THREE

THE LEGAL FRAMEWORK OF CONTRACTING: GENDER EQUALITY, THE PROVISION OF SERVICES AND EUROPEAN PUBLIC PROCUREMENT LAW

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Abstract:
In the last decades, marketization has been a ubiquitous development in Western European Welfare States. In this context, contracting out social services has become a common phenomenon. While the impact of contracting out on working conditions has received attention in the social sciences, the legal implications brought forth by these developments are largely neglected. Addressing this gap, the article examines the legal framework of public contracting in the European Union as provided by European public procurement law and the jurisdiction of the European Court of Justice (ECJ). Starting with a brief characterization of the specifics of public contracting, it provides an overview of the development of European regulations. Focusing on the impact European legislation and jurisdiction have on the possibility to take into account social criteria in general as well as gender equality; it examines the legal possibilities provided by European law as well as the limits it imposes. It is argued that while European public procurement law explicitly allows for measures to foster gender equality in public tendering, European legislation and jurisdiction also impose limits to the range of these measures.

Introduction

One of the most important changes welfare states underwent in the last decades was the marketization of (social) services. Within this context, public services are, often enough, not changed into purely

privatized structures which directly offer certain services to paying customers. Rather, services that are 'contracted out' frequently replace publicly provided social services (a good overview of developments can be found in Bode, 2009; Pollitt & Bouckaert, 2011). As the production of specific services is outsourced, the state no longer provides the services directly. However, by buying services on behalf of the state, it acts as an intermediate between the (end) consumer and the provider. This mode of private production and subsequent public provision via contracting modifies not only the formal provision of services, but it also triggers far reaching changes. In contrast to the public provision of services which in the European Union is a national matter, the purchasing and contracting by public authorities is placed under the scrutiny of European legislation and jurisprudence. In many countries, the public sector is a "major source of employment in areas associated with women's employment" (Rubery, 2013, p. 44). Especially social services are a female dominated domain. Therefore, the structural changes implied by contracting introduce new challenges in the promotion of gender equality in employment.

Thus, contracting out leads to a detachment of the works carried out and services provided from the public sector. This implies that regulations that are centered on public sector employment are not binding for services contracted out. Furthermore, unlike public sector employment itself, public contracting is regulated by competition-based policies at the European level which limit the extent to which national regulatory agencies can compel companies bidding for public contracts to promote gender equality. In 2014, the European Parliament passed Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts. Prior to Directive 2014/24, European secondary legislation had only extended to the award of public procurement contracts. Yet, social services are oftentimes not placed under the public procurement regime, but are rendered under the form of concession

contracts.[1] Thereby, a whole range of services which were not under the scrutiny of European secondary law are now placed under the same legal conditions of public tendering.

Against this background and given increasing European regulations of public purchasing, the question arises what these changes mean for working conditions in service delivery as well as for gender-based policies. While the impact of contracting out has received attention in the social sciences, its legal aspects have been neglected. The paper addresses this gap by providing an introduction to the legal framework set by European public procurement regulations and their impact on the inclusion of regulations with social objectives in public tendering. It focuses on the legal framework for national public procurement regulations and practices that is set by European public procurement law. The article analyzes the impact European public procurement law has on the legal possibility to take into account gender equality in regulations and practices of public procurement at national and subnational level. It thereby does not touch on domestic practices in public tendering as such, but provides an account of the overall framework of public tendering that domestic provisions and tendering practices have to reckon with. Starting with a brief outline of European regulations related to gender equality and the promotion of women, I argue that contracting out impacts the regulation of working conditions and gender equality in services that are outsourced to the private sector. Focusing on the legal dimension of contracting and gender equality, I then analyze the legal basis and framework within which contracting takes place and which has the potential to influence working conditions. This is based on the fact that, in contrast to publicly provided services, employment conditions do not fall under public sector regulations. Moreover, contracting places tendering under the scrutiny of European (economic) regulations. Focusing on the latter,

[1] While as well public procurement contracts as concession contracts are public contracts, the distribution of economic risks in these two modes of contracting is the main difference (C-274/09 Privater Rettungsdienst und Krankentransport Stadler vs. Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau for a short description of the case see among others McGowan, 2011).

the development of European regulations that set the frame within which tendering is taking place, is characterized. I outline the specific tension between the economic underpinnings of public procurement regulations and social objectives in tendering to argue that while European (henceforth EU) regulations since the mid-2000s explicitly acknowledge the validity of social criteria, these are at the same time placed under specific and rather tight constraints. Outlining these constraints, the main points are then summarized in the concluding remarks.

