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The Added Value of Tender-Based Public Procurement as an Instrument to Promote Human Rights Compliance: What Impact May Be Expected from the Instrument?

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1. Introduction and approach

Consumerism may be one of the greatest influencing powers of our time. The choices we make as consumers have great and diverse impact, often far out of sight because of globalized trade. Due to the growing awareness of this impact, consumers demand more transparency regarding the indirect effects of their products (and the way they are produced and disposed of) and increasingly take these into account in their purchasing decisions.

In the field of public procurement too, the concurrent pursuit of policy objectives, such as sustainability goals, has been a hot topic for a while now. As regards sustainability, after the promotion of environmental objectives and 'internal' social objectives (such as social return), the promotion of the 'external' social objective of human rights compliance has gained attention.[1] [2] Both in the supply chain of goods and in the execution of public services and the construction of public works, human rights violations may occur.[3] Although it could be deemed to make sense for public entities to respect and promote human rights in their 'private' role as purchaser, it is sometimes questioned whether public procurement is an appropriate means to pursue this objective. On the other hand, the number of regulatory and policy measures taken in this regard is rising.

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1 See e.g. Case C-368/10 (*Dutch Coffee*), para.1 of the conclusions: 'Not only consumers, but also undertakings and public authorities are attaching increasing importance to the sustainability of their consumption.' Also see e.g. B. Sjåfjell & A. Wiesbrock, *Sustainable public procurement under EU law. New perspectives on the State as a Stakeholder* (2016). For further references D.C. Dragos & B. Neamtu, 'Sustainable Public Procurement in the EU: Experiences and Prospects', in F. Lichère et al. (eds.), *Novelties in the 2014 Directive on public procurement* (2014). Regarding social considerations see 'Public procurement and human rights: A survey of twenty jurisdictions', International Learning Lab on Public Procurement and Human Rights (July 2016), <http://www.hrprocurementlab.org/wp-content/uploads/2016/06/Public-Procurement-and-Human-Rights-A-Survey-of-Twenty-Jurisdictions-Final.pdf> (last visited 24 May 2018); A. Sánchez-Graells, *Smart Public Procurement and Labour Standards* (2018); M.A. Corvaglia, *Public Procurement and Labour Rights: Towards Coherence in International Instruments of Procurement Regulation* (2017); F.J.L. Pennings & E.R. Manunza, 'The Room for Social Policy Conditions in Public Procurement Law', in A. van den Brink et al. (eds.), *Sovereignty in the Shared Legal Order of the EU – Core Values of Regulation and Enforcement* (2015), pp. 173-196.

2 In this paper, 'human rights' refers to both fundamental human rights and labour standards.

3 For examples, see DIHR-ICAR, *Briefing note: Protecting Human Rights through Government Procurement,* <https://www.humanrights.dk/files/media/dokumenter/business/unwg_8_may_workshop_icar_dihr_procurement_final.pdf> (last visited 24 May 2018).

The questions of whether public procurement – tender-based public procurement in particular[4] – *should* be used as a means to promote human rights compliance and if so, what (regulatory) measures should be taken to facilitate this, will not be answered in this paper. A sensible starting point for the answering of these questions however, would be to determine what this instrument would actually have to offer as a complementary means to promote the objective of human rights compliance. This paper attempts to shed light on the potential added value of tender-based public procurement as an instrument to promote human rights compliance, thereby defining 'the instrument' as the combination of both the competitive tendering procedure and the resulting contract.[5]

Obviously, the *actual* impact of tender-based public procurement on the compliance of human rights (hereinafter 'HR') ultimately depends on the behavioural choices of the targeted economic operators themselves.[6] These choices, however, may be affected by (the use of) this instrument. Not only by decisions of the individual contracting authority (hereinafter 'CA') and EU and national legislators, but also at a more fundamental level that is mostly overlooked. I believe the potential impact of the instrument is determined at the following three levels:

1. The inherent nature of the instrument *itself*: the inherent general characteristics of the instrument (the characteristics that inherently come with the use of the instrument, independently of any choices made at levels 2 and 3 below) could themselves have a facilitating or hindering effect in light of the promotion of HR compliance.
2. Subsequently, decisions at the level of (EU and national) regulation may – in addition to the aforementioned level of inherent characteristics – have a facilitating or hindering effect in this regard as well.
3. Ultimately, decisions of the individual contracting authority as regards whether and how to actually make use of the instrument – within the scope of the aforementioned levels – will determine the potential impact of the instrument in a specific case.

This paper will focus on the first level, seeking to answer the question to what extent the inherent characteristics of tender-based public procurement may be expected to have an effect on its potential as an instrument to promote HR compliance. Section 2 will outline the general characteristics that are inherent to the instrument and relevant in light of the objective of HR compliance in particular. Section 3 provides an inventory of the probable facilitating and hindering effects of these characteristics on the instrument's potential in light of the aforementioned objective.

As argued, I believe that a clear picture of what should be expected of the instrument *itself* in light of the objective of HR compliance, will provide a sensible starting point for any subsequent decisions (at the second and third level) regarding potential (regulatory) measures aiming to optimize the potential impact of the instrument in this regard.

4 Regarding the differentiation between 'public procurement' as a general notion and public procurement by means of a competitive 'tendering procedure', see e.g. C.E.C. Jansen, 'Allocation of Limited Rights from a European Public Procurement Law Perspective', in P. Adriaanse et al. (eds.), *Scarcity and the State. The Allocation of Limited Rights by the Administration* (2016), pp. 240-241.

5 The instrument will be assessed from an EU perspective. This is particularly relevant in respect of Section 2.4, as most of the other characteristics will also apply to tender-based public procurement beyond the EU.

6 Also see B. Sjåfjell, 'Sustainable public procurement as a driver', in Sjåfjell & Wiesbrock, supra note 1, pp. 198-99: 'While public procurement undoubtedly is an important economic driver, the legal requirements of public procurement law are still an external force to companies. Many businesses may be tempted to circumvent public procurement requirements if they are perceived as too burdensome or foreign to the businesses' own policies.'

2. General characteristics of tender-based public procurement[7]

2.1 Limited regulatory scope

A relevant characteristic of tender-based public procurement as an instrument to promote policy objectives is that all obligations that may be imposed on economic operators in this context (through tender requirements[8] and/or contract clauses) are temporary.[9] Although the effects of such requirements could in practice extend beyond the duration of the relevant contract (for example in case of certification requirements[10]), the obligations and the associated enforcement possibilities following from the instrument cease to exist when the contract ends.[11] This limitation in terms of duration is closely related to the fact that the content of the requirements must be sufficiently linked to the subject matter of the contract, which limits the scope to include general corporate policy requirements. This will be briefly discussed in Section 2.4 below.

