdão do STA, de 22/04/2015, Proc. 1248/13.

6.2.3 The price or cost criterion

It has been argued[368] that, despite traditionally having been a mandatory element of the MEAT (even if not decisive), the price criterion may, under certain circumstances, not be included in the MEAT. This might be the case where that is not possible (for example, fixed prices), or where that is not convenient from the contracting authority's perspective. The latter occurs rarely – an example would be a contracting authority procuring the best quantity and quality of certain supplies where a maximum amount of money had been made available for that purpose in form of a grant or subsidy. In reality, price remains the determinant criterion in the context of the award of public contracts in Portugal.

Taking into account that the use of the lowest price only is equivalent to an automatic process of application of a mathematical formula, as explained above, the discretion of contracting authorities as regards the evaluation of tenders is non-existent in this scenario. However, contracting authorities retain the discretion to decide whether to choose price or cost only, or the best price-quality ratio. Should they go for the former rather than the latter, contracting authorities must make sure to cement all conditions for the performance of the contract in the contract documents. This will be reflected in a duty to give reasons as to the choice of award criterion.

Finally, as regards the life cycle costing, it is proposed to expressly add this criterion to the CCP, as mentioned above, but there is no case law or literature on the topic yet.

[368] MA Raimundo, *A Formação dos Contratos Públicos* (AAFDL 2013) 845-846.

6.3 Evaluation methodologies

The mandatory use of an evaluation model, when awarding a contract under the MEAT/best price-quality ratio, as well as the associated disclosure requirement, aim to structure and limit the exercise of the contracting authorities' discretionary powers in the context of the assessment of tenders[369].

It is also submitted – again, from the 'insider' perspective of the author of this thesis, as per disclaimer in Chapter 1 – that the 2008 CCP introduced the mandatory use of an evaluation model and the respective disclosure requirement based on the evidence gathered from game theory, which seems to suggest that economic operators should be allowed to know all the rules of the 'procurement game' in advance, so they can make an informed decision about whether and how to play.

Despite having been argued that the CCP proclaims a quasi-anti-discretion principle[370], it is apparent that contracting authorities still enjoy a significant margin of discretion as regards the configuration and application of the evaluation models, especially in relation to qualitative award criteria. In fact, when setting up the evaluation model, the contracting authorities may, whilst complying with the CCP's mandatory rules, provide for 'pockets of discretion' to be exercised when applying the said model to the assessment and scoring of the tenders. This practice is not only valid but also desirable in

[369] See P Gonçalves, *Direito dos Contratos Públicos* (Almedina 2015) 317. See also, Acórdão do STA, de 05/02/2013, Proc. 925/12.

[370] MA Raimundo, *A Formação dos Contratos Públicos* (AAFDL 2013) 834; M Olazabal Cabral, "O concurso publico no Código dos Contratos Públicos" in Gonçalves P (org), *Estudos de Contratação Pública I* (Coimbra Editora 2008) 207-209.

situations where the contracting authorities cannot anticipate all the different aspects of the tenders that might be put forward by the economic operators – thus allowing room for the allocation of scores to innovative aspects, for example. In these situations, however, the extent of the margin of discretion enjoyed by contracting authorities is proportional to the extent of their duty to give reasons[371].

As explained above, according to the CCP, the evaluation models comprise criteria and sub-criteria, respective weightings and **scoring systems**. The latter consist of a **mathematical formula** (only applicable to quantitative criteria) or an **evaluation grid** (typically applicable to qualitative criteria, but not restricted to them). This grid comprises different levels of performance potentially offered by the tenderers. The levels are described in more or less detail, by reference to the order of preferences of the contracting authority as regards each award (sub)criterion. So, for example, "excellent quality", "medium quality" and "poor quality" do not suffice to meet this requirement. The contracting authority must specify what excellent/medium/poor means. A scale is attached to each grid in order to allow for the conversion of performance into scores.

It is clear from the wording of the CCP that **relative or interdependent scoring systems cannot be used**, as they are deemed illegal. In other words, the mathematical formulae and the evaluation grids must not be configured by reference to the best/worst/average aspects of potential tenders - for

[371] P Gonçalves, *Direito dos Contratos Públicos* (Almedina 2015) 322. See also, Acórdão do STA, de 21/01/2104, Proc. 1790/13.

example, using the lowest price offered as a starting point for calculating the mathematical formula is forbidden.

The overall score of each tender consists of a weighted sum of the partial scores allocated to each criterion and/or sub-criterion, multiplied by the respective weighting.

On the subject of **advance disclosure of the evaluation methodologies**, as explained above, transparency prevails in the CCP – these methodologies must be disclosed in the contract documents. *That is to say that contracting authorities are imposed an obligation to self-limit their discretionary powers not only by structuring their margin of discretion via the mandatory use of an evaluation model, but also by adhering to it in the exact terms of its disclosure.*

As regards the **possibility to elaborate award criteria or change the evaluation methodologies**, it has been argued[372] and is hereby submitted that once the award criteria, the respective weightings and the evaluation methodologies are disclosed, it is no longer possible to elaborate the award criteria nor change the evaluation methodologies. This solution seems consistent with the whole set of rules on evaluation provided in the CCP.

Lastly, contracting authorities retain the discretion to include minimum/maximum thresholds in the evaluation models, according to art.42 (3) and (4) CCP. These thresholds may be related to either quantitative or qualitative aspects (including environmental and social considerations). Failure to meet a particular threshold determines the rejection of the respective

[372] P Gonçalves, *Direito dos Contratos Públicos* (Almedina 2015) 316. See also, Acórdão do STA, de 17/01/2007, Proc. 1013/06.

tender[373]. The same logic applies to the establishment of minimum partial scores[374].

As for the **judicial review of award criteria and evaluation methodologies**, it has been argued that[375], more than a mere consequence, it is an objective pursued by the legal obligation imposed on contracting authorities to self-structure their margin of discretion as regards the evaluation of tenders. The extent of the judicial review is inversely proportional to the extent of the contracting authority's discretionary powers.

However, it has been contended[376] and is hereby submitted that, in the light of the principle of separation of powers, it is not for the judiciary to re-evaluate and re-score the tenders. The courts' job is to check that contracting authorities have complied with the CCP's mandatory requirements and that the award decision is supported by sufficient and objective reasons. Unlike in the UK and France, there are no examples in the Portuguese case law where the courts have taken their supervisory powers as far as evaluating an excluded tender by applying the certain award criteria set by the contracting authority, whilst doing without others for deciding on their illegality, and reaching the conclusion that the said tender should have been chosen as the most economically advantageous one.

[373] On how the thresholds operate, see Acórdão do TCAS, de 21/10/2010, Proc. 6179/10.

[374] MA Raimundo, *A Formação dos Contratos Públicos* (AAFDL 2013) 814.

[375] MA Raimundo, *A Formação dos Contratos Públicos* (AAFDL 2013) 826; M Olazabal Cabral, "O concurso publico no Código dos Contratos Públicos" in Gonçalves P (org), *Estudos de Contratação Pública I* (Coimbra Editora 2008) 209.

[376] MA Raimundo, *A Formação dos Contratos Públicos* (AAFDL 2013) 835.

6.4 Illustrations of evaluation models used in practice

The empirical research into the use of evaluation models by contracting authorities in Portugal was *only* based on **document research**. In fact, contract documents regarding public procurement procedures in Portugal are widely available online.