Gender, Employment, and EU Policies

In the EU, regulations on gender equality have a rather long tradition. The funding treaty of the European Economic Community (EEC) set the first stipulations on non-discrimination.[2] Thus, Article 119 of the so-called Treaty of Rome stipulated that "each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work."[3] While the Treaty of Rome provided a starting

[2] In this context, it has to be kept in mind that non-discrimination in the context of gender equality in public tendering can take two distinct points of reference: First, an economic approach focusing on the non-discrimination between tenderers as an essential part of the fundamental freedoms. This notion refers to equal treatment between economic operators non-regarding their origin. It is a basic point of reference for the internal market and European economic regulations. Secondly, non-discrimination also is a central point of concern for (European) regulations on gender equality, requiring equal treatment between people non-regarding their sex.

[3] This stipulation was not grounded on a teleological reasoning of equality but can be traced back to purely economic concerns centering on competition: Based on the assumption that (the continuance of) unequal pay between men and women might create distortions on the market, most importantly France (which had establishes the right to equal pay earlier than other member states of the EEC) feared that unequal pay would favor undertakings in member states that did not adhere to this principle (Hoskyns, 1992). It therefore argued a stipulation that set equal pay a binding stipulation all member of the Community had to ensure. While economic concern had given raise to the inclusion of equal pay as one of the principle laid down in the funding Treaty, it not remain a purely economically based issue for long. Thus, Burri & Prechal (2013) highlight that the European Court of Justice ruled not even twenty years later, in 1976, that this stipulation also had a social aim

point for an expanding legislation and jurisdiction on gender equality, it wasn't until the 1970s that secondary regulations on gender equality and non-discrimination were issued.[4] Since then, the development of gender policies gained momentum (Klein, 2013). However, during a first period, European legislation on gender equality was mainly limited to the sphere of non-discrimination in employment (Lombardo, 2003, p. 161).

In the early 1990s, European regulations started surpassing this rather narrow scope (Klein, 2013, p. 84ff). In 1992, a Directive regarding pregnant and breast-feeding workers and the right to maternity leave was introduced at European level (Council Directive 92/85/EEC). In 1996, a Directive introduced an obligation of member states to adopt legislation for parental leave that foresees certain minimum provisions (Council Directive 96/34/EC). The most the important extension of gender equality legislation during this time was the introduction of Gender Mainstreaming,[5] which stimulated

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and in 2000, it held that the economic aim were to be regarded as secondary against the fundamental human rights principle of equal pay.

[4] In this time namely Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes; Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood were passed.

[5] In 1996 the European Commission defined Gender Mainstreaming as "mobilizing all general policies and measures specifically for the purpose of achieving equality

governments and institutional actors to take into account a gender perspective and an analysis of the gender impact of actions and policies. This and the fact that gender had increasingly become a point of reference in political debates and statements at the European level led Lombardo (2003, p. 163) to conclude "[…] that a shift is taking place from an equal opportunities approach to a more global and comprehensive one."

In brief, at the European level, gender policies originated in provisions aiming at equal treatment and expanded from there. Today they encompass non-discrimination as well as the promotion of opportunities for women beyond the mere scope of anti-discrimination measures (Lombardo, 2003, p. 161ff). Thereby, some European regulations are laid down in generally binding primary and secondary law while others take the form of non-binding recommendations. At national level, more specific measures have been introduced in order to foster women's opportunities and to contribute to gender equality. A wide array of measures has been implemented in the public sector in order to promote equal opportunities for women. To take but one example, in Germany the law requires public employers to institute plans known as *Frauenförderplan* for the promotion of women (Lewalter, 2013, p. 2). In contrast to universally binding regulations, these kinds of gender equality measures only apply to a given sector (i.e. the public sector).

Contracting out and Gender Equality

Services and especially social services are female dominated domains of the labor market. In recent decades, social services have increasingly been marketized and contracted out. Today the availability of an increasingly broad range of services is secured by public contracts. This affects a wide range of different services such as job brokerage and case management services (Bruttel, 2005), further training schemes and specific trainings, services in child and youth welfare and integration assistance (Jasper & Recke, 2010, p.