The instrument's scope is also limited in terms of the parties that can be directly targeted by it. Firstly, because economic operators that do not engage with the public sector logically fall outside the scope of the instrument.[12] Secondly, the possibilities to affect (sub)subcontractors are limited.[13] For, inherent to the legal relationship they aim to manage, both tender requirements and contract clauses in principle regard the *main* contractor. Influencing sub(sub)contractors' behaviour will therefore usually take place indirectly, via the main contractor (for example by means of perpetual clauses in the contract or – in the tender documents – by requiring the main contractor to acquire, and potentially also require, certain management systems or certifications). The current EU Directives, however, do comprise a provision specifically regarding the scope to target subcontractors, in particular to avoid breaches of the social and environmental obligations referred to in Article 18(2) Directive 2014/24/EU.[14] Some of the options mentioned there also seem to enable CAs to affect subcontractors' performance more directly, for example the option to verify whether any grounds for exclusion apply to subcontractors.[15]

2.2 Direct competition

Although there is no generally accepted definition of the notion of a public tendering procedure,[16] it does in any case imply a more or less formalized procedure enabling direct competition between potential suppliers. Although competition will obviously be part of many purchasing processes in some way, it is therefore an indispensable element of public tendering procedures.[17] [18] Competition within

7 This characterization will logically overlap with that of contracts (public or otherwise) that are procured without a competitive tendering procedure (hereinafter referred to as 'normal contracts'), as the contract resulting from the tendering procedure is perceived to be part of the instrument.

8 For reasons of convenience, I will use the term 'tender requirements' to refer to both minimum requirements and criteria aiming for an optimum level of performance. For the same reason, I will use the terminology that applies to enforceable obligations (and therefore refer to *obligations* and *enforcement*). For a discussion of the legal qualification of such tender requirements see – in Dutch – C.E.C. Jansen, 'De aanbestedingsovereenkomst is géén meerpartijenovereenkomst', in M.A.B. Chao-Duivis et al. (eds.), *Alleen Samen. Opstellen aangeboden aan prof.mr. M.A.M.C. van den Berg* (2010), pp. 211-233, who argues that such requirements cannot be perceived as *enforceable obligations*.

9 For a discussion of this and other aspects regarding *contracts* as a regulatory instrument to promote sustainability, see A. Beckers, 'Using contracts to further sustainability? A contract law perspective on sustainable public procurement', in Sjåfjell & Wiesbrock, supra note 1, pp. 210-211.

10 For example, because the contractor decides to maintain its certification with a view to obtaining new contracts or simply because the validity thereof extends the duration of the contract.

11 Assuming tender requirements have autonomous significance (instead of a mere provisional character in relation to the contract conditions), these would logically already cease to exist when the tendering procedure ends.

12 See also A. Semple, 'The link to the subject matter: a glass ceiling for sustainable public contracts?', in Sjåfjell & Wiesbrock, supra note 1, p. 72.

13 Possibly more limited than in 'normal' contracts, as a result of the applicable procurement principles discussed in Section 2.4.

14 See Recital 105 and Art. 71 Directive 2014/24/EU, which also impose an obligation on 'national authorities' to ensure the observance of compliance with Art. 18(2) by subcontractors.

15 See para. 6. Member States can implement this as a mandatory requirement in their national legislation.

16 Directive 2014/24/EU only defines the general notion of 'procurement', see Art. 1(2) and Recital 4.

17 See also Case C-410/14 (*Falk Pharma*), paras. 37-40 where the elements of scarcity and competition are implied by the CJEU, by stating that the aspect of choosing *one* tenderer is a key element of public contracts and procurement in the sense of Art. 1(2) Directive 2014/24/EU. Also see Case C-9/17 (*Tirkkonen*) and note 4, supra.

18 Also see Art. 18(1) of Directive 2014/24/EU, which, by some, is seen as the recognition of the principle of competition as a fundamental principle of public procurement. See e.g. A. Sánchez-Graells, *Public procurement and the EU competition rules* (2015), pp. 196-217, distinguishing competition as an *objective* and competition as a *principle* of EU public procurement law in this regard.

a tendering procedure is always *direct*, in the sense that participants are aware that their offer will be compared to others (based on the requirements and criteria announced beforehand).[19] The assumption is that such direct, and fair, competition will enable the CA to obtain best value for money.[20] [21]

2.3 Primary objective for the contracting authority

In contrast to traditional regulatory instruments such as legislation,[22] a precondition for the instrument of tender-based public procurement to have any impact is that a CA will have to decide to make use of the instrument.[23] The main reason to do so will always be a specific purchasing need (the need for certain goods, works or services).[24] The fulfilment of this need is often referred to as the CA's *primary* objective, thus differentiating it from other objectives that could be pursued through public procurement (such as sustainability goals), designating these as *secondary* objectives.[25] However, given the shifting focus towards a greater role for such 'secondary' objectives in e.g. public procurement, this hierarchical terminology seems decreasingly self-evident.[26] Without settling this multifaceted debate here and now, it is clear that such 'other' objectives like the promotion of HR compliance will in any case never be the *only* objective pursued through this instrument. As a result, the pursuit thereof will always have to be combined with the concurrent pursuit of the CA's primary objective to fulfil its needs through the purchase of a certain product, work or service.[27]

Incidentally, the 'primary' objective underlying the use of the instrument itself (discussed above) should be differentiated from the 'primary' objective underlying the *regulation* thereof (see Section 2.4).

2.4 Overarching governance of the EU public procurement principles and their primary objective

As discussed above, the primary reason for a CA to initiate a tendering procedure will always be a specific purchasing need. This means that the pursuit of other objectives will have to be combined with this primary objective. From the perspective of EU public procurement, the scope to do so is determined by the fundamental principles of public procurement (and, if applicable, the resulting regulation).[28] Like the CA, this regulatory framework primarily aims for an objective other than the promotion of HR compliance. This section will discuss this primary objective and the resulting fundamental procurement principles.

But first, a short side note is needed regarding the perception of the regulatory framework's main objective and the applicability of the resulting principles as a characteristic of the instrument of tender-based public procurement. Arguably, this is an adjustable characteristic of the regulatory framework rather

19 The latter follows from the applicability of the fundamental principles of public procurement, discussed in Section 2.4.

20 See for a critical discussion of this reasoning C. Bovis (ed.), *Research handbook on EU public procurement law* (2016), pp. 35-36 and S. Arrowsmith, *The law of public and utilities procurement. Regulation in the EU and UK. Volume 1* (2014), pp. 3-5.

21 From a supranational perspective, safeguarding fair and open competition is concurrently assumed to facilitate an open supranational market (see Section 2.4). Regarding the role of competition in public procurement also see e.g. Sánchez-Graells, supra note 18.

