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The Protection of Employment in European Public Procurement and the Role of Domestic Implementation*

Zusammenfassung

In den letzten Jahrzehnten hat sich das EU-Vergaberecht dahin gehend entwickelt, soziale Ziele unter den von der vergebenden Entität zu berücksichtigenden Faktoren zunehmend stärker zu gewichten. In diesem Beitrag untersuchen wir das Potential dieser Entwicklung anhand von sozialen Klauseln, die einen Arbeitgeber, der mit der Übernahme einer Dienstleistung beauftragt wurde, dazu verpflichten sollen, die vom früheren Dienstleister eingestellten Arbeitskräfte beizubehalten. Wir sind der Ansicht, dass diese Weiterbeschäftigungsklauseln grundsätzlich mit den fundamentalen Grundfreiheiten der EU-Verträge vereinbar sind.

Résumé

Au cours des dernières décennies, la législation de l'UE sur les marchés publics a évolué en incluant des préoccupations sociales entre les facteurs à prendre en compte par l'entité adjudicatrice. Entre cette préoccupation, les clauses sociales de réembauche sont assez diffusées dans les conventions collectives, particulièrement parmi les secteurs labour-intensive. Dans notre article, nous examinons le potentiel de ce type de clauses en soulignant les questions de proportionnalité entre les droits des salariés et les libertés fondamentales protégées par les traités de l'UE.

1. Introduction

The trend towards outsourcing the production of goods and the provision of services is typical of many activities in the private sector, where since years have been grown practices of disintegration and re-integration of firms' productive cycles. However, albeit qualitatively different, even in the public sector a similar trend has emerged, particularly with regards to the functions of central States and other public entities.[1]

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1 A.C.L. Davies, *Government as Socially Responsible Market Actor After Regio Post*, in A. Sanchez Graells (ed.), *Smart Public Procurement and Labour Standards. Pushing the Discussion after Regio Post*, Hart Publishing, 2018, 165, rightly observes that «Over the past 30 or 40 years, governments around the world have sought to make greater use of the private sector to supply the infrastructure, goods and services required for the achievement of public

For this reason public procurements have gained a pivotal role, both at EU level and at the level of the single Member States, as clearly shown by the fact that between 2012 and 2015 Member States have spent an average of 14% of the European GDP in public procurement procedures. [2]

Through the rules on public procurements, States ensure an efficient allocation of public expenditure: by the one side, in fact, public administrations are obliged to contract with specialised producers and service providers, who bargain on competitive conditions compared with competitors. [3] By the other side, contracting authorities may direct the public contract in pursuit of social objectives, respecting the principles of the TFEU, in particular the free movement of goods, freedom of establishment and freedom to provide services.

According to the Recitals of Directive 2014/24,

> *«Public procurement plays a key role in the Europe 2020 strategy […] as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council and Directive 2004/18/EC of the European Parliament and of the Council should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals […].»*[4]

Such commitment reflects the same goals of the ILO Convention no. 94 of 1949: public contracts must reflect the need to preserve public interests, particularly that of maintaining certain conditions and levels of employment.[5]

The consideration of supranational sources allows to investigate on the conditions and the limits on the use of social clauses directed to safeguard employment in public procurements, being a clear example of how the respective rules and norms must comply also with social objectives.

In this article we advocate that the attitude of the EU legislature towards social issues has substantially changed since the repeal of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts

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policy objectives». See also, S. Arrowsmith and A. Davies (eds.), *Public Procurement: Global Revolution*, Kluwer Law International, 1998.

2 European Commission, Public Procurement overview, at ec.europa.eu/growth/single-market/public-procurement.en.

3 A.C.L. Davies, *supra* note 1, at 165, who notes that «There is widespread acceptance of the view that it is often more cost-effective to put tasks out to tender, and to rely on the expertise of private firms – subject to competitive pressure when contracts are awarded or renewed – to deliver in accordance with agreed budget targets and quality standards, than to attempt to tackle everything 'in house'».

4 Recital n. 2, Directive 2014/24/EU.

5 ILO, *Labour Clauses (Public Contracts) Convention, 1949 (No. 94) and Recommendation (No. 84). A practical Guide*, Geneva, 2008.

and public service contracts[6] and the adoption of Directive 2014/24/EU on public procurement.[7] That shift should not be underestimated when it comes to assessing the compatibility with the internal market rules (i.e., fundamental freedoms) of legislative measures introduced by Member States (MSs) to enhance social goals promoted by collective agreements. Indeed, balancing these measures with internal market freedoms may be lead on the basis of an increased appreciation, at the EU constitutional level, of some provisions contained in the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), which may have an impact on the future legislative initiatives announced after the European Pillar of Social Rights, proclaimed by European Parliament, the Council, and the Commission on 16 November 2017.[8]

2. Varieties of Social Clauses

'Social clauses' can be defined as all of those preoccupations relating to the position of employees involved in mergers, acquisitions, and outsourcing processes. Some are contained in supranational provisions,[9] while others are contained in international treaties, including those involving the external action by the European Union (EU).[10] Moreover, social clauses are widespread in collective agreements concluded at the individual (enterprise), national, sectoral (branch), and regional levels. Their use has dramatically increased in parallel with the globalisation of markets and frequent tur-

6 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004] OJ L 134/114.