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by actively and openly taking into account at the planning stage their possible effects on the respective situations of men and women (Gender perspective)." (European Commission, 1996: 3)

105f), cleaning (for an analysis for contracting for cleaning services in the UK see Equality and Human Rights Commission, 2014), and the operation of kindergartens.

While contracting for services is not a new phenomenon (Lane, 2000, p. 147), its importance has thoroughly increased throughout the last decades (Bell & Fageda 2007, p. 519f; Veggeland 2008, p. 280; Pollitt & Bouckaert, 2011, p. 24). Contracting out services affects working conditions as well as states' agencies opportunities to influence them. This situation concerns women in several ways: most contracted out services remain female-dominated and shape an important part of female employment. In these services a high percentage of the cost of a given services is determined by personnel costs. A price based competition might create incentives to lower wages and poorer working conditions.

Contracting out transforms the provision of services into a contractual relationship based on a split between a (private) provider and a (public) purchaser. By turning publicly provided services into services provided by a third party, contracting out introduces a change with (potential) impact on wages, working conditions as well as gender related measures. In these public contracts, universally binding regulations have to be upheld. This is also explicitly stated in European public procurement regulations; hence, Directive 2014/24 states that "Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labor law established by Union law, national law, collective agreements or by the international environmental, social and labor law provisions listed in Annex X" (Directive 2014/24, Article 18(2)). Further regulations refer also to subcontracting and state that "observance of the obligations referred to in Article 18(2) [which refer to 'applicable obligations in the fields of environmental, social and labor law established by Union law, national law, collective agreements or by the international environmental, social and labor law' listed in the Annex of the Directive, author] by subcontractors is ensured through appropriate action by the competent national authorities acting within the scope of their

responsibility and remit" (Directive 2014/24, Article 71(1)). Therefore, Directive 2014/24 explicitly states: "It is necessary to ensure some transparency in the subcontracting chain […]" (Recital 105). Furthermore, national law may allow or require the contracting authority to ask for the indication of the share of the individual contract that will be subcontracted (Directive 2014/24 Article 71(2)).

Directive 2014/24 furthermore states that "[p]ublic contracts should not be awarded to economic operators that have participated in a criminal organization or have been found guilty of corruption, fraud to the detriment of the Union's financial interests, terrorist offences, money laundering or terrorist financing. The non-payment of taxes or social security contributions should also lead to mandatory exclusion at the level of the Union" (Directive 2014/24, Recital 100). If an enterprise is in breach of binding obligations such as the payment of taxes or social security contributions, it can be excluded from tendering (see Directive 2014/24, Article 57(2)). Yet, requirements that are specific to the public sector lose their impact as the services become contracted out. Hence, in addition to general working conditions in female dominated services, the question therefore arises as to how contracting out specifically affects equal opportunities and measures to promote gender equality.

Development of European public Procurement Law

Government purchasing was for a long time excluded from international trade regulations. In what is now the EU, first legal regulations affecting public procurement practices date back to the origin of this association of states. Since the Treaty of Rome, the principle of non-discrimination regarding the movement of goods and services is one of the cornerstones of regulating (among other things) public purchasing (Arrowsmith, 2009, 254ff). Contracting has to contend with this requirement of non-discrimination. Exceptions apply (among others) to a certain range of services which are connected to the "exercise of official authority". However, in practice, the reach of this exception is highly restricted. Hence, Hatzopoulos states that "[t]he official authority exception […] is of

virtually no relevance to the provision of services" (2012, p. 146). Since the 1970s, public procurement has received increasing in European policy-making. Hence, secondary law that specifically addressed public procurement was passed (Bovis, 1998, p. 220ff).

European Public Procurement Law, Social Objectives, and Gender Equality Before 2004

Since their inception, European public procurement regulations were firmly embedded in the logic of the internal market. Based on "the power found in Articles 47, 55, and 95 EC Treaty to legislate for an internal market" (Arrowsmith, 2009, p. 257), public procurement regulations set a tight framework for tendering that aims at market building. The regulations strongly focus on the principles of non-discrimination among tenderers and transparency. In this context, at European level, national public procurement regulations and domestic tendering practices were increasingly perceived as (potential) non-tariff barriers and potential hindrances to market building, the free movement of goods, and the single market (Bovis, 1998, p.221ff). This view was put forth especially in the 1985's European Commission's White Paper for the Completion of the Single market which highlighted the importance public procurement had as a (potential) non-tariff barrier (Bovis, 1998 p.221f, 230).