22 The question whether tender-based procurement should be perceived as a (alternative) *regulatory* instrument is beyond the scope of this paper. See in this regard however H. Collins, *Regulating contracts* (1999); J. Black, 'Constitutionalising Self-Regulation', (1996) 59 *The Modern Law Review*, no. 1, pp.24-55 (particularly p.27 regarding 'individualized regulation'). Also see Semple, supra note 12, pp. 16-17, who argues, contrary to Beckers in the same volume (supra note 9, pp. 206-242) that public procurement is *not* a regulatory instrument.

23 This preliminary decision to make use of the instrument is actually twofold: it comprises both the decision to purchase something and the decision to organize a competitive tendering procedure in this regard. The latter can either result from a CA's free will, or the CA can be compelled to do so by procurement regulation.

24 See also C. Bovis, *Public procurement in the European Union* (2005), p. 14.

25 See, for example, Jansen, supra note 4, pp. 240-241 and A. Wiesbrock & B. Sjåfjell, 'Public procurement's potential for sustainability', in Sjåfjell & Wiesbrock, supra note 1, pp. 235-236. This terminology is also used in the interrelated context of the objectives of procurement *regulation*, see Section 2.4.

26 Also see S. Arrowsmith & P. Kunzlik (eds.), *Social and environmental policies in EC procurement law* (2009), pp. 9-15; Corvaglia, supra note 1, pp. 45-49.

27 Obviously, this does not necessarily imply a *conflict* between the two. See in this regard e.g. Wiesbrock & Sjåfjell, supra note 25, pp. 235-236 and R. Caranta, 'Sustainable procurement', in M. Trybus et al. (eds.), *EU public contract law. Public procurement and beyond* (2014), pp. 165-66. Incidentally, now that 'secondary' aspects of e.g. the production process are perceived as part of the purchased product, in my view it could even be argued that the promotion of such 'other' objectives should be seen as *part of* the primary objective.

28 This section focuses on (the implications of) the fundamental principles, for these are applicable to *all* public contracts (see e.g. Recital 1 Directive 2014/24/EU) and form the basis for the EU Directives. A detailed discussion of the content of the provisions resulting therefrom, falls outside the scope of this paper.

than an inherent characteristic of the instrument itself.[29] However, when perceiving the instrument from an EU perspective, I believe that the applicability of the fundamental principles and the consequently overarching influence of the underlying objective cannot be separated from the instrument itself, because the dominance of this primary objective and the fundamental principles cannot be eliminated (by decisions at the level of regulation or the individual CA) without fundamentally redefining the instrument itself. If a European CA voluntarily or obligatorily decides to use the instrument of tender-based procurement, the obligation to respect the fundamental principles is automatically implied.[30] This general applicability of the principles makes it both possible and relevant to discuss their potential effect on the promotion of HR compliance.

According to the EU Directives, the fundamental objective underlying the regulatory framework is to ensure compliance with the TFEU (in particular the free movement obligations), thereby enabling cross-border competition, ultimately aiming for a unified EU market.[31] Although the reformed EU Directives show a shift in this regard by also paying attention to other objectives to be pursued through tender-based procurement (such as sustainability goals),[32] the aforementioned Single Market objective is still the original and primary focus.[33] Moreover, where the regulatory provisions do not apply or do not provide a clear scope, this scope will in practice be determined on the basis of the fundamental procurement principles that directly follow from the Single Market objective only.[34]

Although at a more detailed level, perceptions of the fundamental principles (and how they relate to each other and the EU market objective) might slightly differ, based on the Directives and the CJEU case law, the following principles are generally assumed to derive from this EU market objective.[35]

The *principle of equality* compels the CA to create a level playing field, providing equal chances to all parties interested in obtaining the public contract.[36] More specifically, this implies that a CA must not favour or disfavour specific parties, e.g. by means of biased requirements or treating participants unequally during the tendering procedure. In this sense, the principle of equality forms a safeguard for fair competition. In addition to the assumption that such fair competition will contribute to the CA's objective to obtain best value for money (discussed in Section 2.2), from a EU regulatory perspective, safeguarding fair competition is assumed to contribute to the opening-up of the EU internal market.[37]

This link with the EU market objective is much more obvious with regard to the *principle of non-discrimination*. This principle specifically prohibits CAs to favour or disfavour economic operators based on nationality, thereby obviously safeguarding the free movement of goods and services throughout the EU market.[38]

29 This would cause it to fall outside the scope of this paper's central question, see Section 1.

30 See Recital 1 Directive 2014/24/EU.

31 Ibid. Also see, for example, Case C-19/00 (*SIAC*), para. 32; Bovis, supra note 20, p. 1; Arrowsmith, supra note 20, p. 155. Also see S. Arrowsmith (ed.), *Public procurement regulation: An introduction* (2010), p. 16, including a more international perspective on this objective, beyond the scope of the EU.

32 See, for example, Recital 2 and Art. 18(2) Directive 2014/24/EU; M. Monti, *A New Strategy for the Single Market: At the service of Europe's economy and society* (2010). Also see Sjåfjell & Wiesbrock, supra note 25, pp. 1-5 and 235-236; Caranta, supra note 27, pp. 165-168. For a discussion of the CJEU's driving role regarding this shift in the EU legal framework in general, see B. Sjåfjell, *Towards a sustainable European company law: an analysis of the overarching objectives of EU law, with the takeover directive as a test case* (2009) (particularly para. 10.9 regarding the issue of HR).

33 See in this respect also Jansen, supra note 4, pp. 243-244, differentiating *additional policy objectives recognized* and *recommended* by the EU regulation from the primary objective being *regulated*. However, the wording of some provisions, particularly Art. 18(2), does seem to imply more than a mere recommendation.

34 Obviously, these should be applied concurrently with other applicable (EU) law. In practice however, decisions of CA's as well as national Courts, seem to be merely based on this particular procurement framework.

35 See e.g. Recital 1 and Art. 18(1) Directive 2014/24/EU.

36 See e.g. Arrowsmith, supra note 20, pp. 614-621 and Case C-243/89 (*Storebaelt*), para. 33, explicating that 'the duty to observe that principle lies at the very heart of the directive'. The CJEU considers furthermore that this principle is violated if a tender is accepted that does not comply with the conditions communicated beforehand by the CA. This restriction of the CA's discretion is further discussed below in the context of the principle of transparency.

37 See e.g. Case C-410/14 (*Falk Pharma*), para. 36, which explicates this twofold link to both objectives; also see in this regard Arrowsmith & Kunzlik, supra note 26, pp. 32-33. Regarding the role of competition and competition as a fundamental principle also see notes 17 and 18, supra.

38 Also see e.g. Arrowsmith, supra note 20, pp. 621-627 and Case C-87/94 (*Concordia*), where the difference between the general (procurement) principle of equality and that of non-discrimination was emphasized in relation to environmental award criteria.