7 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, [2014] OJ L 94/65.

8 See in https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en#documents.

9 ILO Convention no. 84 and ILO Recommendation no. 94, of 1949.

10 G. Gruni, *Towards a Sustainable World Trade Law? The Commercial Policy of the European Union after Opinion 2/15 CJEU*, in *Global Trade and Customs Journal*, 2018, 5; P. Leenknegt, *EU Trade Policy and International Labour Standards: The View from the ILO*, in R. Blanpain, *Protecting Labour Rights in a Multi-Polar Supply Chain and Mobile Global Economy*, Kluwer Law International, 2015, 73. See also Court of Justice of the EU (CJEU) Opinion No. 2/15 of 16 May 2017, ECLI:EU:C:2017:376, on commercial policy of the EU, observing that Point 13 of the Free Trade Agreement between the EU and Singapore plays an essential role in the envisaged agreement so that 'it is also specific in nature because a breach of the provisions concerning social protection of workers and environmental protection, set out in that chapter, authorises the other Party — in accordance with the rule of customary international law codified in Article 60(1) of the Convention on the law of treaties, signed in Vienna on 23 May 1969 (*United Nations Treaty Series*, vol. 1155, p. 331; 'the Vienna Convention'), which applies in relations between the European Union and third States — to terminate or suspend the liberalisation, provided for in the other provisions of the envisaged agreement, of that trade'.

nover of service providers as a response to the need to ensure the basic terms and conditions of employment for workers employed in the services sector.[11]

Contrary to the prototype of a social clause focused on the protection of workers by assuring them minimum standards, social rehire clauses can be defined as mechanisms aimed to impose, on an employer taking over a service, an obligation to employ all or part of the workforce previously employed by the former service provider, or at least give them priority in future hiring.

Social rehire clauses are especially prevalent in those service areas commonly defined as labour-intensive, where the added value results more from the work performed than from other factors (capital, machines, etc.).

The obligation contained in such social rehire clauses is particularly crucial in circumstances that fall outside the scope of the EU directive on the protection of acquired rights in case of transfer of undertakings, which requires continuity of employment contracts from the transferor to the transferee.[12]

The use of social rehire clauses is typically associated with different rationales. The most obvious is that they benefit the employees involved by allowing them to keep their employment contract, albeit with another service provider. However, it could also be said that such clauses allow the new employer to engage a workforce that is already qualified and trained for the specific tasks to be accomplished. Eventually, they contribute to alleviate the burden on the former employer of starting collective redundancy procedures. Social rehire clauses, therefore, can be seen as a typical mechanism facilitating the smooth functioning of the market while protecting sectoral levels of employment. At the same time, however, they establish a serious limitation on the new employer's freedom to conduct its business, in that they limit – in whole or in part – its discretion to choose the employees it wants to employ to provide the service.

3. From Frigidity to Awareness: The Tardy Affirmation of Social Preoccupations in Public Procurement Directives

The social implications of the execution of public contracts have long been denied recognition by the legislature at the EU level. As a consequence, that they did not have a substantial impact on the jurisprudence of the CJEU.

To date, in fact, the CJEU has only ruled in two cases on social rehire clauses, in the specific case of the airport ground-handling sector, deciding not to allow MSs keeping the workforce previously employed therein, mainly centering its arguments on the letter and on the aims of the relevant directive (Directive 96/67).[13]

11 B. Hepple, *Labour Laws and Global Trade*, Hart, 2005.

12 See Article 3, Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L 82/16.

13 In the case CJEU, 9 December 2004, C-460/02, *Commission v. Italy*, ECLI:EU:C:2004:780, the Court held that the obligation imposed by MSs on the new service provider "to take over the staff of the previous supplier puts potential new competitors at a disadvantage in relation to established undertakings and jeopardises the opening-up of the ground-handling

A different scenario can be observed in the area of public procurement. The first directives on public procurement[14] did not contain any reference to the protection of workers employed by the selected provider, and could therefore be attributed to a model of 'negative integration' in the EU's predecessor, the European Community, which focused exclusively on the removal of barriers to the free movement of people, goods, services, and capital.[15]

Since the second half of the 1990 s, one can find some awareness within the European institutions of the importance of the role that public administrations and the awarding entities themselves play in implementing the various aspects of social policy in concluding their contracts. The Commission Green Paper of 27 November 1996, entitled *Public Procurement in the European Union: Exploring the Way Forward* states that