As regards the **evaluation of price**, since the 2008 CCP entered into force, the use a relative or interdependent scoring method based on the lowest price has been forbidden. This used to be a common practice beforehand and, in the early days of the CCP, contracting authorities still took some getting used to alternative ways of evaluating price. Currently, empirical data reveals that almost all mathematical formulae set up for the evaluation of price consist of a linear distribution of scores by reference to a **price threshold**. According to art.47 CCP, contracting authorities are free to determine the *maximum price* they are willing to pay for each works, supplies or services contract. Contracting authorities should come up with this figure after having consulted with the market in order to estimate the cost of said works, supplies or services. Furthermore, contracting authorities should take into account the relevant contract conditions provided in the contract documents – such as: delivery date, quality, warranty features, etc. – which may impact on price. Finally, contracting authorities should take into consideration their own budgetary constraints.

Any scoring system which relies on the price threshold is a very transparent, not only because the scores allocated to each tender depend on a price that has been identified and

disclosed in advance by the contracting authority (i.e. does not depend on future unforeseen aspects of the tenders, such as the lowest price offered), but also because the maximum price the contracting authority is willing to pay gives tenderers an additional indication of the relative importance of price as an award criterion under the MEAT/best price-quality ratio.

On the one hand, if the contracting authority sets a maximum price which is higher than the average market price, that signals its willingness to pay more than the usual price for that particular contract. This situation may occur where the contracting authority also provides for other criteria 'above average', for example a relatively higher quality standard or a relatively shorted delivery period. On the other hand, if the contracting authority sets a maximum price which is lower than the prevailing market price, that reveals its willingness to pay a comparatively smaller amount for that particular contract. This may be the case where price the most important criterion under the MEAT/best price-quality ratio, for example due to budgetary limitations the contracting authority is under.

A scoring method based on the price threshold means that tenders offering a price which matches the said threshold attract zero marks, and that tenders whose price is above this figure shall be rejected. Indeed, this maximum price acts as a "competition cap": tenderers compete with each other for the best price score below that cap, i.e. tenders are ranked comparatively to that maximum price. The ranking system can be implemented in many different ways, for example by **inverting the "standard differential" method** mentioned in Chapter 4. This option uses the maximum price as a starting point (instead of the lowest price), which attracts 0

scores instead of 100. It can be mathematically expressed as follows:

Si = (Mp – Tp) / Mp x 100, where

Si = the score allocated to each tender under the price award criterion;

Mp = the maximum price the contracting authority is willing to pay and has disclosed in advance;

Tp = the price offered by each tender;

100 = 0 to 100 scoring scale.

Empirical data show that, alongside this rather straightforward way of evaluating price, contracting authorities often use the maximum price *in combination with* other types of price standards also disclosed in advance. For example, the **optimal price** the contracting authority would ideally pay for a particular contract. This option puts pressure on tenderers to make an effort to reach that optimal price. In this case, a formula like this is usually used:

Si = (Mp – Tp) / (Mp – Op) x 100, where

Si = the score allocated to each tender under the price award criterion;

Mp = the maximum price the contracting authority is willing to pay and has disclosed in advance;

Tp = the price offered by each tender;

Op = the optimal price the contracting authority would ideally pay and has disclosed in advance;

100 = 0 to 100 scoring scale.

This means that that the maximum price attracts zero scores and the optimal price attracts 100. Furthermore, the contracting authority may decide whether to allocate 100 scores (*closed scale*) or >100 scores (*open scale*) to tenders whose prices are even lower than the optimal price.

Another price standard capable of being used in combination with the maximum price, which can also be observed in practice, is the **abnormally low price**. It should be noted that the CCP provides that the abnormally low price is equivalent to *at least 40% less* than the price threshold set by the contracting authority for a works contract; and *at least 50% less* than the price threshold set by the contracting authority for a supplies or services contract. Hence, this option can be configured as follows:

Si = (Mp – Tp) / (Mp – ALp) x 100, where

Si = the score allocated to each tender under the price award criterion;

Mp = the maximum price the contracting authority is willing to pay and has disclosed in advance;

Tp = the price offered by each tender;

ALp = the abnormally low price calculated in accordance with the CCP rules explained above;

100 = 0 to 100 scoring scale.

In this situation, the maximum price attracts zero scores and the abnormally low price attracts 100. Taking into account the nature of this price parameter, contracting authorities use a closed scoring scale.

These variations of the scoring method for the evaluation of price are the basis for the more sophisticated mathematical

formulae contracting authorities use when awarding complex contracts.

As regards the **evaluation of non-price aspects**, relative or interdependent scoring methods are also forbidden. Therefore, it is illegal to use, for example, the highest quality offered by a tender or the shortest delivery period offered by another tender as an evaluation parameter.

The illustrations of evaluation methodologies of non-price aspects extracted from the empirical data collected for the purposes of this thesis beg the highlight of the following observations:

Firstly, **minimum non-price thresholds**, namely minimum qualitative aspects, seem to be frequently used. Failure to meet them results in the rejection of the respective tender.

Secondly, there are plenty of examples of evaluation of non-price aspects based on an **grid with only two levels of semantic descriptions** matching two units of performance in the light of the respective (sub)criterion, which translate into 0 scores and 100 scores, respectively.

Evaluation of non-price criterion X	
Detailed description of level of performance A	100 scores
Detailed description of level of performance B	0 scores

This option, whilst complying with the CCP's mandatory requirements regarding the setting up of an evaluation methodology, affords a very generous margin of discretion to the contracting authority. This practice allows contracting authorities to self-structure their discretion and to retain control over a significant slice of it at the same time. In these

situations, the duty to give reasons as regards the award decision is aggravated.

Thirdly, empirical data also shows contracting authorities willingness to use **open scoring scales**. These may lead to the allocation of negative scores, as well as scores above the 'natural' top end of the said scale. The latter situation is particularly useful where innovative (sub)criteria are used, as it allows room for allocating more scores to tenders which offer a higher level of performance than that estimated by the contracting authority as regards a particular (sub)criterion.

Finally, the major issue revealed by the empirical data collected for the purposes of this thesis has to do with the **vague or insufficiently defined descriptions of the levels of performance comprised in evaluation grids** of non-price aspects, namely qualitative ones. There are many examples like the following:

Evaluation of the criterion "ease of use" of the equipment	
Very easy	100 scores
Fairly easy	66 scores
Not easy	33 scores
Very difficult	0 scores

Another example along the same lines:

Evaluation of qualitative criterion X	
Excellent	100 scores
Very Good	75 scores
Good	50 scores
Satisfactory	25 scores
Unsatisfactory	0 scores

As explained above, the different levels of performance comprised in a evaluation grid must be described by reference to *potential* aspects of the tenders regarding the respective (sub)criterion, ranked by order of preference according to the attached scoring scale. Different contracting authorities have different understandings of what "fairly easy to use" or "satisfactory quality" means. The above-cited examples are, therefore, *inadmissible* in the light of the legal requirements set out by the CCP. Indeed, these methodologies confer an unlimited margin of discretion on contracting authorities.

Last but not least, all the reported illustrations seem to suggest that contracting authorities make an effort to balance the legally imposed self-structuring of their margin of discretion with the 'preservation' of some portion of discretionary powers, which are essential to their evaluative job.

As regards the **overall score of tenders**, the CCP imposes the adoption of a *weighted sum* of the partial scores allocated to the (sub)criteria, as explained above. The proposed amended version of the CCP introduces a new rule which aims to clarify that, in case of a tie, the "tender submitted in the first place" cannot be used as a tie-breaker. Besides the prohibition of arbitrary examples like this one, contracting authorities are free to provide tie-breakers in the contract documents.