The *principle of transparency*, mostly perceived as a safeguarding corollary to the principle of equality,[39] requires the CA to act transparently throughout the procedure. A key obligation that has been derived from this principle is the obligation to predefine the subject matter of the contract as well as the manner in which the award decision will be taken by means of clear, precise and unequivocal requirements and criteria.[40] This is furthermore considered to imply an obligation to strictly apply these requirements and criteria[41] [42] and thus strict limitations to the CA's discretion to change these after publication.[43] This is because allowing the CA to change the aforementioned criteria and requirements in hindsight would deprive the preliminary obligation to timely and transparently communicate these beforehand of any intended effect.

During the execution phase however, the scope for changes seems broader than implied above, for only *substantial* changes to the contract are deemed to form an inappropriate infringement of the principles.[44]

Whether this broad scope for change (currently) also applies to changes prior to the award decision, has not been explicated in regulation or case law. Although the wording of some CJEU cases could be argued to implicitly point in this direction,[45] a clear reference to the full doctrine in this regard (or a rejection of the aforementioned more restrictive approach of previous case law such as *Wienstrom*) is absent. Moreover, Article 72 of Directive 2014/24/EU explicitly regards the execution phase only.

I would therefore argue that the principles currently seem to leave more room for changes during the execution phase than during the tendering procedure (although the latter scope is not completely clear). This is also due to a general lack of transparency and related obligations during the execution phase.[46] Apart from the practical need for such a broader scope for change during the execution phase, a more limited impact of the principles (in general) at this stage also fits the fact that the decisive legal relation at this stage is usually assumed to be the *bilateral* contract.

Notably, whether and to what extent the aforementioned duty to consistently apply tender requirements also implies a duty to accurately investigate and verify compliance with these requirements has not been explicated in case law or regulation yet.[47]

Lastly, a principle that clearly gained attention under the current EU Directives is that of *proportionality*. With this increase of its role, a growing number of diverging objectives seem to have been linked to this principle.[48] The basic idea of the principle is, however, that every decision of the CA regarding the design and execution of the tendering procedure must be proportionate in light of the value and objectives of the subject matter of the contract. I believe that whether this limits the scope to include requirements aiming for policy objectives exceeding the CA's primary purchasing need will depend on how and how broadly the *subject matter of the contract* is defined (which is not explicated in regulation or case law). However, in light of the concept of the *link to* the subject matter requirement (hereinafter 'LtSM requirement'; one of the main limiting concepts of the EU Directives),[49] it has been explicated that requirements do not need to

39 See e.g. Case 496/99, *Succhi di Frutta*, paras. 110-111. For an interesting outline of CJEU case law and literature on the question whether transparency should be considered to fulfil an independent role see A. Buijze, *The principle of transparency in EU law* (2013), Section 4.4.2.2.

40 Ibid., para. 111. Also see Case C-19/00 (*SIAC*), paras. 40-42.

41 Ibid., para. 115. A concrete implication thereof is that a tender that does not fulfil the minimum requirements must be rejected, see e.g. Case C-599/10 (*SAG*), paras. 36-37. (Notably, this is in line with the reasoning based on the equality principle in the *Storebaelt* case (supra note 36). For the only exception to this rule see *SAG*, para. 40; Case C-336/12 (*Manova*), paras. 30-40; Case C-298/15 (*Borta*), para. 73.

42 Buijze (supra note 39, p. 166) argues this to be an obligation of *consistency* rather than one of transparency.

43 See e.g. Case C-448/01 (*Wienstrom*), paras. 91-93.

44 See Case C-454/06 (*Pressetext*) and Art. 72 Directive 2014/24/EU for more detail. Also see Case C-549/14 (*Finn Frogne*).

45 See for example Case C-368/10 (*Dutch Coffee*), para. 55 and Case C-298/15 (*Borta*), paras. 69-76, where the CJEU explicates that changes during the tendering procedure can be allowed under certain conditions, which seem to partially overlap with the doctrine of substantial change.

46 I will briefly come back to this in Section 2.6.

47 Notably, CJEU case law from which an 'obligation to *enforce*' could potentially be deduced, such as the cases mentioned above (note 38-43), regards the situation where non-compliance *is already established* and thus focuses on the question whether in that case, there is an obligation to *sanction*. However, in my view, a duty to *verify* could also be argued to derive from the fundamental principles and possibly from the general obligation to ensure the effectiveness of EU law and the duty of good administration (Art. 41 EU Charter of Fundamental Rights). Incidentally, Dutch procurement law contains a specific provision in this regard requiring effective verification if the CA questions the proof provided by a tenderer (Art. 2.113a(2) *Aanbestedingswet*).

48 See for example the Dutch *'Gids Proportionaliteit'* and Art. 1.5 *Aanbestedingswet*, linking the objective of SME participation to this principle.

49 For a discussion of this concept and its increased relevance in the reformed Directives see Semple, supra note 12, pp. 50-74 and M.A. Corvaglia, 'RegioPost and Labour Rights Conditionally', in A. Sánchez-Graells (ed.), *Smart Public Procurement and Labour Standards: Pushing the discussion after RegioPost* (2018), pp. 253-255.

relate to the material substance of the end product and may relate to all stages of its life cycle.[50] In my view it follows from this broad approach to the LtSM requirement that the general concept of proportionality too does not generally limit the possibilities to include HR requirements regarding the production process of the purchased goods.[51] According to the Preamble of Directive 2014/24/EU however, the LtSM requirement implies that such requirements must not regard general corporate policy requirements (that cannot be considered as a factor characterizing the specific process of production or provision of the purchased goods, works or services).[52] However, this limitation does not seem applicable to all types of tender requirements. Firstly, tender*ers* can be excluded in case of a former breach of social and environmental standards mentioned in Article 18(2). Secondly, although the LtSM requirement does apply to selection criteria, these always relate to the tender*er* – contrary to award criteria and contract clauses, which relate to the specific contract. This raises the question whether the aforesaid definition of the LtSM requirement can be upheld in this context.[53]

2.5 Relevant stakeholders

Compared to (other) regulatory instruments such as legislation, the final 'regulator' of policy objectives in tender-based procurement is the CA.[54] For it is the CA that ultimately decides whether and how to promote any policy objectives in its tender requirements.[55] On the other hand, the CA, in this decision-making process (the third level of the classification explicated in Section 1), will have to comply with the applicable (procurement) regulation (the second level of the aforementioned classification).[56]

The parties legally affected by the CA's requirements during the tendering procedure are all participants to this procedure. They will need to comply with these requirements (or, in case of award criteria, with a certain level of performance) in order to be granted access to the procedure and, ultimately, to obtain the contract.