> *«The European Union's social policy contributes to promoting a high level of employment and social protection (Article 2 of the EC Treaty), the free movement of workers, equality of opportunity between men and women, stronger economic and social cohesion, better living and working conditions, a high level of health protection, high standards of education and training and the integration of the disabled and other disadvantaged groups into society.' For this reason, 'Contracting authorities and contracting entities may be called upon to implement various aspects of social policy when awarding their contracts, as public procurement is a tool that can be used to influence significantly the behaviour of economic operators. As examples of the pursuit of social policy objectives, one can mention legal obligations relating to employment protection and working conditions binding in the locality where a works contract is being performed or so-called "positive action.»*[16]

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markets, thereby undermining the effectiveness of Directive 96/67" (para. 34). In similar terms, CJEU, 14 July 2005, C-386/03, *Commission v. Germany*, ECLI:EU:C:2005:461, in which the Court held that the German legislation at stake brought the "risk that it would impair the rational use of airport infrastructures and the reduction of the costs of the services charged to users, thus jeopardising the opening-up of the ground-handling markets and the useful effect of Directive 96/67" (para. 29).

14 Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts [1971] OJ L 185/5 (repealed and replaced); Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts [1977] OJ L 13/1 (repealed and replaced); Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [1992] OJ L 209/1 (repealed and replaced); Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts [1993] OJ L 199/1 (repealed); and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [1993] OJ L 199/54 (repealed).

15 M.E. Comba, *Variations in the Scope of the New EU Public Procurement Directives of 2014: Efficiency in public spending and a major role of the approximation of laws*, in F. Lichter, R. Caranta, S. Treumer (eds.), *Modernising Public Procurement: The New Directive*, DJOF, 2014, 29. See also F. Scarpelli, *La dimensione sociale nella regolazione degli appalti pubblici*, in M.T. Carinci, C. Cester, M.G. Mattarolo, F. Scarpelli (eds.), *Tutela e sicurezza del lavoro negli appalti privati e pubblici. Inquadramento giuridico ed effettività*, Giappichelli, 2011, 307.

16 COM (96) 583 final.

The successor directive, Directive 2004/18/EC – the legislative response to the 2001 Commission Communication on the law applicable to public procurement and the possibilities for integrating social considerations into public procurement[17] – left the instrumentality of the rules on public procurement separate and apart from the aims of favouring free circulation of services and protecting the interests of economic operators in adjudication.[18] The preambles to Directive 2004/18/EC clarify the objective of providing rules able to obtain the best offer with regards to quality and price, as well as that of guaranteeing equal opportunities and occupation through the use of 'sheltered workshops' and 'sheltered employment programmes' for the integration or reintegration of people with disabilities in the labour market.[19] Article 19 of Directive 2004/18/EC then mirrors this narrow approach by leaving the MSs the ability to reserve the right to participate in public contract award procedures to the cited categories of disfavored persons.

It is only with the 2011 Green Paper, entitled 'Towards a More Efficient European Procurement Market',[20] that the EU Commission demonstrates visible attention to the social aspects of public procurement contracts,[21] and attempts to respond to various controversies arising from some cases decided by the Court of Justice of the European Union (CJEU).[22] That attention culminated in the adoption of three distinct directives on different aspects of public procurement,[23] the most relevant of which is Directive 2014/24/EU.[24]

Chapter II of Directive 2014/24/EU, entitled 'General Rules', begins with a crucial norm (Article 18, Principles of Procurement) that, on the one hand, enhances the principles of equality and non-discrimination among economic operators (Article 18(1)) and, on the other hand, inextricably intertwines the performance of public contracts with an obligation on the economic operators' part to

> *comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the*

17 COM (2001) 566 final.

18 CJEU, 13 November 2007, C-507/03, *Commission v. Ireland*, ECLI:EU:C:2007:676, par. 27: «the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State».

19 Directive 2004/18, Preamble No. 28.

20 COM (2011) 15 final.

21 See C. Barnard, *Using Procurement Law to Enforce Labour Standards*, in G. Davidov, B. Langille (eds), *The Idea of Labour Law*, OUP, 2011, 256.

22 CJEU, 3 April 2008, C-346/06, *Rüffert*, ECLI:EU:C:2008:189; CJEU, 15 July 2010, C-271/08, *Commission v. Germany*, ECLI:EU:C:2010:426.

23 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (Text with EEA relevance) [2014] OJ L 94/1; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (Text with EEA relevance) [2014] OJ L 94/243.