However, it is not only market building and non-discrimination of tenderers that are major points of reference for (domestic) public procurement regulations and practices. Against the background that public purchasing and contracting account for high amounts of money spent, it has widely been acknowledged that by purchasing strategically, public procurement can be used as a lever to promote social goals. Among these goals is the fostering of equal opportunities (McCrudden 2007, p. 66ff; Sarter et al., 2014, p.10f, 15f, 20f). With increasing European legislation, a conflict of goals arose between market building and the single market and the strategic use of public procurement as a lever to foster social goals (Benedict, 2000, p. 6, 11, 13). This conflict was at the core of political debates in policy-making as well as an important point of concern in European jurisdiction.

Public Procurement Law, Social Considerations, and Gender Equality before 2004

Public procurement constitutes an important market. It comes as no surprise that the connection between gender equality and public procurement regulation was drawn rather early. Already in the 1980s, the European Parliament highlighted the importance strategic public procurement can have in fostering equal opportunities in the workplace. In a Legislative Resolution, the European Parliament "[…] emphasizes therefore that any system regulating the placing of public supply contracts must take into account the need to reduce discrimination against [sic!] women, ethnic minorities and the disabled at work […]"(European Parliament 1987, C 246/84). However, the European Parliament was rather weak at this point of time. The European Commission as well as the Council opposed the inclusion of social objectives in public procurement regulation. Therefore, the impact of the European Parliament's position remained highly limited until the 2000s. Thus, it wasn't until the 2004 that European public procurement law explicitly acknowledged the strategic use of public procurement (Scherrer et al., 2010, p.117f).

The European Court of Justice

While it wasn't until 2004 that social considerations explicitly formed part of European Directives regarding public procurement, social aspects were not inexistent beforehand. The European Court of Justice (ECJ) had already clarified that social policy considerations can be integrated in the tendering process as award criteria as long as they do not interfere with the fundamental principles of the Treaty and insofar as they are outlined in the invitation for tenders (Case C-31/87 Gebroeders Beentjes BV vs. State of the Netherlands). This was reinforced through later rulings (most importantly Case C-225/98 Commission vs. French Republic (Nord-Pas-de-Calais)). While the case law of the ECJ highlights the general possibility of social objectives being included in public tendering, it also restricted the use of social criteria. It maintained that it would be *ultra vires* to make use of social criteria as selection criteria thereby limiting member

states' and contracting authorities' possibilities to set standards throughout the whole tendering process (Bovis, 2012, p. 30).

Directive 2004/18

Since 2004, the option to include social criteria explicitly forms part of European public procurement law. As outlined by Directive 2004/18, the award of public contracts can be either based on the lowest price or on the most economically advantageous tender. Thereby, Article 68 gave a (non-exhaustive) list of possible award criteria relating to social policy objectives. Furthermore, Directive 2004/18/EC (as well as its counterpart, Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors) explicitly referred to the possibility to lay down special conditions to social criteria as part of contract performance (Directive 2004/18, Article 26). Yet, Directive 2004/18 only mentions gender related objectives in a very limited way. Thus, it declares that "[n]on-observance of national provisions implementing the Council Directives 2000/78/EC and 76/207/EEC concerning equal treatment of workers, which has been the subject of a final judgment or decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct" (Recital 43).

Public Procurement Law, Social Considerations, and Gender Equality II: Directive 2014/24

In the years following the implementation of Directive 2004/18, social criteria and the promotion of equal opportunities remained in focus of the debate. They were especially prominent issues in the course of the latest reform of European public procurement. As a result, Directive 2014/24 strengthened the provisions introduced by Directive 2004/18. It declared that best price quality ratio (that is the most economically advantageous tender) is the sole award criterion. The best price quality ration thereby explicitly can include (among

other) social aspects (see Directive 2014/24, Article 67f).[6] While Directive 2004/18 explicitly referred to the possibility to penalize non-compliance with national law Directive implementing European Directives on equal pay, the latest Directive on public procurement (Directive 2014/24) explicitly mentions the possibility that "[c]ontract performance conditions might also be intended to favor the implementation of measures for the promotion of equality of women and men at work, the increased participation of women in the labor market and the reconciliation of work and private life, […]" (Directive 2014/24, Recital 98). Article 18.2 stipulates that compliance with fundamental ILO Conventions listed in Annex X shall be ensured. The Conventions listed comprise the so called Core Labor Standards. These explicitly encompass provisions on equal treatment of men and women. This reference hence lays down provisions regarding gender equality. Also Directive 2014/23 explicitly acknowledges gender equality as one of the policy objectives that can be fostered by and in tendering for concession contracts (Recital 65).