During the execution phase, the relevant actors and their roles slightly change. All obligations imposed on the winning tenderer will have the form of contractual obligations. This also seems to imply that the only relevant actors with a view to these obligations are the contractual counterparties: the winning tenderer as the legally affected actor (see Section 2.1), and the CA as the enforcing actor (see Section 2.6). However, although the former competitors indeed play no role from a contract law perspective, they still have a limited role from a public procurement law perspective, namely in case of a substantial change to the contract. Such a change implies an infringement of the principles (see Section 2.4) and thus provides former competitors with a ground to initiate a claim against the CA (see Section 2.6).[57]

Furthermore, it is relevant to the promotion of HR compliance that any other third parties – such as the people ultimately benefiting from the HR requirements or citizens concerned with potential HR violations indirectly supported with tax money – in principle play no legal role either during or after the tendering procedure.[58]

50 See Case C-368/10 (*Dutch Coffee*), para. 91 and Art. 67(3) Directive 2014/24/EU. For a discussion of the material substance matter, see P. Kunzlik, 'The procurement of 'green' energy', in Arrowsmith & Kunzlik, supra note 26, pp. 392-401.

51 Whether the LtSM requirement can indeed be perceived as a concretization of the general proportionality concept, is not explicated in the Directives. However, given the great resemblance between the two concepts, I find it hard to imagine that the implications of the latter could be different in this respect. Also see Semple, supra note 12, p. 74.

52 Recitals 97 and 104 Directive 2014/24/EU. Also see European Commission, *Green Paper on the modernisation of EU public procurement policy: towards a more efficient European procurement market*, COM(2011) 15 final, p. 39: 'The link with the subject-matter of the contract ensures that the purchase itself remains central to the process in which taxpayers' money is used'.

53 See in this regard also T-288/11 EU:T:2013:288 (*Kieffer Omnitec*), paras. 37-41.

54 See note 22, supra regarding the issue of 'regulation'.

55 Also see Semple in this regard (supra note 12, pp. 72-73).

56 Also see Bovis, supra note 20, pp. 41-45 on the dualistic role of the CA, especially related to the public and private law aspects of it.

57 Regarding the decreased role of the principles and – with that – that of the former competitors during the execution phase also see G. Racca et al., 'Competition in the execution phase of public procurement', (2011) 41 *Public Contract Law Journal*, no. 1, pp. 89-108 and 'The safeguard of competition in the execution phase of public procurement: framework agreements as flexible competitive tools' (1 September 2010), Seminar on 'The New Public Law in a Global (Dis)order. A Perspective from Italy,', IRPA and Jean Monnet Center of NYU School of Law.

58 However, see on the notion of 'third-party rights' e.g. Beckers, supra note 9, pp. 211-212; P. Verbruggen, 'Regulatory governance by contract: The rise of regulatory standards in commercial contracts', (2014) 35 *Recht der Werkelijkheid*, no. 3, pp. 79-100 and – in Dutch – Jansen, supra note 8.

2.6 Enforcement

In general, acts of governance by means of regulatory intervention are usually assumed to consist of three interrelated elements: (1) establishing legal standards; (2) monitoring; and (3) sanctioning in case of non-compliance.[59] Starting from this trichonomy, the potential of tender-based procurement as an instrument to promote compliance with *existing* legal standards such as HR obligations, will, logically, largely lie in the monitoring and sanctioning (i.e. enforcement) possibilities it provides.[60] The enforcement of HR obligations through the instrument of tender-based procurement will in practice equate the enforcement of tender requirements (during the tendering procedure)[61] or contractual obligations (during the execution phase). This section will discuss two (interrelated) enforcement options in this regard.

Primarily, both tender requirements and contractual obligations are obviously enforced by the CA itself. Depending on the nature and purpose of the requirements, the monitoring or verification, and subsequent sanctioning can either take place during the tendering procedure or during the execution phase.

During the tendering procedure, the ultimate 'sanction' is the exclusion of the non-complying tenderer (in case of non-compliance with minimum requirements) or a decreased chance to obtain the contract (in case of suboptimal compliance in light of the award criteria).

After the conclusion of the contract, a different 'enforcement regime' applies. The exact range of available sanctions (contractual remedies) as well as the conditions under which these can be imposed are mainly determined by national contract law and may therefore vary from jurisdiction to jurisdiction.[62] Generally however, enforcement at this stage will come down to the CA monitoring its counterparty's performance and, in case of non-compliance, invoking a contractual remedy (such as specific performance, compensation for damages or, ultimately, termination of the contract).[63] Although, in principle, these remedies can be used to enforce any type of contractual obligations, the initial underlying rationale (following from the principle of privity of contract) is to compensate contractual counterparties for their private loss or damage resulting from the non-compliance.[64] Correspondingly, contractual remedies can only be invoked *by* the CA[65] and *against* its contractual counterparty. But particularly relevant to the use of such private enforcement means to promote HR compliance is the fact that the aforementioned rationale also affects the *conditions* under which such remedies can be invoked (if, for example the CA needs to demonstrate its *own* loss, this limits the scope to use such a remedy to enforce HR compliance[66]) and the *results* the CA is able to achieve through these remedies (although specific performance or termination of the contract seem to fit the objective of the enforcement of HR best, from the perspective of the private interest rationale, it is not self-evident that this result can always be claimed).[67]

59 See, for example, C. Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design', (2001) *Public Law*, pp. 329-353.

60 See in this regard also Beckers, supra note 9, p. 209 with reference to Sjåfjell in the same volume. In my view however, this *enforcement* function is *not* the *only* added value of the instrument, for it could also fulfil a role relating to the *establishment* and *imposition* of more concretized obligations (see Section 3 in this regard).

61 As mentioned before (supra note 8), it may be questioned whether all tender requirements comprise *enforceable obligations* (or rather duties with a legal effect of some sort). However, I will use this terminology for reasons of convenience.

62 Obviously, such national laws must be established and applied in concurrence with relevant EU regulation (e.g. Arts. 72 and 73 of Directive 2014/24/EU and Directive 2007/66/EEC). Differences between jurisdictions can regard the qualification of such a contract (for example as 'contracts administratifs' in French law), as well as the correlated issue of the applicable field of law (public and/or private law) and, at a more nuanced level, whether the application of this law should be altered because of the particular way in which the contract is concluded (see on the latter C.E.C. Jansen et al., 'Towards (further) EU Harmonization of Public Contract Law', in *Proceedings of the 5th International Public Procurement Conference* (Seattle 17-19 August 2012), pp. 759-809). Also see R. Caranta, 'Many Different Paths, but Are They All Leading to Effectiveness?', in S. Treumer & F. Lichère (eds.), *Enforcement of the EU Public Procurement Rules* (2011), pp. 55 et seq.

63 The hierarchy of such remedies however, differs between common-law and civil-law systems. See in this regard J. Smitset al., *Specific performance in contract law: National and other perspectives* (2008).