24 For an overview see R. Caranta, *The Changes to the Public Contracts Directives and the Story They Tell About How EU Law Works*, in *Common Market Law Rev*., 2015, 391.

international environmental, social and labour law provisions listed in Annex X (Article 18(2)).[25]

The preambles to Directive 2014/24/EU make clear that the aims of Article 18(2) include that of integrating «environmental, social and labour requirements into public procurement procedures».[26] Such integration is to be achieved in conformity «with the basic principles of Union law, in particular with a view to ensuring equal treatment».[27]

From the 'general rules' concerning labour preoccupations during the performance stage of the contract derives another crucial norm, one that is fundamental for the perspective here assumed. Article 70 of Directive 2014/24/EU, entitled «Conditions for Performance of Contracts», provides that

«contracting authorities may lay down special conditions relating to the performance of a contract» that may have economic, innovation-related, environmental, social, or employment-related considerations, «provided that they are linked to the subject-matter of the contract».[28]

This last requirement is met when the conditions «relate to the works, supplies or services» to be provided under the contract, according to Article 67(3) of Directive 2014/24/EU.

A correct reading of said Article 70 must take account of the distinction, emerging from the case law of the CJEU, between adjudication criteria and performance conditions. As early as the end of the 1980s, the CJEU was asked whether a contract condition such as that of employing long-term unemployed persons was admissible under EU law. In *Beentjes,*[29] the Court introduced a distinction between an examination of the suitability of contractors to carry out the contracts to be awarded and the award of the contract itself, clarifying that the MSs «remain free to maintain or adopt substantive and procedural rules in regard to public works contracts on condition that they comply with all the relevant provisions of Community law, in particular the prohibitions flowing from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services».[30]

As Article 70 of Directive 2014/24/EU clearly suggests that social and employment considerations may well be included in public procurement contracts, the pivotal question is to understand the extent of the discretion afforded to national legislatures to incorporate such considerations and, in this regard, the ultimate limits deriving from EU law.

25 The list includes a number of ILO Conventions such as No. 87 on Freedom of Association and the Protection of the Right to Organise, No. 98 on the Right to Organise and Collective Bargaining, No. 29 on Forced Labour, No. 105 on the Abolition of Forced Labour, No. 138 on Minimum Age, No. 111 on Discrimination (Employment and Occupation), No. 100 on Equal Remuneration, and No. 182 on Worst Forms of Child Labour.

26 Directive 2014/24, Recital No. 37(1).

27 Directive 2014/24, Recital No. 37(2).

28 Article 70 of Directive 2014/24/EU.

29 CJEU, 20 September 1988, C-31/87, *Beentjes,* ECLI:EU:C:1988:422.

30 CJEU, 20 September 1988, C-31/87, *Beentjes*, para. 20.

The subsequent case law of the CJEU has not yet had an opportunity to rule on these particular questions; rather, it observed that the EU directives on public contracts do not preclude «all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment, provided that that condition is consistent with all the fundamental principles of Community law». However, that criterion should constitute a «condition of performance of the contract and not a criterion for the award of the contract».[31]

4. Admissibility of Social Rehire Clauses Provided by Collective Agreements: The Case Study of the Italian Code of Public Procurement Contracts

The question on the breadth of the MSs' discretion in implementing social rehire clauses is all but theoretical. Independent reports[32] show that the majority of the MSs had not fully transposed Directive 2014/24/EU by its April 2016 deadline, forcing the Commission to start infringement proceedings against a number of them.[33]

Unlike some other EU legal systems that merely transposed Directive 2014/24/EU,[34] the Italian legislature's implementation thereof results in an interesting case study. During the years 2012/2015, Italy has invested an average of around 10% of its GDP in public procurement procedures,[35] which attests the importance of investigating the legal problems arising therein.

In its original version, article 50, Legislative Decree n. 50/2016 (Italian Code on Public Procurement Contracts) which implemented the 2014 Directive, provided that the public administrations "can include" in the calls for tenders, in the notices and in the calls specific social clauses aimed at promoting the employment stability of the personnel employed, foreseeing the application by the contractor, of the sector collec-

31 CJEU, 26 September 2000, C-225/98, *Commission v. France (Nord-Pas-de-Calais)*, ECLI:EU:C:2000:494, paras 52-54.

32 DLA Piper, *Implementation of the 2014 procurement directives across EU Member states*, June 2016; Detons, *A few questions about Implementation of the EU public procurement directives*, June 2016.

33 Formal notices have been issued in May 2016 to: Austria; Luxembourg; Belgium; Malta; Bulgaria; the Netherlands; Croatia; Poland; the Czech Republic; Portugal; Cyprus; Romania; Estonia; Slovenia; Ireland; Finland; Greece; Spain; Latvia; Sweden. Additional information at http://www.howtocrackanut.com/blog/2016/6/14/some-anecdotal-updates-on-the-transposition-of-the-2014-public-procurement-package.