Constraints to Gender Equality Measures

While the strategic use of public procurement to foster social goals is acknowledged and gender related objectives are explicitly mentioned in both (new) Directives, social criteria are placed under certain constraints. The criteria can be drawn up "including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles mentioned in recital 2" (2004/18/EU, Recital 1).The fundamental principles referred to are "the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the

[6] This does, however, not impede that the award of public contract is based solely on the basis of price or cost elements only (Directive 2014/24 Recital 90).

principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency" (2004/18/EU Recital 2).

Thus, as a general rule, all criteria used must be objective; they as well as their respective weighting must be clarified in the invitation for tenders and accord the principles of transparency, non-discrimination, and equal treatment among tenderers. Two of these principles represent major restrictions limiting the possibility to include social objectives such as the promotion of equal opportunities in public procurement practices. First, the stipulation of non-discrimination, and second is the link to the subject matter. While the impact of these two criteria on gender related measures has been elaborated further by the ECJ, their impact has been evaluated with regard to other social criteria. Yet, these rulings are important for the regulations of gender related measures and the promotion of equal opportunities in public tendering.

Non-Discrimination and Social Criteria

The principle of non-discrimination is not only based on primary law regulations, but has also been highlighted in the specific secondary law regulations as one of the major principles of public procurement regulations. Having been an integral part and a base of public procurement regulations since their inception, it remained at the core of reformed regulations and stressed as one of the fundamental principles by the ECJ in various occasions (Benedict, 2000, p.81, 84f). The requirement of non-discrimination thereby is of high importance when it comes to which criteria can be set in tendering. This holds especially true regarding stipulations of wage levels.

In the literature, it has been argued that contracting out of services oftentimes leads to a deterioration of wages (Equality and Human Rights Commission, 2014; Sack, 2014). As social services are increasingly contracted out the regulation of wage levels (above minimum wages) is one of the issues at hand. Against the background that a number of social services are female dominated domains, the question of wage regulations is important to those employed in social services. It thereby gains importance from a gender perspective.

European regulations of public procurement have a strong focus on non-discrimination within the single market. Within this context, low wage levels in one country can be perceived as a legitimate means for enterprises to gain an advantage in competitive tendering processes and limiting this possibility can be seen as a non-legitimate means of limiting the market. Against this background, it comes as no surprise that European public procurement regulations affect the possibilities to stipulate regulations of working conditions and, especially, wage levels. The relationship between the requirement of non-discrimination and the potential use of public procurement to foster employment standards (especially in relation to wages) has been a major point of legal dispute. Thus, the ECJ has dealt with a number of cases, in which employment conditions and employment related rights on the one hand and non-discrimination on the other were to be negotiated.

Regarding social standards, and most importantly remuneration, two cases clearly limited the discretion of contracting authorities to introduce wage levels beyond the scope of universally binding minimum wages. One of the landmark cases regarding social standards and social criteria in public procurement was Case-346/06 *Rüffert vs. Land Niedersachsen* (Otting, 2008). It was based on Directive 96/71 and backed up by Art. 49 EC. Directive 96/71 made clear that posted workers have to be guaranteed at least the wages and employment conditions that are laid down by legal regulations and collective agreements or arbitration awards, which are universally binding (Art. 3.1). Yet, it remained unclear whether or not these provisions are to be taken as a bottom line of wage levels which can be stipulated, or rather as fix standards. Case 346/06 questioned the validity of stipulations that require contracting authorities to award contracts only to those enterprises that pay at least the wage levels set out in regional collective agreements in force at the place of work – which are not universally binding.

In his statement, Advocate General Bot interpreted Directive 96/71 as laying down a bottom line for the stipulation of wage levels in tendering that could be surpassed. Yet, in its ruling, the ECJ highlighted the possibility for restrictions to the freedom to provide

services can be justified by the protection of workers, the objective of ensuring protection for independence in the organization of working life by trade unions, and the financial balance of the social security system. It did not see these requirements fulfilled as the provisions stipulated did not refer to all workers, but only to a certain group (i.e. those employed in works for which a public contract was awarded). Therefore the ECJ ruled that the Directive in question did not allow stipulating adherence to employment conditions (including wages) that go beyond universally binding mandatory rules and therefore declared the stipulation made in the Lower Saxonian law not conforming with EU law.