CHAPTER 7 – COMPARATIVE ANALYSIS

7.1 Introduction

The aim of this chapter is to present a comparative view of the main topics investigated in the national chapters of this thesis against their common EU background. The comparative findings are, therefore, drawn in the same order used to structure the previous chapters.

However, taking into account the topic of this thesis focuses on the discretionary powers of contracting authorities when choosing and applying the award criteria in the context of public procurement procedures, it seems appropriate that the beginning of this comparative exercise should be a brief reflection on **the relationship between the type of regulatory approach** to public procurement in each one of the national jurisdictions under comparison and **its impact on the margin of discretion** enjoyed by contracting authorities when awarding public contracts.

It is apparent from the previous chapters that different public procurement domestic systems opt for different ways of implementing the same EU framework issued for the approximation of laws within the Members States. It is submitted that *this is hardly surprising*, as **deference to the national constitutional traditions in the context of the subsidiary principle at EU level** would always determine a varying degree of 'dissimilarities', which are mostly a result of the **cultural diversity** that can be found inside the EU borders and is necessarily mirrored in the domestic laws,

regulations, administrative practices and case law. *It is not proposed in this thesis to make a case about the need to further harmonize public procurement rules and procedures*, not least because the internal market legal basis to do so only goes so far, and can arguably go any further than the current state of affairs (as discussed in Chapter 3). On the contrary, it is submitted that an understanding of the differences between national approaches to public procurement regulation under the 'umbrella' of the EU directives is essential for taking the next step, i.e. *acknowledging that diversity – be it cultural, legal or other – is actually a source of knowledge that can only benefit from being shared*.

One of the classical objectives of comparative law would be to promote 'legal borrowings' that would imply transplanting legal solutions from one jurisdiction to another. **The aim of this thesis is not to advocate for the export of any particular national rule or procedure, not even to identify best practices in the field of public procurement award criteria**. Taking into account that the starting point of this thesis is the common ground set by the 2004 Public Sector Directive and the 2014 Public Procurement Directive, *the purpose of this comparison is to provide an opportunity for 'learning from others'*.

It could be said that, by focusing on the discretionary powers of the contracting authorities, this thesis would be more concerned with the *'meta-legal' exercise of the procuring function*, i.e. with the choices and decisions of contracting authorities that go beyond the strict legal framework imposed by various means (EU regulations, domestic laws, soft law guidelines, case law, etc.) and, therefore, rely on *judgments of opportunity and convenience*. It is, however, submitted that

there lies the essence of procurement: achieving the best possible outcome in the light of the applicable constraints (for instance, budgetary limitations). So, by identifying the legal parameters that define the boundaries of the margin of discretion enjoyed by contracting authorities for choosing and applying the award criteria, ‘procurement people’ are ready to start learning and sharing their practices and experiences. The ultimate goal being the improvement of the procurement function considered as a whole, and not only from the strict legal perspective.

7.2 Comparative findings

7.2.1 The choice of the award criteria

From a general perspective, the subject of the choice of award criteria in the field of public procurement typically reveals the diversity of national approaches to how domestic jurisdictions 'own' the EU rules which require implementation at Member State's level. It is apparent that the UK opts for a mainly **tick-box approach to transposing** the public procurement directives by approving a set of rules whose wording differs little from the wording of the directives. Although a similar observation might be made of the French solution for the same implementation challenge, it should be noted that there are three main differences when comparing these two jurisdictions. Firstly, the French legislator actually adds some 'original' aspects to the transposed rules (as happens, for example, with the non-exhaustive list of possible award criteria under the MEAT), whereas the legislative approach of the UK is much less creative. Secondly, the French system produces and thrives on **soft law guidance** issued for the benefit of procurement agents in particular, and the efficiency of the procurement system in general, whereas there is limited guidance available in the UK (although the Crown Commercial Service seems to be inverting this trend). Thirdly, there is an incomparable greater **amount of case law** on public procurement in France than in the UK, which contracting authorities can refer back to as an authoritative orientation when making discretionary decisions. When comparing the UK and French case studies with the regulatory choices made in Portugal on the same topic, it is apparent that the Portuguese

legislator is much more 'adventurous'. On the one hand, Portuguese rules on public procurement in general and award criteria in particular go far beyond the transposition obligations provided in the EU Directives, especially as regards the legal requirements related to evaluation models. Consequently, on the other hand, the margin of discretion of Portuguese contracting authorities is subject to a greater compression as a result of the regulatory approach in Portugal relying on hard law, rather than soft law and with little support in case law.

A closer look to the public procurement practice in these three jurisdictions, however, begs the *question of the extent to which the differences in regulatory environment produce a proportional impact in the way contracting authorities exercise their discretionary powers*.

7.2.1.1 The most economically advantageous tender (MEAT)

As regards the most economically advantageous tender, and in particular the freedom to choose the criteria under the MEAT, as well as the freedom of choice conferred by those criteria, it is observed that all three national jurisdictions are mostly similar on this point. It is submitted that some of the current differences are mainly due to the *different stages the Member States are at in terms of the implementation of the 2014 Public Procurement Directive*. The UK has already fully transposed the directive's rules, whereas France has made a partial transposition and Portugal is still preparing its new legislation. An example of this would be the provision (or not) for the **possibility to restrict or prohibit the use of the price or cost only criterion** in certain circumstances.

As for the contracting authorities' generally broad discretion to choose to award the contract based on a **combination of criteria**, as well as the known (five) **limitations on the freedom of choice conferred by those criteria**, these are largely similar in all three jurisdictions because they emanate directly from primary and secondary EU legislation, which has been the subject of several interpreting judgments by the Court of Justice.

6.2.1.2 Permitted and prohibited award criteria

It has been herein submitted that the most common rationale behind the inadmissibility of an award criterion has to do with **the linkage requirement**. It seems that, on this respect, the assorted judgments at national level that attempted a definition of the concept of link to the subject matter of the contract tend to be distinguished on their facts and reflect, to a certain extent, domestic preferences in terms of the objectives pursued by the public procurement regulation. This is the case of environmental and social criteria in the UK and in France. However, taking into account the fact that the 2014 Public Procurement Directive introduced a comprehensive (if not generous) notion of the link to the subject matter of the contract, it is expected that the issues around this requirement will be mitigated.

Despite being *en route* for adopting the linkage requirement as a result of the transposition of the 2014 Public Procurement Directive, the Portuguese jurisdiction appears to be more demanding on this topic by imposing the legal requirement that the aspects used as award criteria (regardless of their nature) be capable of being formulated as *contract conditions*.

Therefore, the Portuguese approach to this issue seems stricter than the 'announced' relaxed interpretation of the notion of link to the subject matter of the contract. In practice, however, it is still not possible to confirm the actual impact of this alleged regulatory difference in terms of the margin of discretion enjoyed by contracting authorities.

Other reasons to conclude for the permission or prohibition to use certain award criteria have to do with either the breach of public procurement **principles** (e.g. the discriminatory nature of the geographical criterion) or the breach of public procurement **procedural rules** (e.g. using selection criteria at the award stage).

It is interesting to observe how different jurisdictions come up with slightly different interpretations for the same criterion. This is the case, for example, with the geographical criterion which has been instrumentalised under the criterion related to the reliability of the supply and, hence, been deemed lawful in certain circumstances in France.