34 *See, e.g.*, the implementation of Directive 2014/24 by France, with Ordonnance n°2015-899 of 23 July 2015 (later amended), which simply translates Article 18(2) adding some clarifications: Art. 38-I states "Les conditions d'exécution d'un marché public peuvent prendre en compte des considérations relatives à l'économie, à l'innovation, à l'environnement, au domaine social ou à l'emploi, à condition qu'elles soient liées à l'objet du marché public. Elles peuvent aussi prendre en compte la politique menée par l'entreprise en matière de lutte contre les discriminations".

35 European Commission, Public Procurement overview, at ec.europa.eu/growth/single-market/public-procurement.en.

tive agreements referred to in Article 51, Legislative Decree n. 81/2015.[36] The norm has been modified by article 30, Legislative Decree n. 56/2017 which made it mandatory for the contracting authorities the inclusion of social rehire clauses in the tender documents. [37] According to the new article 50, Legislative Decree n. 50/2016, as amended in 2017, it is no longer expected that the administrations "can include", but that they "may include" social clauses in the tender documents, with the effect of transforming a discretionary power into a proper obligation. [38]

Rehire clauses, however, are mandatory "particularly" in labour-intensive contracts, where labour costs are more than the total value of the contract.[39]

As a consequence, in labour-intensive contracts, the public administration is required to include in all tender documents a re-hire clause; on the contrary, when the cost of labour is lower, the introduction of social re-hire clauses seems to be left to the discretionary choice of the public authority.[40]

The norm obliges the contracting authorities to include in the tender documents related to the labour intensive contracts, as defined above, the social clauses on employment stability contained in the sectoral collective agreements referred to in article 51, Legislative Decree n. 81/2015.[41] The obligation to re-hire therefore finds its source in the call for tenders, while its content and its concrete modalities are defined by the sector-level collective agreements stipulated by comparatively more representative unions at the national level. These clauses can therefore be defined as "conventional social clauses".

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36 See M. Forlivesi, *Le clausole sociali negli appalti pubblici: il bilanciamento possibile tra tutela del lavoro e ragioni del mercato*, in *WP Massimo D'Antona.it*, n. 276/2015, 2.

37 G. Orlandini, *La clausola sociale negli appalti pubblici diventa obbligatoria (ma resta flessibile)*, in *Diritti & Lavoro*, 2017, n. 4, 6; T.A.R. (acronym of Administrative Regional Tribunal), sez. II, Genova, 21/07/2017, n. 640, in www.dejure.it.

38 G. Orlandini, supra note 37, at 6.

39 See article 50, Legislative Decree n. 50/2016 which applies «[…] with particular regard» to public procurements so-called «labour-intensive».

40 The "preferential" reference to labour intensive public contracts risks in reality to bring the effect of creating a strict equation between labour intensive services and stability or rehire clauses, with the result of excluding their mandatory character every time the costs of workforce are lower that those of the contract itself. The interpretation argued in the text is fully in line with the relation accompanying the adoption of the Legislative Decree n. 56/2017, which can be consulted at: http://documenti.camera.it/apps/nuovosito/attigoverno/Schedalavori/getTesto.ashx?file=0397_F001.pdf&leg=XVII#pagemode=none. Such interpretation is also confirmed by the reasoned opinion given by the Council of State (the highest level of the administrative judiciary system) of last 22 March 2017, which can be consulted at: http://documenti.camera.it/apps/nuovosito/attigoverno/Schedalavori/getTesto.ashx?file=0397_F003.pdf&leg=XVII#pagemode=none.

41 The reference contained in article 51, Legislative Decree n. 81/2015 must be read as referred only to rehire clauses and not to the other conditions regulated by collective labour agreements. If it were not so, article 50, Legislative Decree n. 50/2016 would have the same meaning of article 30, Legislative Decree n. 50/2016, and thus bring to an incoherent interpretation. See, on this point, I. Marimpietri, *La clausola sociale di stabilità nel nuovo codice degli appalti pubblici,* in D. Garofalo (ed.), *Appalti e lavoro. Disciplina pubblicistica*, vol. 1, Giappichelli, 2017, 940.

4.1. Which collective agreements?

The reference to such collective agreements poses, however, numerous interpretative questions on their scope of application, on what kind of collective agreement is recalled by the law, and on which level of collective bargaining is relevant.