64 See F. Wilman, *Private Enforcement of EU Law Before National Courts. The EU Legislative Framework* (2015), pp. 515 et seq. (Notably, the invocation of remedies by the CA against its counterparties does *not* involve private enforcement of EU law. However, this section of the book does apply here as well.)

65 See note 58 supra regarding third-party rights.

66 See H. Schebesta, *Damages in EU Public Procurement Law* (2016), p. 235.

67 See also P. Mitkidis, 'Sustainability clauses in international supply chain contracts: Regulation, enforceability and effects of ethical requirements', (2014) *Nordic Journal of Commercial Law,* no. 1, p. 23; F. Cafaggi, 'The regulatory functions of transnational commercial contracts: New architectures', (2013) 36 *Fordham International Law Journal*, no. 6, pp. 1611-1616.

Secondarily, the instrument provides a complementary (non-contractual) enforcement option that may function as a safeguard to the aforementioned primary enforcement by the CA. This applies if the CA has included certain requirements in its tendering procedure, but subsequently fails to enforce them.

As argued in Section 2.4 in general, the CA's discretion regarding the design and execution of the tendering procedure is restricted by the regulatory framework. Although the ultimate objective of this framework is not to safeguard the private interests of the tenderers, they are indeed the primary enforcers.[68] As a result, if a competitor of the non-complying tenderer is able to demonstrate that the CA's decision *not* to enforce the requirement at issue implies an infringement of the regulatory framework, this party can initiate a claim against this CA.[69] The ultimate consequence of such a claim is the forced termination of the tendering procedure or – during the execution phase – the termination of the contract.[70]

In principle, the aforementioned applies to both the tendering procedure and the execution phase. However, as a result of the decreased role of the principles (discussed in Section 2.4) during the execution phase and – with that – that of the former competitors (discussed in Section 2.5), the possibilities to initiate an infringement claim are much more limited at that stage. As argued, only an infringement of the principles in the form of a *substantial* change of the contract will then provide ground for a claim. Moreover, it also follows that – contrary to the many information duties applicable during the strictly regulated tendering procedure – few to no duties to inform the former tenderers are assumed to result from the procurement principles during the execution phase.[71] Due to this lack of transparency, there is a good chance that even *if* the contract is substantially changed, competitors will never be aware of that fact. This would obviously prevent such a party from being able to initiate a claim.[72] [73]

3. General characteristics of tender-based public procurement from the perspective of human rights compliance: Positive or negative impact?

3.1 Introduction

Based on the general characterization of the instrument of tender-based public procurement provided in Section 2, this section discusses the instrument's potential in light of the promotion of HR compliance by economic operators. Bearing in mind the limitations of this inventory, it seeks to answer the following question: To what extent can the inherent characteristics of the instrument be expected to affect its potential to contribute to HR compliance?

The impact of the instrument's characteristics in this regard is twofold. Firstly, *if* a CA decides to employ the instrument as a means to promote HR compliance, the instrument's characteristics are likely to influence the impact of this decision (first dimension). Preliminary thereto however, they are also likely to impact this crucial decision itself; to *include* HR requirements in a tendering procedure and subsequently *enforce* them (second dimension).

68 Also see S. Treumer, 'Enforcement of the EU Public Procurement Rules: The State of Law and Current Issues', in S. Treumer & F. Lichère (eds.), *Enforcement of the EU Public Procurement Rules* (2011), pp. 17 et seq., who also discusses the additional possibility of *supranational enforcement* (the EC supervising Member States compliance with EU law). This supranational enforcement falls outside the scope of this paper.

69 Such a claim will be invoked before a national court, based on national law (in concurrence with EU law, e.g. the Remedies Directive 2007/66/EC and Art. 73 Directive 2014/24/EU). Additional procedural requirements could follow from national procedural law such as the requirement of sufficient interest (see in Dutch law, Art. 303 *Rechtsvordering*).

70 Regarding the latter see Arts. 72 and 73 Directive 2014/24/EU; Case C-549/14, (*Finn Frogne*) and Case C-503/04 (*Commission v Germany*). Also see Treumer, supra note 68, pp. 28-44 (who also discusses termination of the contract based on the remedy of ineffectiveness of Directive 2007/66/EC).

71 However, Art. 72(1) Directive 2014/24/EU now requires the CA to publish substantial changes made during the execution of the contract.

72 Obviously, this is not strictly an HR issue, but also a general issue regarding the effective enforcement of procurement law.

73 The potential this provides for the enforcement of HR compliance, not only depends on the question whether competitors will be *able* to initiate a claim – discussed above –, it is also relevant whether competitors are *willing* to do so. The latter aspect will be discussed in the specific context of HR requirements (Section 3).

3.2 First dimension: Impact of the instrument's inherent characteristics if a CA decides to make use of the instrument

As regards the first dimension – *if* a CA decides to make use of the instrument – some of the instrument's characteristics could serve the objective of promoting HR compliance.

Starting from one of the main rationales underlying the instrument (the assumption that direct competition enables obtaining best value for money) an obvious benefit of the instrument is that its inherent competitive setting could equally be used to obtain 'the best level of HR compliance'. It could thereby function as a driving force to change market behaviour, complementary to existing legal instruments already imposing HR obligations on economic operators. Regarding HR in particular, the added value of tender-based public procurement as a complementary *norm-imposing* instrument mainly lies in the fact that it provides a scope for concretizing general standards into *specific* tailor-made obligations (implementing them).[74] [75]

Moreover, the instrument facilitates the CA to impose *feasible* obligations, responsive to the status quo of the specific market. The pre-set design of the tendering procedure, entailing a combination of minimum requirements and award criteria aiming for an optimum level of performance, enables the CA to adjust the way in which it promotes HR compliance in line with the specific market, contract by contract.[76] If the most appropriate level of performance is unknown to the CA, award criteria can be used to partially leave this question to the participating market parties.[77]

Imposing clear, concrete and feasible obligations will obviously enhance the chances of actual impact on market behaviour. Moreover, it may contribute to a more focused contemplation and debate regarding the appropriate level of performance and the right distribution of responsibilities in this regard.[78] This may ultimately even have an impact outside the scope of public contracts.

In addition to this complementary role in *establishing* and *imposing* concrete HR obligations, the instrument provides complementary *enforcement* options (see Section 2.6). These primarily come down to the CA verifying and eventually rejecting the non-complying tenderer (during the tendering procedure) or invoking contractual remedies (during the execution phase). Given the fact that the ultimate goal is to promote HR compliance *during the execution of the contract*, two (interrelated) observations are relevant:

1) The powerful sanction of rejecting a tenderer *before* concluding a contract cannot be used to directly enforce HR obligations in the execution of the contract.[79] However, the CA can influence the execution of the contract indirectly by enforcing requirements that *can* be verified during the tendering procedure (but ultimately aim for compliance during the execution phase) such as label requirements.[80]

2) Actual enforcement of HR obligations during the execution phase will usually come down to the invocation of standard contractual remedies by the CA.