Finally, one of the most contended criterion in the recent past of the public procurement history – the qualification and experience of the staff assigned to the performance of the contract in question – has been clarified in the new wording of the 2014 Public Procurement Directive, and so is expected to be applied in a more coherent way throughout the EU Member States, including in Portugal as per the proposed amended wording of the respective provision.

7.2.1.3 The price or cost criterion

As regards the price criterion, from the perspective of the contracting authorities' discretion to use it, the main issues debated not entirely in the same terms at national level consist in knowing whether price is a mandatory criteria under the MEAT, and whether Member States can curtail contracting authorities' discretion to award contracts based on price alone by imposing a restriction or prohibition of use. According to the new 2014 Public Procurement Directive, the answer to both these questions is affirmative. Therefore, this is expected to approximate the divergent solutions at national level and, as a result, create further limitations to the contracting authorities' discretionary powers. It should be noted, however, that the Member States may decide to 'opt out' of transposing the second limitation, which appears to be the case of the UK and Portugal.

Finally, it submitted that despite the cost having already been used as an award criterion under the MEAT (including via life cycle cost related analysis) in most Member States, the new rules on this topic introduced by the 2014 Public Procurement Directive - namely as regards the possibility for the Commission to adopt and impose mandatory evaluation methodologies of the said life cycle cost - may give rise to future application issues and dissimilarities at domestic level.

7.2.2 Evaluation methodologies

This is the topic which most affects the margin of discretion of contracting authorities and where more differences have been observed at domestic level, both in terms of case law and practice.

As regards the choice of **sub-criteria and respective weightings**, contracting authorities tend to be free. Concerning the choice of weightings in particular, there is no stated maximum or minimum weighting required as regards the price criterion or indeed any other criteria in all three national jurisdictions. However, there is a duty to assure that the weighting of a specific criterion does not result in a neutralization or minimization of its effect as regards the relative value of the rest of the evaluation aspects.

With regard to the **scoring systems**, there is a variety of different legal solutions, which range from *mandatory rules* on how to set up scoring systems (Portugal), to *milder guidance* on specific elements such as allocation of scores (France), to a *much greater flexibility* for contracting authorities to come up with their own scoring systems or even to do without them (UK).

As regards the **disclosure** of the sub-criteria and respective weightings, as well as of the scoring system (where it exists), the Court of Justice line of jurisprudence seems to indicate there is a transparency obligation to do so, but the French case law has repeatedly ruled that sub-criteria weightings and scoring systems are not subject to the advanced information requirement. In the UK, the tendency of the case law seems to

be the application of the *ATI* conditions in order to decide whether the scoring systems need to be disclosed. Whereas in Portugal there is a clear legal requirement to disclose sub-criteria, respective weightings, and scoring systems.

It is submitted that since contracting authorities are bound by the information disclosed, there is an **inversely proportional relationship between the degree of disclosure and the margin of discretion left for the contracting authorities to exercise their powers in the evaluation stage**. On the flip side, the more information contracting authorities allow tenderers, the better they are said to be able to optimise their tenders in light of the contracting authorities' preferences which have been disclosed[377].

It has been elsewhere submitted[378] that *disclosing relative or interdependent scoring methodologies does not meet the transparency requirement and may produce a perverse effect from an economics perspective* (see section below). This is echoed in the Portuguese regulations which clearly forbid *relative or interdependent scoring methodologies.* The same cannot be said of the rules, the case law and the practice observed in the UK and France.

Indeed, "it is only possible to publish all details of the scoring method when an absolute scoring method is used. Relative scoring methods can be published as abstract formula, but a supplier can never calculate the scores as they depend on other bids coming in as well. Relative scoring methods will

[377] TH Chen, "An economic approach to public procurement" (2008) 8 Journal of Public Procurement 407.

[378] P Bordalo Faustino, "Evaluation models in public procurement: A comparative law perspective" in M Comba and S Treumer (eds), *Award of contracts in EU procurements* (DøJF 2013) 344.

never guarantee to fit the preferences of the buyer, as their exact form and position depends on the bids coming in. As such, relative scoring methods replace the preferences of a buyer to a certain extent by a lottery, because the lowest price is determined by the market and not by the buyer. Only absolute scoring methods can be used to accurately represent the value functions of the buyer, as the buyer can indicate what he believes to be a good price and quality."[379]

In other words, **relative scoring methods** risk being *arbitrary* because the contracting authority has no control over the reference levels for allocating scores, which are dictated by the *actual* aspects offered by the tenderers. The lowest price, the best quality, the shortest delivery period etc. are dependent on the universe of tenders submitted to a particular public procurement procedure – and because these aspects are only known after the submission of the respective tenders, this type of scoring method allows for an element of 'chance' (hence the reference to lottery) which may challenge the legal certainty that underpins the rules of the public procurement 'game'.

The abovementioned empirical study concludes that relative or interdependent scoring methods (by reference to the lowest or average price, the highest quality, etc.) encourage the submission of tenders "as close as possible to what they [the tenderers] expect the best or average price will be"[380]. In fact, the *uncertainty* associated with this type of methodology is

[379] J Telgen and F Schonatus, "The effects of full transparency in supplier selection on subjectivity an bid quality" in 4th International Public Procurement Conference Proceedings (Seoul 2010).

[380] GL Albano, F Dinni and R Zampino, "Suppliers' behaviour in competitive tendering: Evidence from the Italian Ministry of Economy and Finance's acquisitions of its services" in 3rd International Public Procurement Conference Proceedings (Amsterdam 2008) 697.

believed to be able to "trigger a precautionary or not aggressive bidders' behavior on the price side."[381] Ultimately, this discussion is about *predictability*, which has been shown to provide incentives for price reduction, the same way it should stimulate an increase in quality.

As regards the **admissibility to elaborate the award criteria or introduce changes to the evaluation methodologies**, the most common approach seems to be to deem that elaboration or those changes *inacceptable*, namely after the deadline for the submission of tenders has expired. This is an absolute rule in Portugal. There might still be some scope for the application of the *ATI* conditions in the period after the submission of tenders but before their opening in the other two jurisdictions. However, in France, the admissibility to change the scoring methods would appear to be capable of being inferred from the abovementioned lack of duty to disclose them in the first place[382].

All in all, it is suggested that the margin for changing the evaluation models tends to be inversely proportional to the extent of the obligation to disclose them. Hence, Portugal configures the extreme case of full disclosure and zero margin for elaborating the award criteria or introducing changes to the evaluation methodologies.

Finally, on the topic of **judicial review of the evaluation methodologies**, it should be observed that the starting point common to all three jurisdictions is the *deferential approach* of courts towards the margin of discretion enjoyed by the

[381] Idem, 686.

[382] This is debatable from the perspective of the transparency principle, as well as in the light of the abovementioned EU case law.

contracting authorities as regards the decision-making process of setting up and applying the said methodologies. This approach determines the extent of the review, which usually consists in a decision of illegality based on the breach of a procedural requirement, or the violation of a public procurement principle.

Thus, courts *tend not to replace contracting authorities in their evaluative task*, in name of the principle of separation of powers. However, there have been cases in the UK and France, mentioned in the respective national chapters above, where the courts *effectively* re-evaluated and *re-scored* the tenders in an apparent display of a significant willingness to exercise judicial control over the contracting authorities margin of discretion. It has been submitted above that this interference of the courts in the essence of the procurement function by contracting authorities is not desirable. This issue is taken for granted in the Portuguese jurisdiction.