First of all, article 50 Legislative Decree n. 50/2016 seems to determine an *ultra partes* application of the sectoral collective agreement, to the extent that it obliges the administrations to incorporate in the procurement documents the re-hire clauses contained therein, regardless of the affiliation of the subcontractor to one of the contracting associations. Article 50, Legislative Decree n. 50/2016 must be interpreted as a parameter-rule setting the minimum level of protection – in terms of employment stability – to be guaranteed in the event that a new contractor takes over a public contract. This avoids a possible contrast with article 39, Part II of the Italian Constitution, which fixes the rules according to which collective agreements may be erga omnes applicable, but which has never been implemented by the Parliament. Therefore, Article 50 is interpreted similarly to article 36 of Workers Statute (the fundamental law no. 300/1970), which imposes to the adjudicating administrations the respect of labour and employment conditions not lower than those provided by sectoral or territorial collective agreements.[42]Article. 50, Legislative Decree n. 50/2016 is therefore to be read as the response of the legislator to the lack of a general rule similar to article 36, Workers Statute on the protection of employment in service provision changes.[43]

Secondly, in sectors where several collective agreements are simultaneously in place, it can be difficult to identify which comparatively more representative unions stipulate one or the other agreement. [44] In fact, if the assessment of the level of comparative representativeness may be easy in some sectors, it is more complex in others, such as services, where it is possible only after a judicial investigation. In the latter cases, competing economic operators cannot identify *ex ante* the conditions of performance of the contract. [45] For this reason, it is considered essential that the contracting public authorities indicate in all tender documents the collective agreement whose application is requested, attaching the relative clauses. [46]

Finally, it is not clear what is the contractual level authorized to regulate social rehire clauses. While, in fact, article 51, Legislative Decree n. 81/2015 refers to the national, territorial and enterprise level collective agreements, stipulated by comparatively more representative unions at national level, article 50, Legislative Decree n.

42 The interpretation of article 36 of the Workers Statute as a parameter-rule has been secured by the italian Constitutional Court: see C. Cost., 1.06.1998, n. 226, in *Foro It.*, 1999, I, 3465.

43 L. Ratti, *Autonomia collettiva e tutela dell'occupazione. Elementi per un inquadramento delle clausole di riassunzione nell'ordinamento multilivello*, Cedam, 2018, 143.

44 See E. Villa, *Crisi della funzione anticoncorrenziale del contratto collettivo nazionale*, in A. Lassandari, F. Martelloni, P. Tullini e C. Zoli (eds.), *La contrattazione collettiva nello spazio economico globale*, BUP, 2017, 74 s.

45 L. Ratti, *supra* note 43*,* at 137.

46 M. Pallini, *Diritto europeo e limiti di ammissibilità delle clausole sociali nella regolazione nazionale degli appalti pubblici di opere e servizi*, in *Giornale di Diritto del Lavoro e di Relazioni Industriali,* 2016, n. 151, 538.

50/2016 refers to sectoral collective agreements, which may be national or territorial. In order to overcome this contradiction, it is possible to consider that the national and territorial collective agreements stipulated by comparatively more representative trade unions at national level can be considered legitimate to regulate social clauses. If this reading is accepted, the reference to article 51, Legislative Decree n. 81/2015 is justified for the sole purpose of identifying the area in which to measure the comparative representativeness. To avoid the occurrence of the uncertainties just mentioned, it would have been preferable to include this reference directly in article 50, Legislative Decree n. 50/2016. If we consider that collective contracting parties regulate erratically social rehire clauses, we understand why it is difficult to make observations valid for all cases.

4.2. What is the procedure designed by conventional rehire clauses?

The majority of conventional social rehire clauses refer to a two-stage procedure.[47]

At first, the actual service provider must inform the relevant trade unions about the number and typology of workers employed in the execution of the contract; similarly must do the successful bidder (new service provider). This information contributes facilitating the start of an eventual consultation process aimed at raising the awareness of all the parties involved about how many employees the new service provider will be obliged to re-hire.

Once this information is delivered, conventional social rehire clauses normally entail a genuine obligation for the new service provider to rehire all or a number of the workers previously employed.

A failure to comply with the obligations encompassed by conventional social rehire clauses gives rise to claims by both the public administration (for breach of the execution of the contract) and individual employees (for a breach of a *facere* obligation), for which the individual may seek specific performance or compensatory damages.

Where the sectoral collective agreement does not contain any social clause, article 50, Legislative Decree n. 50/2016 requires the contracting authority to also define its contents.

Both in case they are regulated by a collective agreement, and when they are substantially defined by the public administration, do social clauses impose on the new contractor an unconditional obligation to rehire all the employees of the previous contractor?