From the perspective of HR, it may – as argued in Section 2.6 – be questioned whether the private interest rationale underlying these contractual remedies limits the possibilities to use them as a means to contribute to the objective of HR compliance. This may be a reason to take regulatory measures (such as the introduction of a specific right to terminate contracts in case of HR breaches) to facilitate the CA in this regard.

74 Such concretization may possibly even be deemed obligatory based on the principle of transparency.

75 However, also see A. Sánchez-Graells, 'Regulatory substitution between labour and public procurement law: the EU's shifting approach to enforcing labour standards in public contracts', (2018) 24 *EPL*, no. 2, pp. 229-254 (Section 3.2) regarding the use of procurement requirements to go *beyond* existing standards.

76 Regarding the issue of *responsive* or *reflexive* regulation, see e.g. H. Collins, *Regulating contracts* (1999), p. 65.

77 Also see O.S. Pantilimon Voda, 'Innovative and sustainable procurement: framework, constraints and policies', in Bovis, supra note 20, p. 215. Incidentally, this could also be stimulated by specifying the subject matter of the contract in *functional* terms, thereby leaving the concrete method of meeting these requirements up to the participating economic operators. From the perspective of HR requirements however, the latter would concurrently take away the aforementioned advantage of concrete and transparent obligations.

78 Such a debate may also be organized by the CA in the context of one or more particular tendering procedures in the form of a market consultation (Art. 40-41 Directive 2014/24/EU).

79 The power of this sanction during the tendering procedure is even fortified by the safeguard of the competing tenderers (which, as argued, is limited during the execution phase).

80 Obviously, other tender requirements too have a more or less provisional character. However, *technical* requirements can usually be 'pre-verified' more easily and more effectively.

Additionally, enforcement of the fundamental principles by competitors of the non-complying party may function as a safeguard to the aforementioned primary enforcement by the CA of its own requirements.[81] This may, as a side-effect, benefit the objective of HR compliance *if* (1) the CA has *included* HR requirements in its tender documents but (2) subsequently *failed to enforce* these obligations and (3) the latter can be perceived as a *violation of the regulatory framework* and (4) a competitor is *aware* of the aforementioned and (5) is *willing* to initiate a claim against the CA. For example: If a CA fails to reject a tenderer in case of non-compliance with a minimum requirement comprising a HR obligation, a competitor could – for the sake of enhancing its chance to obtain the contract – initiate a claim against the CA, compelling it to reject the non-complying tenderer. Although this will neither be the competitor's primary motive to initiate the claim, nor the rationale of the principles that the claim will be based on, a side-effect would ultimately be in such a case that the contract is not performed by the party violating the HR requirement at issue.

However, as shown by conditions 1-4, the availability of this claim to the competitor is limited.[82] Firstly, not every lack of enforcement will qualify as an infringement of the regulatory framework. Since the regulatory framework does not explicitly impose a duty to adequately *verify*,[83] a lack of verification will in some cases even be likely to *prevent* an infringement claim, because it prevents the non-compliance (and lack of sanctioning thereof) to be established at all. Secondly, competitors, as a result of a lack of transparency, will not usually be aware of the non-compliance. Both these observations are even more problematic during the execution phase. As argued in Sections 2.4 and 2.5, the role of the principles and the competitors is strongly decreased at that stage. More concretely: a claim will only be available to the competitors in case of a substantial change *and* the chances of competitors not knowing about such changes are much greater than during the tendering procedure.[84]

In conclusion, the option for competitors to enforce compliance with the principles may be of added value in light of the promotion of HR compliance. However, the availability of this option to competitors is limited in general and especially during the execution phase. The latter is particularly unfortunate because, as argued, *actual* monitoring of HR compliance is only possible at that stage.[85]

In addition to the aforementioned elements that could be of added value, the instrument entails some inherent limitations in light of the promotion of HR compliance. One of the most obvious limitations lies in the limited regulatory scope of the instrument, particularly regarding the options to affect performance further down the supply chain.[86] Moreover, the regulatory framework limits the employment of some easy to use practical tools that are available to private-sector purchasers (e.g. 'black and white lists').

Furthermore, the limited scope to change requirements, discussed earlier as a potential element of added value, may also have a negative effect on the promotion of HR compliance. For it limits the possibilities to adjust the level of performance on the go (that is: *if* such modification was not part of the original contract), while a gradual, customized approach (due diligence) is indeed assumed to be a successful method for the improvement of HR compliance.[87]

81 And of the mandatory requirements following from procurement regulation, such as the exclusion ground in case of child labour, see Art. 57(1)(f) Directive 2014/24/EU (incidentally, applicability of Art. 57(1)(f) also allows for termination of the contract, see Art. 73(b) Directive 2014/24/EU).

82 The fifth condition, the *willingness* of the competitor to initiate a claim, will be discussed in Section 3.3. below.

83 See Section 2.4.

84 Ibid.

85 Regarding monitoring or lack thereof in the execution phase and the decreased safeguarding role of competitors in this regard also see Racca et al., supra note 57.

86 See Section 2.1.

87 See e.g. the OECD Guidelines <http://mneguidelines.oecd.org/guidelines/> and <https://www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-companies/type-of-step-taken/human-rights-due-diligence> (last visited 25 May 2018). However, the CA can create more flexibility by announcing such an approach as part of its contract performance conditions in its tender documents. See for the Dutch approach in this regard <https://www.pianoo.nl/nl/document/14444/bestekteksten-internationale-sociale-voorwaarden> (last visited 25 May 2018).

3.3 Second dimension: Impact of the instrument's inherent characteristics on the CA's decision to use the instrument

However, the most relevant barriers resulting from the instrument's inherent characteristics lie in its influence on the CA's decisions as to whether and how to use the aforementioned potential of the instrument at all. As the potential impact of the instrument greatly depends on these decisions, this perspective should not be overlooked. Obviously, such decisions (as well as their impact on the economic operator concerned) are influenced by numerous different factors. I will only discuss the most relevant effects to be expected of the instrument's characteristics on the CA's decisions (1) whether or not to *include* requirements aiming for HR compliance and (2) whether or not to *enforce* such requirements (during the tendering procedure or during the execution phase).