7.2.3 Evaluation models used in practice

There are a number of different models in use in practice. Some seem more common than others, like for example the models based on **weighted sums** or 'corrected' weighted sums. There are linear and non-linear techniques for allocating scores (i.e. when there is a direct proportional relationship between an increase in score and a variation in the respective attribute, or not).

It is submitted that in Portugal there is a question of *legality* of the evaluation models in the light of the mandatory legal requirements applicable to the configuration of said models. Whereas, in the UK and France it is rather a question of *suitability* in the context of each procurement procedure, which is to be decided by the contracting authorities through the exercise of their discretionary powers.

More importantly, it is also apparent that relative or interdependent scoring methodologies are frequently used in the UK and France where the lowest price, the best quality, or medians are used as reference levels for the allocation of scores. This is not the case of Portugal, where said methodologies are specifically prohibited.

It has been argued that relative or interdependent scoring methodologies are not adequate in the field of public procurement. Rules of social choice theory have been adduced, such as the independence of irrelevant alternatives, according to which the relative ranking of two tenders, for instance, should not be affected by the arrival on the scene of

a third tender[383]. Others have managed to prove, either theoretically[384] or empirically[385], that absolute or independent scoring methodologies stimulate the submission of more economically advantageous tenders. Indeed, according to one empirical study, "Independent scoring rules facilitate bidding and encourage suppliers to be more aggressive on the economic side. This suggests that interdependent scoring rules are only an obstacle to bidding in already complex procurement environments."[386] Alluding once more to the personal 'insider' perspective of the author of this thesis, it should be mentioned that these considerations have been the motivation behind the Portuguese rule that prohibits relative scoring methods.

[383] TH Chen, "An economic approach to public procurement" (2008) 8 Journal of Public Procurement 412.

[384] J Telgen and F Schonatus, "The effects of full transparency in supplier selection on subjectivity an bid quality" in 4th International Public Procurement Conference Proceedings (Seoul 2010).

[385] GL Albano, F Dinni and R Zampino, "Suppliers' behaviour in competitive tendering: Evidence from the Italian Ministry of Economy and Finance's acquisitions of its services" in 3rd International Public Procurement Conference Proceedings (Amsterdam 2008) 697.

[386] Ibid.

CHAPTER 8 - CONCLUSIONS

8.1 Summary of the main conclusions

Public procurement regulation is generally concerned with *procedural* issues, not the actual *outcome* of the award of public contracts by contracting authorities. This is often based on the belief that impartiality of the award decision – indifferent to its content - could be achieved by the mere compliance with public procurement rules. This has been called 'fétichisme procedural'[387], which denotes a preference for a *formal approach rather than a substantive approach* to public procurement regulation.

However, it could be counter-argued that the opposite logic underpins the rules on award criteria, since their objective is to allow for the selection of the most economically advantageous tender, hence *focusing on the substance of the procurement activity rather than just its form*.

Whether a 'rule-based' (typically, Portugal), a 'discretion-reliant' (typically, the UK), or a 'half-way' (typically, France) approach to public procurement in general, and award criteria in particular, is taken at domestic level, it will impact on the outcome of the public procurement procedures to the extent that it either restricts or broadens the margin of discretion contracting authorities enjoy to make procurement decisions.

There are known **regulatory reasons** behind the different approaches, which are justified by the *national constitutional traditions* of the Member States. These are also visible in the

[387] F Linditch, *Le Droit des Marchés Publics* (5th edn, Dalloz 2009) 28.

procurement culture of each domestic jurisdiction.

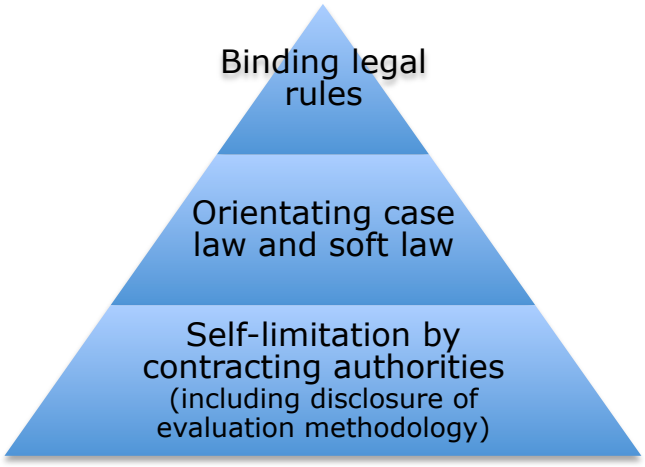
Providing for more *transparency*, or not, is one of the examples discussed above which are framed by the EU public procurement directives but still vary greatly between national legal systems. It is submitted that this is directly related to the **objectives** pursued by each national public procurement system[388], including value for money and fighting corruption. There is no right or wrong way[389], just the more adequate for each jurisdiction at each moment in time.

Drawing an analogy with a suggested illustration of how diverse regulatory levels can afford distinct amounts of discretion to the addressees of said regulation[390], the following figure aims to represent the abstract correlation between the different regulatory layers applicable to the use of award criteria in the context of public procurement procedures and the respective margin of discretion left for contracting authorities to make decisions on that topic:

[388] P Trepte, *Regulating Procurement* (OUP 2004) 386

[389] P Trepte, *Regulating Procurement* (OUP 2004) 385: "There can be no 'one size fits all' model of public procurement regulation."

[390] C Coglianese and E Mendelson, "Meta-Regulation and Self-Regulation" in Baldwin, Cave and Lodge (eds), *The Oxford Handbook of Regulation* (OUP 2010) 152.



It is pertinent to observe that, in practice and regardless of the different degree of intensity of the respective national regulatory approach, contracting authorities in the UK and France appear to exercise identical levels of self-limitation in terms of adhering to more or less complex evaluation methodologies which have the effect of structuring their margin of discretion. The major distinction between the two jurisdictions seems to be associated with the degree of prior disclosure of information related to the details of the evaluation methodology, which tends to be greater in France rather than in the UK.

Less discretion, as a result of the said disclosure, does not mean 'zero discretion' as contracting authorities still retain the freedom to evaluate each of the tenders' features against the respective (sub)criteria. This is more noticeable in respect to qualitative criteria, as quantitative ones might be scored by the mere application of mathematical formulae.

The more intense level of self-limitation of contracting authorities' margin of discretion imposed by the mandatory legal requirements in Portugal means that contracting

authorities are less free namely to decide about the configuration of evaluation models. Nevertheless, as explained in Chapter 6, contracting authorities still retain ‘pockets of discretion’ in order to pursue their evaluative job, which should not be regarded as automatic. In fact, only the use of mathematical formulae is equivalent to ‘zero discretion’ in the Portuguese system.

8.2 Learning from others

It is proposed that the understanding gained from investigating and comparing different jurisdictions should be more conducive to the sharing of lessons learned rather than the drawing of recommendations[391].

Having said that, some proposals are put forward with a view to promote the methodological approach that underpins this thesis: the belief that learning from others is the decisive driver to knowledge development.