These stipulations on wage regulations in public tendering have furthermore been elaborated in Case C−549/13 *Bundesdruckerei GmbH vs. Stadt Dortmund*.[7] In the aftermath of this ruling, specific minimum wages for public contracts were issued in Germany (Sack & Sarter, 2015). In Case C-549/13, the question was raised whether minimum wage provisions can be stipulated non-regarding the place of establishment of the subcontractor and the place where the work is to be carried out. Drawing on the Rüffert Case, the ECJ stated that

> […] the imposition, under national legislation, of a minimum wage on subcontractors of a tenderer which are established in a Member State other than that to which the contracting authority belongs and in which minimum rates of pay are lower constitutes an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State. (Paragraph 30)

[7] At the time of writing, however, a further case on the legality of minimum wage regulations in public procurement was in procession in the ECJ. Given the fact that no judgment has been issued so far, the extent and scope as well as the exact meaning of C-549/13 beyond the specific case remains somewhat uncertain.

In the view of the ECJ, such a provision can establish a restriction of Article 56 of the Treaty on the Functioning of the European Union (TFEU). This can be justified by the objective to protect workers. Yet, as the minimum wage refers solely to public contracts, the ECJ declared that "[…] such a national measure is not appropriate for achieving that objective if there is no information to suggest that employees working in the private sector are not in need of the same wage protection as those working in the context of public contracts […]" (paragraph 32), and therefore rendered the application of a public procurement specific minimum wage in this specific case as non-conform to European law.

In a nutshell, European regulations on non-discrimination strongly affect the possibility to stipulate minimum conditions – especially concerning wage levels beyond universally binding minimum wages – in the Member States. Thereby, the requirement of non-discrimination mainly impacts general working conditions. While not impeding the regulation of employment or wage standards completely, the requirement of non-discrimination limits the level of standards that can be stipulated. As has been highlighted by the ECJ, imposing minimum levels different from those in place in the private sector not bound by public contracts challenges the legal justifiability of these stipulations and therefore their conformity with European legislation. Therefore, wage levels which can be stipulated in tendering are highly restricted. They can only refer to generally binding minimum wages.

The existing legal framework limits the possibility to stipulate wage levels that surpass universally binding regulations. It impacts contracting authorities' potential to stipulate higher wage levels in order to uphold remunerations that surpass universally binding wages. Competition-based tendering can set incentives to decrease wages in order to lower the price of a service and thereby increase the chances of winning a tender. This holds especially true for the provision of services, as a large proportion of costs in this field results from personnel costs. A way to counteract these incentives and thereby uphold remuneration standards could be to stipulate specific levels of remuneration tenderers have to adhere to

(e.g. regional collective agreements) or by stipulating remuneration standards. By restricting the possibility to stipulate specific wage levels, the legal framework hence also restricts public authorities' possibilities to counteract existing incentives to lower wages in the provision of contracted services.

Yet, other legal stipulations also impact on working conditions and wage levels in contracted service provisions and might provide a means to uphold employment conditions. The European regulation on transfer of undertakings (Council Directive 2001/23/EC) is a possible source for upholding working conditions in contracted services. In cases of change of ownership of a firm, this regulation limits (under certain conditions) the new employer's discretion to change the terms and conditions of existing employees' employment contracts and may thereby serve to uphold existing remuneration standards and working conditions (for a detailed account see among others Barnard, 2012, 577-628; Bovis, 2012, p.283).

Subject matter of the contract and its implications for social criteria
A second requirement that influences accounting for social considerations is the requirement that all criteria are to be linked to the subject matter of the contract. A couple of rulings shed light on what this requirement means for social criteria. Case-513/99 *Concordia Bus Finland Oy Ab vs Helsingin Kaupunki* lays ground for the stipulations that non-economic criteria can be taken into account only under certain conditions. Thus, non-economic criteria have to be linked to the subject matter of the contract. They must not create unrestricted freedom of choice for the contracting authority. Furthermore, they have to be stated in the invitation for tenders, and be in accordance with EU law and general principles (Arnould, 2003).