Regarding the decision to *include* HR requirements in a tendering procedure, potential hindering factors result from the fact that both the CA and the applicable regulatory framework primarily aim for other, potentially conflicting objectives. The CA will therefore both have to search a way to conjunctionally obtain its primary purchasing need[88] and promote HR compliance and determine the scope to do so within the regulatory framework. The fact that this framework primarily aims for another objective entails two potential hindering factors. Firstly, the scope to include HR compliance is often less clear than the scope to include other objectives (such as compliance with technical standards).[89] Secondly, if the objective of HR compliance *conflicts* with the primary objective, the regulatory framework will currently still safeguard the latter.[90] Concurrently considering the fact that infringements of this procurement regulation are much more likely to provoke legal claims against the CA than its potential indirect contribution to HR violations, the instrument rather provides a countervailing force than a facilitating one regarding the inclusion of HR requirements.

If, despite the above, a CA is sufficiently motivated to include HR requirements in its tendering procedure the actual impact will greatly depend on its subsequent decision to also *enforce* such requirements. I believe that the impact of the instrument's characteristics is twofold here as well.

On the one hand, the aforementioned option for competitors to initiate a claim based on infringement of the regulatory framework, as argued, may function as a unique incentive for the CA to enforce its requirements. However, the safeguarding power to be expected for the enforcement of HR requirements is limited. Not only because competitors, as argued, will often be *unable* to initiate such a claim, especially in the execution phase, but also because it is very likely that competitors will only be *willing* to use this option if it benefits their own private interests.[91] This obviously limits the potential of this claim to function as an incentive for the CA to enforce HR obligations, for this benefit will only occur if the latter objective overlaps with the private interests of one or more competitors.

Moreover, the limited risk of such a potential infringement claim may even have a negative impact on the CA's decision to *verify* (or *monitor*) during the execution phase, because – in addition to the investments needed for monitoring in general – it enhances the risk of subsequent costs if such monitoring indeed uncovers non-compliance. Whereas in a standard contractual situation such uncovering would only invoke a discretionary option for the CA to initiate a legal procedure against its contractual counterparty, for a tender-based contract it also enhances the risk of being confronted with competitors' claims. Verification may shed light on information that would otherwise probably have remained unknown, as former tenderers themselves (or any other supervisory entity) do not have any means to verify their competitors' performance. Subsequently, as argued, an infringement of the fundamental principles will probably be easier to establish if the CA *knowingly* fails to remedy the

88 Also see Semple, supra note 12, pp. 67-68 regarding the potential adverse effect of the CA's own primary objective.

89 This is also due to a lack of relevant case law.

90 See for example Recital 37 Directive 2014/24/EU, which clearly states a hierarchy between sustainability objectives and the general principles.

91 In this cost-benefit balance, the chance to obtain the contract (or compensation for damages) will play an important role. See for other considerations preventing private parties to initiate claims in general: Wilman, supra note 64. In the context of procurement in particular, Wilman points out the issue of potential fear of 'biting the hand that feeds you'.

breach.[92] Ultimately, such claims could even lead to a forced termination of the contract, which would imply both a loss of (tax payers) money and, at best, a delayed performance (of the retendered contract). Given this enhanced risk of double legal procedures and additional costs, a strong motivation of the CA to verify will be needed. Regarding the verification of more traditional requirements (related to the primary purchasing need) this usually will not be very problematic. In addition to the fact that such verification will often be less complicated, a clear incentive to verify results from the CA's direct need to obtain well-functioning goods. Regarding HR requirements however, such a direct incentive seems to be absent[93] and quick verification methods are usually unavailable. Therefore, considering this specific nature of HR requirements, the aforementioned counterforce resulting from the instrument, often combined with a general lack of time and capacity, may very well provoke a quite understandable 'why stir up the hornet's nest' mentality.[94]

4. Conclusion

What conclusions may be drawn regarding the potential added value of tender-based public procurement when it comes to the promotion of HR compliance, based on the inherent characteristics of this instrument?

Although there are some inherent limitations, the instrument may certainly provide a facilitating scope for the promotion of HR compliance. Complementary to the existing general HR obligations, it may facilitate the establishment of more concrete and feasible obligations, responsive to sector-specific market developments, and furthermore provide an additional enforcement regime accompanying these concretized obligations.

However, it is also inherent to the instrument that its potential impact on HR compliance will primarily depend on the individual CA's decisions to actually use the aforementioned potential. These decisions are likely to be affected by the instrument's inherent characteristics itself. As argued in Section 3, the instrument will assumably have a hindering effect on the CA's decision to *include* HR requirements in the first place, ultimately resulting from the fact that the promotion of HR compliance is neither the primary objective of the CA, nor of the applicable regulatory framework. If a CA nonetheless decides to include HR requirements, the impact thereof will obviously depend on the subsequent decision whether or not to enforce them. I argued that the instrument does provide a unique incentive in this regard, because the CA's discretion *not* to enforce its requirements is restricted by the regulatory framework, which can be enforced by the competitors of the non-complying tenderer. Although I noted various limitations to the potential of such an infringement claim to function as a safeguard for the enforcement of HR requirements in particular, it may nonetheless provide a positive incentive for the CA to *enforce* its HR requirements *during the tendering procedure*. This incentive would be even more useful *during the execution phase*, where the actual compliance with HR can be verified and sanctioned. It is therefore unfortunate that the possibilities to invoke an infringement claim during the execution phase are much more limited. Moreover, I argued that especially in the execution phase the limited risk of such a claim may potentially even have an adverse effect on the CA's willingness to *verify*, because although the risk that such a claim is invoked is smaller than during the tendering procedure, the consequences of such a claim are more extensive for the CA.

In conclusion, tender-based public procurement could be a useful complementary tool to impose and enforce contract-specific HR obligations. However, without a strong intrinsic motivation of the CA or specific incentives, at the same time the instrument itself is likely to negatively affect the CA's decisions to use this potential, especially during the execution phase. Any (regulatory) measures aiming to optimize the impact of the instrument on HR compliance, should take into account such effects of the instrument itself, thereby focusing on facilitating and stimulating CA's not only to include but also *to enforce* HR requirements and not only before but also *after the award decision*. Such measures may include facilitating practical sector-specific

92 See Section 2.4 and note 47, supra.

93 Such an incentive could evidently follow from societal or regulatory pressure. However, both regulatory measures and public awareness currently mainly focus on the *inclusion* of such requirements, rather than on the verification and enforcement thereof.

94 A lack of *ex-post* monitoring also leads to distortion of competition. See in this regard e.g. Sánchez-Graells, supra note 75 and Racca et al., supra note 57.

(third-party) monitoring tools[95] and educating CA's on both soft and hard enforcement options. Moreover, the instrument's unique potential of competitors as a monitoring safeguarding force could be more effectively exploited by expanding transparency and related obligations during the execution phase.[96]

95 See for a Swedish example <http://www.scpclearinghouse.org/initiative/hallbarhetskollen-swedish-service-social-sustainability-monitoring> (last visited 25 May 2018). For another example see <http://electronicswatch.org/en> (last visited 25 May 2018).

96 See in the same line of thinking Racca et al., supra note 57.