Firstly, it is submitted that a ***formal forum for the exchange of relevant public procurement practices***, namely as regards the use and application of the award criteria, should be set up at EU level. The aim would be to learn not only how contracting authorities in all Member States implement EU mandatory rules on public procurement, but also how they exercise their discretionary powers as regards those areas where there is freedom to make decisions solely (or partly) based on the contracting authorities' value judgments. It might be argued that the realm of this decision-making freedom is outside the legal considerations which frame the public procurement rules. However, it should be noted that, on the one hand, compliance with the general principles of law shall always constitute a limitation on the exercise of these discretionary powers. And, on the other hand, it is uncanny that the advancement of public procurement knowledge should ignore the 'regulation free'

[391] In the sense that this is not an attempt to extract and impose universal concepts, in the words of P Trepte, *Regulating Procurement* (OUP 2004) 388.

aspects of the procuring activity, since the latter are as likely to determine the success of any public procurement procedure as the mandatory procedural requirements.

There is an informal European-wide co-operation network in the field of public procurement, which dates back to 2003: the ***Public Procurement Network***[392]. It is, however, apparent that its activity does not amount to a sharing of experiences by public procurement practitioners, nor does it intend to constitute a repository of shared knowledge. The same could be said of several groups of experts on different public procurement topics set up under the auspices of the European Commission[393].

Secondly, it is also submitted that consideration should be taken of the ***possibility to use the Open Method of Coordination (OMC) as an alternative method of governance in the field of public procurement at EU level***. OMC would be based on mechanisms for benchmarking and exchanging of relevant practices between contracting authorities of the Member States, especially on the topic of award criteria. This form of voluntary cooperation between Member States has been used in other policy areas, such as social protection and social inclusion, pensions and healthcare, research and development, education, information society, environment, immigration, etc.

OMC seems to be a particularly suitable method to fulfill the objective of sharing lessons learned regarding the exercise of contracting authorities discretionary powers in the context of public procurement award criteria mainly because its

[392] Accessible via www.publicprocurementnetwork.org/.

[393] Accessible via http://ec.europa.eu/growth/single-market/public-procurement/studies-networks/index_en.htm.

regulatory aim is to promote convergence in policy areas which fall under the competence of Member States (at least partially). This is the case of the margin of discretion accorded to contracting authorities when choosing and applying award criteria. This *cooperation instrument* would be expected to contribute to the improvement of public procurement practice in the field of award criteria.

Thirdly, it is further submitted that a ***soft law instrument*** providing explanations and illustrations of the use of award criteria in the context of public procurement procedures should also prove useful to contracting authorities. Whether this would take the form of a recommendation or a communication is a matter for the European Commission to decide. Indeed, they are both categorized as *steering instruments of EU soft law*, which "aim at establishing or giving further effect to Community objectives and policy or related policy areas. Sometimes this is done in a rather political and declaratory way - in declarations and conclusions - but often also with a view to establishing closer cooperation or even harmonisation between the Member States in a non-binding way, as occurs in particular in recommendations, resolutions and codes of conduct."[394]

There is a known tradition of communications by the European Commission in the field of public procurement. For example, the communication on pre-commercial procurement[395] states that its aim "is to draw the attention of Member States to the

[394] L Senden, "Soft Law, Self-Regulation and Co-Regulation in European Law: Where do they meet?" [2005] 9.1 Electronic Journal of Comparative Law 23.

[395] European Commission, Communication, *Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe*, COM(2007) 799 final, of December 14, 2007.

existing but underutilised opportunity of pre-commercial procurement. The Annex provides, by way of example, one possible implementation in line with the existing legal framework."[396] In a similar way, one of the objectives of the communication on contract awards not or not fully subject to the provisions of the Public Procurement Directives[397] is said to be the suggestion of 'best practices' in order to help the Member States to reap the full benefit of the internal market.

The underpinning idea of such a soft law instrument to be produced by the European Commission is alluded to in the ***2nd paragraph of Recital (121) 2014 Public Procurement Directive***:

> "Better guidance, information and support to contracting authorities and economic operators could also greatly contribute to enhancing the efficiency of public procurement, *through better knowledge*, increased legal certainty and professionalisation of procurement practices. Such guidance should be made available to contracting authorities and economic operators wherever it appears necessary to improve correct application of the rules. The guidance to be provided could cover *all matters relevant to public procurement*, such as acquisition planning, procedures, choice of techniques and instruments and good practices in the conduct of the procedures." (emphasis added)

Indeed, the *provision of guidance, information and support*, in order to improve public procurement practices via the

[396] Ibid, 3.

[397] European Commission, *Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives* [2006] OJ C179/02.

development of a body of knowledge derived from and shared by all Members States, is proposed by this thesis as the way forward in terms of bridging the gap between form (mandatory procedural rules) and substance (discretionary procurement content).

Finally, it is argued that ***the above mentioned proposals complement each other***, and that their successful implementation largely depends on the way they feed each other and allow for the setting up of a knowledge sharing system between all Member States. **The functioning of this system should not be about imposing 'best practices' but rather identifying 'relevant practices' and making them available for contracting authorities to use and adapt to the specific circumstances of their public procurement procedures.**

BIBLIOGRAPHY

Albano GL, Dinni F and Zampino R, "Suppliers' behaviour in competitive tendering: Evidence from the Italian Ministry of Economy and Finance's acquisitions of its services" in 3rd International Public Procurement Conference Proceedings (Amsterdam 2008)

Amaral e Almeida J and Fernández Sánchez P, *Temas de Contratação Pública I* (Coimbra Editora 2011)

Andrade da Silva J, *Dicionário dos Contratos Públicos* (Almedina 2010)

Andrade da Silva J, *Código dos Contratos Públicos – Comentado e Anotado* (Almedina 2008)

Arnould J, "Environmental criteria and the EC procurement directives: a note on the Concordia Bus Finland case" (2003) 1 Public Procurement Law Review NA3-8

Arnould J, "A turning point in the use of additional award criteria?" (2001) 1 Public Procurement Law Review NA13-19

Arrowsmith S, "Rethinking the approach to economic justifications under the EU's free movement rules" (article accepted for publication in Current Legal Problems following peer review, 2015 – the pre-copyedited, author-produced version of this article is available online at http://www.nottingham.ac.uk/pprg/documentsarchive/economic-derogations-revised.docx)

Arrowsmith S, *The Law of Public and Utilities Procurement* (3rd edn, Sweet&Maxwell 2014)

Arrowsmith S, "Understanding the purpose of the EU' procurement directives: the limited role of the EU regime and some proposals for reform" in SCA (ed), The Cost of Different Goals of Public Procurement (Västerås 2012) 44-118

Arrowsmith S, "Modernising the European Union's public procurement regime: a blueprint for real simplicity and flexibility" (2012) 3 Public Procurement Law Review 71-82

Arrowsmith S, "The purpose of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies", in C Barnard and M Gehring (eds), *Cambridge*

Yearbook of European Legal Studies (vol.14, Hart Publishing 2011-2012)

Arrowsmith S, "Horizontal Policies in Public Procurement: A Taxonomy" (2010) 10/2 Journal of Public Procurement 149-186

Arrowsmith S and Kunzlik P (eds), *Social and environmental policies in EC procurement law: new directives and new directions* (CUP 2009)

Arrowsmith S, "The past and future evolution of EC procurement law: From framework to common code?" (2006) 35/3 Public Contract Law Journal 338-384

Arrowsmith S, *The Law of Public and Utilities Procurement* (2nd edn, Sweet & Maxwell 2005)

Arrowsmith S, "An assessment of the new legislative package on public procurement" (2004) 41 CMLR 1277-1325

Arrowsmith S, "The EC Procurement Directives, National Procurement Policies and Better Governance" (2002) 27(1) European Law Review 3-24

Arrowsmith S, "The procurement rules in the UK: An analysis of the Harmon case" (2000) 9 Public Procurement Law Review 120.