The case law of administrative courts repeatedly intervened on this point, stating that rehire social clauses are in principle capable of jeopardising the freedom of private economic initiative of the incoming contractor.[48]To be legitimate, such social clauses must, in fact, be harmonized and made compatible with the business organization

47 L. Ratti, *supra* note 43*, at* 29 ss.

48 According to the Council of State (Cons. Stato, 8/06/2018, n. 3471), «the insertion of a social clause in the procedural acts of a public tender according to the Code of Public Procurement Contracts (article 50) is in line with the domestic Constitution and with the EU legal system only if it does not bring to an unconditional and generalized obligation to rehire all the workforce previously employed by the former contractor».

of the incoming contractor:[49] if, for example, it is able to carry out the contracted service with fewer employees, the new contractor cannot be obliged to rehire all the workers previously assigned to the contract. [50] The social clause must realize "a balance between the workforce requirements for the execution of the new contract and the autonomous organizational and entrepreneurial choices of the new contractor".[51] The workers of the outgoing contractor who do not find space in the business organization of the new contractor remain employed by the former, who can then choose whether to dismiss them, if they can't be employed in different areas of the organization.[52]

Only by interpreting the rehire clauses in an elastic way, the freedom of private economic initiative, protected by article 41 of the Italian Constitution, and the need to protect work and employment, which find their legal basis in articles 1(4), 4(1) and 35(1) of the Constitution, are appropriately secured.

4.3. Is the Italian Code of Public Procurement Contracts correctly implementing EU law?

Numerous other interpretative problems do arise from the application of the 2016 Public procurement code, particularly with regards to EU law. In fact, from an EU law perspective, social rehire clauses seem to pose compatibility issues with Directive 2014/24/EU and, moreover, with the EU constitutional setting of economic fundamental freedoms.

Albeit the provision of Article 50, Legislative Decree n. 50/2016 is contained in Part II, Chapter I, of the Italian act and is, thus, included among the rules on the awarding phase of the procurement contract, an EU-oriented interpretation must refer to

49 See Cons. Stato, sez. III, 30/03/2016, n. 1255; Cons. Stato, sez. III, 05/05/2017, n. 2078; Cons. Stato, sez. V, 28/08/2017, n. 4079; T.A.R., sez. III, Firenze, 13/02/2017, n. 231, all of which can be consulted at: www.dejure.it.

50 See on this Cons. Stato, sez. III, 30/03/2016, n. 1255.

51 Cons. Stato, sez. III, 08/06/2018, n. 3471. According to a rather different interpretation, adopted by an isolated court (T.A.R., sez. III, Genova, 21.7.2017, n. 640), the limits drawn by the administrative courts would only concern cases in which the content of the social clause is defined by the public administration, since the sectoral collective agreement does not contain any obligation to rehire. In the event that, instead, the social clause was regulated by the sectoral collective agreement, the new contractor could not oppose the freedom of private economic initiative to obtain a flexible application of this obligation.

52 On a different direction, for the moment isolated, the same Council of State (Cons. Stato, sez. V, 07/06/2016, n. 2433, in www.dejure.it) held that the re-hire clause obliges the subcontractor to employ all the workforce of the former contractor. The newcomer, however, is not required to employ all such employees in the same service, but may also allocate these employees to different areas of its business organization. Where some workers employed by the incoming contractor are made redundant, it is up to the latter to dismiss them. This opinion cannot be shared because, beyond the contrary assertions contained in the ruling, it too overwhelms the freedom of private economic initiative of the incoming contractor, who is required to take on workers in excess of its organizational needs.

the systematic place of Directive 2014/24/EU's Article 70 among the rules regarding the performance of the contract.[53]

But, even considering Article 50, Italian Code of Public Procurement Contracts as pertaining to the performance stage of the procurement contract, it remains to be seen whether this rule can be aligned with Directive 2014/24/EU, whose preambles leave the MSs free to introduce or maintain "terms and conditions of employment which are more favourable to workers".[54] From this point of view, Directive 2014/24/EU must be seen as a minimum harmonization instrument, establishing a common floor of rights and not a maximum ceiling of protection.

Two decisive questions result from the Italian framework. First, are social rehire clauses, such as those exemplified here, admissible under the new formulation of Article 70, Directive 2014/24? If so, what are the conditions for their admissibility?

5. In Search of a Constitutional Justification

When dealing with minimum treatment social clauses in public procurement contracts, the CJEU's approach has evolved over time, from an initial marginalization thereof in *Rüffert* to a tentative acceptance in *Regio Post*.

Although the Court did not follow the persuasive arguments offered by AG Mengozzi – who suggested that Article 26, Directive 2004/18 be deemed to be *lex specialis* with respect to Article 56 TFEU[55] – the Court acknowledged that Directive 2004/18 does not lay down exhaustive rules in respect of special conditions relating to the performance of contracts, so that the legislation at issue in the main proceedings may be assessed in the light of the primary law of the European Union.[56]

Its assessment was, therefore, partly favourable in *Regio Post*, as the Court found that the MSs are permitted

> *«to lay down, in the context of the award of a public contract, a mandatory rule for minimum protection referred to in point (c) of the first subparagraph of Article 3(1) of [Directive 96/71/EC[57]], such as that at issue in the main proceedings, which requires undertakings established in other Member States to comply with an*

53 This interpretation has been brought by a decision of the Council of State (Cons. Stato, sez. III, 09/07/2013, n. 3639) who, exactly to interpret domestic law in conformity to EU law, hold that the re-hire clause cannot be interpreted in such a way as to "give it an effect that is automatically and strictly excluded". More recently, however, the same Council of State (Cons. Stato, sez. III, 5/05/2017, n. 2078), hold that "if it is true that compliance with the obligations assumed by the tenderer in the tender [...] regards the execution of the contract, [...] however it is also relevant in the tender, as a symptomatic index of further defects of the offer [....]. ".