The requirement that criteria need to be linked to the subject matter has been developed further by European case law. In 2003 a preliminary ruling requested by the Austrian Federal Procurement Agency (Bundesvergabeamt) clarified some issues relating to the use of non-economic criteria in Case C-448/01 *EVN AG and Wienstrom*

GmbH vs Republik Österreich. Being concerned with the provision of renewable energy, the case became a landmark case for the use of non-economic criteria in public procurement. Dischendorfer highlights the fact that this case "[…] underlines that contracting authorities enjoy a wide margin of discretion in that respect, provided they take account of the basic principles of EC public procurement law, notably the principles of transparency and equal treatment" (2004, p. NA82). Furthermore, the ruling outlined that award criteria can be used even if they do "[…] not necessarily serve to achieve the objective pursued" (Case C-448/01, paragraph 29).

This case clarified the general possibility to take into account non-economic considerations. It further rendered possible consideration of a rather high importance to non-economic aspects in the assessment of the tender. At the same time, it delineated the limits for such criteria. Non-economic award criteria are thereby possible as long as they display a "[…] close connection to the subject matter of the contract in so far as the criterion must be linked to a concrete need of the contracting authority, such as estimated consumption requirements or reliability of supply going beyond estimated requirements […]" (Dischendorfer, 2004, p. NA82f). They are to be stated and clearly formulated in the invitation for tenders so that "all reasonably well-informed tenderers of normal diligence can, without difficulty, know the exact scope of the criterion in question and are thus able to interpret it in the same way" (Dischendorfer, 2004, p. NA83). Furthermore, they must not lead to unrestricted freedom of choice on the side of the contracting authority and have to comply with EU law and its general principles (especially with the principle of non-discrimination). Moreover, Case C-448/01 outlined that the "[…] award criterion must be accompanied by requirements as to how its fulfilment by the tenders will be verified; in other words, when a contracting authority lays down an award criterion, it must also intend or be able to verify the accuracy of the information supplied by the tenderers" (Dischendorfer, 2004, p. NA83).

Most importantly, the reach of the criteria used was a virulent point of concern. The case addressed the question whether it is possible to stipulate that the tenderer should produce more

sustainable energy than the contracting authority intended to purchase by the specific contract. The ECJ declared that an award criterion (amount of sustainable energy that can be provided) must not exceed the scope of the individual contract, which in this specific case is the amount of the energy bought by the specific contracting authority and potential reserves. Taking into account the total amount of sustainable energy produced by the company relates to the tenderer as such. Therefore, such a criterion cannot be regarded as linked to the subject matter of the contract (Bovis, 2012, p.423). This was later codified in Directive 2014/24, which explicitly states that "[a]ward 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" (Directive 2014/24 Article 67(3)). Thereby Recital 97 clarifies "[…] the condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterizing the specific process of production or provision of the purchased works, supplies or services. Contracting authorities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place" (Directive 2014/24 Recital 97).

This sets limits to the stipulation of general conditions regarding non-economic criteria. It also impacts on the regulation of employment conditions and other social objectives such as the promotion of equal opportunities. It has been argued that the legality of stipulations relating to (among other) measures to foster gender equality (such as e.g. quotas for the employment of women) which relate to the enterprise as a whole would surpass the legal scope for social policies objectives (Verband der Bayerischen Wirtschaft 2013, p. 27). Hence, under European public procurement law, it is not possible to request that tenderers put general quotas for women into place. And also the possibility to request a scheme of preferential

promotion – which could be a means to foster gender equality in companies – is restricted.

Yet, while this requirement clearly limits the scope of non-criteria, it does not generally impede measures relating to the promotion of women. While no explicit legislation on quotas for the employment of specific groups exists at European level, case law issued by the ECJ has clarified its admissibility. In C-31/87 *Gebroeders Beentjes BV vs. State* of the Netherlands as well as in Case C-225/98 *Commission vs. French Republic* (Nord-Pas-de-Calais), the ECJ declared such a stipulation relating to employment of certain groups as generally possible.

While it may not be possible to take into account whether or not a company has company-wide quotas for the employment of women, it is legally possible to stipulate quotas among those directly involved in the execution of a public contract. Based on this legal opportunity, in the course of construction works for the Olympic Park in London, the Women into Construction Project aimed to strategically use public procurement for construction works to foster employment of women (and minorities). Setting quotas which related to female representation in the workforce employed in the construction works contracted, the project provided apprenticeships and employment opportunities for women (for a detailed account of the Project see Wright, 2014).