Arrowsmith S (ed), *EU Public Procurement Law: An Introduction* (available at http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf and last accessed on 28/09/2015)

Arrowsmith S, *A Guide to the Procurement Cases of the Court of Justice* (Earlsgate Press 1992)

Barnard C, *The Substantive Law of the EU: The Four Freedoms* (3rd edn, OUP 2010)

Bordalo Faustino P, "Award criteria in the new EU Directive on public procurement" (2014) 3 Public Procurement Law Review 124-133

Bordalo Faustino P, "Regulating discretion in public procurement: an anti-corruption tool?" in Racca G and Yukins C, *Integrity and Efficiency in Sustainable Public Contracts* (Bruylant 2014) 147-151

Bordalo Faustino P, "Evaluation models in public procurement: A comparative law perspective" in M Comba and S Treumer (eds), *Award of contracts in EU procurements* (DøJF 2013) 339-358

Bovis C, *EU Public Procurement Law* (Edward Elgar 2007)

Bovis C, EU Public Procurement: Case Law and Regulation (OUP 2006)

Bovis C, "The new public procurement regime: A different perspective on the integration of public markets of the European Union" (2006) 12/1 European Public Law 73-109

Bovis C, "The new public procurement regime of the European Union: a critical analysis of policy, law and jurisprudence" (2005) 30/5 European Law Review 607-630

Braun P, "The use of qualitative award criteria and the difference between award and qualification criteria: a note on T-4/01, Renco SpA v Council of the European Union" (2003) 5 Public Procurement Law Review NA116-119

Brent R, *Directives: Rights and Remedies in English and Community Law* (1st ed, LLP, London 2011)

Brown A, "Evaluation criteria for the supply of home respiratory treatment services in Spain: a note on C-234/03 Contse SA, Vivisol and Oxigen Salud SA v Insalud" (2006) 2 Public Procurement Law Review NA48-51

Brown A, "The right to choose between the criteria of lowest price and most economically advantageous tender: Case C-247/02 Sintesi SpA v Autorita per la Vigilanza sui Lavori Pubblici" (2005) 2 Public Procurement Law Review NA15-18

Brown A, "Award criteria under the E.C. Procurement Directives: a note on the SIAC Construction case" (2002) 2 NA25-29

Brunning S, "Clarity of tender requirements and errors in evaluation: Healthcare At Home Ltd v The Common Services Agency" (2013) 4 Public Procurement Law Review NA101-NA105

Brunning S, "United Kingdom - Cabinet Office provides advice to contracting authorities: Public Services (Social Value) Act 2012" (2013) 3 Public Procurement Law Review NA84-87

Caranta R, "The changes to the Public Contracts Directives and the story they tell about how EU law works" (2015) 52 Common Market Law Review 391-460

Caranta R, "Award criteria under EU law (old and new)" in Comba M and Treumer S (eds), *Award of contracts in EU procurements* (DøJF Publishing 2013) 21-38

Caranta R, "Transparence et Concurrence" in Noguellou R and Stelken U (dirs), *Droit Comparé des Contrats Publics / Comparative Law on Public Contracts* (Bruylant 2010) 145-172

Caranta R and Trybus M (eds), *The Law of Green and Social Procurement in Europe* (Djøf Publishing 2010)

Chabanol D, "Le choix du contractant:pouvoir discrétionnaire ou lié?" in Clamour G an Ubaud-Bergeron M, *Contrats Publics - Mélages en l'honneur du Professeur Michel Guibal* (vol.I, Montpellier 2006)

Chalmers D, Davies G and Monti G, *European Union Law: Text and Materials* (2nd edn, CUP 2010)

Chen TH, "An economic approach to public procurement" (2008) 8 Journal of Public Procurement 407-430

Coglianese C and Mendelson E, "Meta-Regulation and Self-Regulation" in Baldwin, Cave and Lodge (eds), *The Oxford Handbook of Regulation* (OUP 2010) 146-168

Craig P, *Administrative Law* (6th edn, Sweet & Maxwell 2008)

Craig P and de Burca G, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011)

Crown Commercial Service, *The Public Contracts Regulations 2015 - Guidance on Awarding Contracts* (available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417934/Guidance_on_Awarding_Contracts.pdf and last accessed on 28/09/2015)

Crown Commercial Service, *Procurement Policy Notice – Public Procurement and the Public Sector Equality Duty* (Information Note 1/13, 28 January 2013)

Crown Commercial Service, *Procurement Policy Note – The Public Services (Social Value) Act 2012* (Information Note 10/12, 20 December 2012)

Diniz de Ayala B, "Liberdade e vinculacao da Administracao na avaliacao de propostas no ambito da contratacao publica" (2005) 49 Cadernos de Justica Administrativa 40-62

Diniz de Ayala B, *O (défice de) controlo judicial da margem de livre decisão administrativa* (Lex 1995)

Dischendorfer M, "Attaching specific weight to the subheadings of an award criterion under the EC Public Procurement Directive: a note on Case C-331/04" (2006) 2 Public Procurement Law Review NA55-58

Dischendorfer M, "The rules on award criteria under the EC procurement Directives and the effect of using unlawful criteria: the EVN case" (2004) 3 Public Procurement Law Review NA74-84

Dischendorfer M, "The EBS case: definition of a "body governed by public law", limitation periods, and publicity requirements for scoring methods" (2003) 2 Public Procurement Law Review NA34-40

Direction des Affaires Juridiques - Ministère de l'Économie et des Finances, *Le prix dans les marchés publics: Guide et recommandations* (2013) (available at http://www.economie.gouv.fr/files/files/directions_services/daj/marches_publics/oeap/concertation/autres_groupes_travail/guide-prix-dans-mp.pdf and last accessed on 27/09/2015)

Dragos D and Neamtu B, "Sustainable public procurement: Life-cycle costing in the new EU directive proposal", (2013) 1 European Procurement & Public Private Partnership Law Review 19-30.

Durviaux AL, *Logique de marché et marché public en droit communautaire* (Larcier 2006)

Esteves de Oliveira M and Esteves de Oliveira R, *Concursos e Outros Procedimentos de Contratacao Publica* (Almedina 2011)

Estorninho MJ, *Curso de Direito dos Contratos Publicos* (Almedina 2012)

Estorninho MJ, *Direito Europeu dos Contratos Públicos* (Almedina 2006)

Fernández Martín JM, *The EC Public Procurement Rules: A Critical Analysis* (Clarendon Press 1996)

Frot O, *Marches Publics: Comment choisir le mieux-disant?* (2nd edn, AFNOR 2008)

Galligan DJ, *Discretionary Powers* (Clarendon Press 1986)

Gonçalves P, *Direito dos Contratos Públicos* (Almedina 2015)

Gouveia Martins A, "Apreciacao de propostas e respectiva ponderação no regime das empreitadas de obras publicas" (2004) 46 Cadernos de Justica Administrativa 26-40

Gruber G, Gruber T, Mille A and Sachs M, *Public Procurement in the European Union* (2nd edn, Graz 2009)

Guettier C, *Droit des contrats administratifs* (3rd edn, PUF 2011)

Guibal M and Charrel N, *Code commenté des marches publics* (6th edn, Le Moniteur 2013)

Hansen C, *Contracts not covered or not fully covered by the Public Sector Directive* (DJøF Publishing 2012)

Henty P, "The rules on selection and award criteria and the margin of discretion for contracting authorities: Willmott Dixon Partnership Limited v London Borough of Hammersmith and Fulham" (2015) 5 Public Procurement Law Review NA178-NA181

Henty P, "Time limits for proceedings and prior disclosure of material relating to the award" (2011) 5 Public Procurement Law Review NA213-221

Henty P, "Disclosure of information and time limits for proceedings in public procurement cases: Mears Ltd v Leeds City Council" (2011) 3 Public Procurement Law Review NA93-96

Jacob M, Ravenel P and Pasquier-Desvignes A, *L'offre economiquement la plus avantageuse* (2nd edn, Le Moniteur 2004)

Jacob M and Pictet J, "A propos des notes negatives dans l'analyse des offes", (2013) 131 Contrats Publics 73-75.