54 Dir. 2014/24, Recital no. 37(1).

55 AG Mengozzi, Opinion in the case C-115/14, *Regio Post*, ECLI:EU:C:2015:566, par. 60 *et seq*.

56 CJEU, 17 November 2017, C-115/14, *Regio Post*, ECLI:EU:C:2015:760, par. 59.

57 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1.

obligation in respect of a minimum rate of pay for the benefit of their workers posted to the territory of the host Member State in order to perform that public contract. Such a rule is part of the level of protection which must be guaranteed to those workers».[58]

In the context of social rehire clauses, and in light of this reasoning, it should be noted that the breadth of discretion afforded to the MSs has already been established by the EU legislature, particularly as Directive 2014/24 allows for the implementation of the so-called secondary policy rationales (mostly social and environmental) at the national level.

The Italian transposition of Directive 2014/24 in the Italian Code of Public Procurement Contracts pushes the limits of what can be imposed to contracting parties in compliance with Article 56 TFEU and what is required by the Directive itself. When read in contrast with its predecessor (Directive 2004/18), Directive 2014/24 seems to provide a clearer norm for promoting social preoccupations,[59] from which the reference to mandatory compliance with EU law disappears.[60]

The same article 76 of the 2014 Directive, titled «Principles of awarding contracts», providing measures to be implemented for the social inclusion of the unemployed and other disfavored persons has, in the context of Directive 2014/24, a mere exemplificative role,[61] thus leaving room to introduce more general employment-related provisions, such as social rehire clauses.

To some extent the admissibility of such clauses depends on the vision the interpreters have of EU public procurement legislation.

Some advocate for the relevant rules (and the market) to be driven by purely efficiency-based rules of free competition, so that public expense is optimally allocated to the economic operators that provide for the most efficient service in terms of cost. That position is based on the assumption that economic objectives must prevail over secondary policy rationales, as such policy considerations may constitute obstacles, except when they are strictly proportional to the economic objectives.[62]

Such an approach, however, does not appear to fully cover the aims of Directive 2014/24 as stated in its Preambles. Also, it appears to underestimate the role public procurement contracts take as an integral part of public policy, such that they must include the values and rights typically embedded in the concept of public interest in a given time.

Enhancing employment is one of the pivotal values embedded in the concept of public interest. Of course, the EU's employment-related policies encompass a number of different initiatives, such as measures intended to include the long-term unemployed, the disabled and other disfavored groups, and others in the pool of employed workers.

58 CJEU, 17 November 2017, C-115/14, *Regio Post*, cit., par. 65.

59 *See* Article 18(2), Directive 2014/24, in contrast with Article 26, Directive 2004/18.

60 A.C.L. Davies, *supra* note 1, at 183.

61 G. Meli, *Clausole sociali. "Fair outsourcing" delle pubbliche amministrazioni e paradigma della proporzionalità (parte I)*, in *Diritti Lavori Mercati*, 2014, 719.

62 A. Sanchez Graells, *Public Procurement and the EU Competition Rules*, OUP, 2015 and A. Sanchez Graells, *Truly Competitive Public procurement as a Europe 2020 Lever: What role for the principle of competition in moderating horizontal policies?*, in *Eur. Pub. Law*, 2016, 377.

But more generally, micro-level employment measures are also included among those enhancing-employment policy values.

In concreto, the limitations deriving from the EU's fundamental freedoms must take into account that social rehire clauses also favor the same new service provider, such that their function is not strictly limited to worker protection.

More importantly, the constitutional value of maintaining and increasing the levels of employment is made clear by the aims expressed in the EU Treaties, primarily Article 3(3) TEU and Article 151 TFEU. The same proportionality test applied by the CJEU, centered on Article 56 TFEU, permits a reading that includes employment preoccupations in the realm of legitimate aims justifying restrictive measures on the freedom to provide services.[63]

Outside that specific experience, it remains to be seen how the CJEU will reconcile the current legal framework in the more general scheme of public procurement after the implementation of Directive 2014/24. Specifically, it is unclear whether it will apply a strict proportionality test based on Article 56 TFEU or broaden the horizon and, thus, recognize the ability of the constitutional 'block' on employment preoccupations to justify some level of discretion for the MSs to allow social rehire clauses in collective and other employment-related agreements.

63 L. Ratti, *supra* note 43, at 161 ff.