Next to specific regulations on social criteria in public procurement, Bovis (2014, p. 126f) draws attention to the connection between the requirements of capacity and reliability of tenderers and labor law conditions. Furthermore, the possibility to use variants is another issue not to be neglected. Without going into detail, Directive 2014/24 allows contracting authorities to admit or require variants (as did its predecessor). In this case, the invitation for tender only states minimum provisions which have to be fulfilled, but leaves room for innovation (see Directive 2014/24, Article 45).

Conclusion

An economically driven stipulation that provided equal pay for men and women marked the initiation of European gender policies. In the following decades, non-discrimination legislation remained at the heart of European regulations regarding gender equality. Thereby, the scope of European gender policies has expanded to tackle gender inequalities beyond mere anti-discrimination. While gender related policies have been expanding significantly in scope and reach since the 1970s on, marketization of services and contracting out have posed new challenges for the regulation of working conditions and measures to promote gender equality.

First, contracting out of services detaches the services affected from the public sector. As a result, those regulations that refer to employment practices in the public sector lose their impact for those employed in the services that are contracted out. This might suggest imposing standards, practices and regulations regarding measures to foster gender equality to be imposed on services contracted out. Contracting out places the process under the scrutiny of European economic legislation. It thereby imposes legal constraints on the use of criteria referring to gender equality in public tendering.

To date, little concern has been given to the legal implications arising from European regulation. Yet, within the context of debates for increasing international and bilateral regulations on the award of public contracts, the impact trade agreements and the abolishment of trade barriers have on the possibility to stipulate social criteria in public contracts, is highly relevant. More research on the impact legal regulation have on social aspects in public procurement as well as on the implications that arise from increasing international regulation of public tendering is needed. Within the EU's single market, such regulations have a rather longstanding tradition. Against this background, the article set out to explore the impact of European public procurement law on national and subnational policymaking in the EU and on local tendering practices. While the analysis centers on the impact of European regulation, it does highlight trade-offs that may arise in other trade agreements tackling public procurement. On

the one hand European regulations enable national policy-makers and local procurers to include stipulations on social criteria such as gender equality. On the other hand European economic regulations (namely European Directives of public procurement and on the award of concession contracts) limit the possibilities to take into account social considerations in tendering.

This framework imposes limits on the range of measures that can be taken into account when tendering. First, the requirement of non-discrimination clearly limits the stipulations of wage levels to universally binding regulations. It thereby does not allow individual contracting authorities to stipulate higher wages levels in order to foster specific services or counteract incentives set by competition-based tendering. Yet, it has been suggested that European legislation on transfer of undertakings might offer a way to uphold wages and working conditions in certain situations. Second, it impacts on the possibility to take into account gender related criteria. While European regulations explicitly allow for the use gender related criteria, European regulations and jurisdiction restrict the possibility to impose measures that foster gender equality beyond the limited range of those workers directly involved in the provision of the services in question and the time of the contract by stipulating a link to the so-called subject matter.

Based on the analysis of European legislation and jurisdiction the article highlighted the fact that taking into account gender equality when tendering is possible as long as it conforms to given restrictions. The analysis showed that long-term measures as well as measures relating to general business policies are explicitly excluded from the range of possible criteria. The scope of measures is thus, clearly limited. As the principles which restrict social aspects to be taken into account are based on primary law, they are highly unlikely to change (Conant, 2002, p. 44f; Stone Sweet 2010, p. 9) or, as Blauberger (2012, p. 110) stressed, reversing them is "largely hypothetical" option. Therefore, for those working to enhance gender equality, the focus should be set on how best to use the scope provided by European legal regulations. As the Women into Construction project highlights, a constructive and effective use of

public procurement to foster gender equality within the current framework is possible. The general possibility coupled with constraints imposed by European legislation also leads to a set of questions that should be addressed by further research. The (comparative) analysis of the transposition of European provision to domestic laws as well as to local practices seems to provide a promising field of study. Special emphasis should be given to the way that European regulations affect national policy-making on equal opportunities in public tendering, the impact of changing regulations on tendering practices (in different member states), and the impact of tendering practices on gender equality in the workplace in contracted services.

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