Kelman S, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (The AEI Press 1990)

Kotsonis T, "Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market" (2011) 3 PPLR NA51-58

Kotsonis T, "Discriminatory selection criteria and the nature of award criteria - applying the Lianakis ruling in a utilities context: Commission v Greece (C-199/07)" (2010) 3 Public Procurement Law Review NA77-86.

Kotsonis T, "The nature of award criteria and the subsequent stipulation of weightings and sub-criteria: Lianakis v Dimos Alexandroupolis (C-532/06)" (2008) 4 Public Procurement Law Review NA128-134

Lajoye C, *Droit des Marchés publics* (5th edn, Lextenso Éditions 2012)

Lee P, "Implications of the Lianakis decision" (2010) 2 Public Procurement Law Review 47-56

Lichère F, Droit des contracts publics (2nd edn, Dalloz 2014)

Lichère F, "Award of contracts covered by the EU rules in France" in Comba M and Treumer S (eds), *Award of contracts in EU procurements* (DøJF Publishing 2013) 69-89

Linditch F, *Le Droit des Marches Publics* (5th edn, Dalloz 2009)

Mateus R, Ferreira JA and Carreira J, "Full disclosure of tender evaluation models: Background and application in Portuguese public procurement" (2010) 16 Journal of Purchasing & Supply Management 206-2015

McCrudden C, *Buying Social Justice: Equality, Government Procurement, & Legal Change* (OUP 2007)

McGovern P, "Issues relating to award criteria and limitation periods: the case of Irish Waste Services Limited v Northern Ireland Water Limited and others" (2013) 5 Public Procurement Law Review NA133-NA135

McGovern P, "Bias and error in the evaluation of tenders: the substantive hearing in Traffic Signs and Equipment Ltd v Department For Regional Development and Department of Finance and Personnel" (2011) 4 Public Procurement Law Review NA144-148

Ménéménis A, *Code des Marches Publics et Autres Contrats – Commenté* (6th edn, Dalloz 2013)

Neumayr F, "Value for money v. equal treatment: the relationship between the seemingly overriding national rationale for regulating public procurement and the fundamental E.C. principle of equal treatment" (2002) 4 Public Procurement Law Review 215-234

Nielsen R and Treumer S (eds), *The New EU Public Procurement Directives* (DJøF Publishing 2005)

Nicinski S, *Droit Public des Affaires* (4th edn, LGDJ 2014)

Olazabal Cabral M, "O concurso public no Código dos Contratos Públicos" in Gonçalves P (org), *Estudos de Contratação Pública I* (Coimbra Editora 2008)

Petersen Z, "Refining the rules on the distinction between selection and award criteria - Evropaiki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission (T-589/08)" (2011) 6 Public Procurement Law Review NA246-249

Pictet J and Bollinger D, *Adjuger un marche au mieux-disant* (PPUR 2003)

Poulsen ST, Jakobsen PS and Kalsmose-Hjelmborg SE, *EU Public Procurement Law* (2nd edn, DJøF Publishing 2012)

Procurement Lawyers' Association, *Issues in Evaluating Public Sector Tenders* (2010) (available at http://www.procurementlawyers.org/Docs/Evaluation%20Paper.pdf and last accessed on 29/09/2015)

Raimundo MA, "Grelha + Nota = Fundamentacao. A questao da fundamentacao numerica" (2015) 109 Cadernos de Justica Administrativa 30-46

Raimundo MA, *A formação dos contratos públicos* (AAFDL 2013)

Ribot C, *La passation des marchés publics* (Le Moniteur 2007)

Richer L, *Droit des contrats publics* (9th edn, LGDJ 2014)

Richer L, *L'Europe des marchés publics* (LGDJ 2009)

Sánchez Graells A, *Public Procurement and the EU Competition Rules* (Hart Publishing 2011)

Semple A, "The Link to the Subject-Matter: A Glass Ceiling for Sustainable Public Contracts?" (working paper presented at

the University of Oslo as part of the European Law Conference 2014, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2565051 and last accessed on 28/09/2015)

Senden L, "Soft Law, Self-Regulation and Co-Regulation in European Law: Where do they meet?" [2005] 9.1 Electronic Journal of Comparative Law 1-26

Sérvulo Correia JM, *Legalidade e Autonomia Contratual nos Contratos Administrativos* (Almedina 2003)

Smith S, "C-538/13 *eVigilo*: Dealing with Bias and Conflict of Interest, Time Limits for Making a Claim ans Acceptability of Allegedly Abstract Award Criteria", (2015) 4 Public Procurement Law Review NA104-NA108

Smith S, "Undisclosed evaluation criteria and failure to appropriately notify reasons for rejection of a tender for Vassilikos power station: European Commission v Cyprus (C-251/09)" (2011) 3 Public Procurement Law Review NA74-76

Smith S, "Irish translation services: disclosure of and changes to the weighting of award criteria for "Annex II B" (non-priority services)" (2011) 2 Public Procurement Law Review NA9-12

Telgen J and Schonatus J, "The effects of full transparency in supplier selection on subjectivity an bid quality" in 4th International Public Procurement Conference Proceedings (Seoul 2010)

Telles P, "Awarding of Public Contracts in the United Kingdom" in Comba M and Treumer S (eds), *Award of Contracts in EU Procurements* (DjøF Publishing 2013) 251-272

Trepte P, "The Contracting Authority as Purchaser and Regulator: Should the Procurement Rules Regulate what we Buy?" in Ølykke, Risvig and Tvarnø (eds), *Eu Procurement Directives – Modernisation, Growth and Innovation* (DjøF Publishing 2012) 85-105

Trepte P, *Public Procurement in the EU* (2nd edn, OUP 2007)

Trepte P, "Transparency requirements" in R Nielsen and S Treumer (eds), *The New EU Public Procurement Directives* (DJøF Publishing 2005) 49-65

Trepte P, *Regulating Procurement* (OUP 2004)

Treumer S, "The distinction between selection and award criteria in EC public procurement law - a rule without exception?" (2009) 3 Public Procurement Law Review 103-111

Treumer S, "The discretionary powers of contracting entities - towards a flexible approach in the recent case law of the European Court of Justice?" (2006) 3 Public Procurement Law Review 71-85

Trybus M, "Public contracts in European Union internal market law: foundations and requirements" in R Noguellou and U Stelkens (dirs), *Droit Comparé des Contrats Publics / Comparative Law on Public Contracts* (Bruylant 2010) 81-121

Turpin C, Government Contracts (Penguin 1972)

Viana C, *Os princípios comunitários na contratação pública* (Coimbra Editora 2007)

Watson A, *Legal Transplants* (Scottish Academic Press 1974)