

THE PRINCIPLE OF PROPORTIONALITY ON PUBLIC PROCUREMENT

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1. INTRODUCTION

The principle of proportionality is one of the most ancient principles that operate in the field of Administrative law. According to Braibant, it is no more than the application of a rule of common sense to the Public Administration.² Traditionally it has been used as an instrument to control the discretionary powers of public authorities, assessing that their actions do not involve excessive harm for the citizens.³ One of the most characteristic features of the principle of proportionality, which makes it special in comparison with other general principles, is the existence of an internal structure composed of three sub-principles or levels of scrutiny (suitability, necessity, and proportionality *stricto sensu*). They apply in a successive and staggered manner, so that the measure at issue should pass each level of scrutiny before it can move on to the next.

² Braibant, G. (1974) “Le principe de proportionnalité”. In *Le Juge et le Droit Public. Mélanges offerts a Marcel Waline*, vol. II, Paris, p. 298.

³ Barnes, J. (1994) “Introducción al principio de proporcionalidad en el Derecho comparado y comunitario”. *Revista de Administración Pública*, 135, pp. 495-538; Galetta, D. (2015) “General Principles of EU Law as Evidence of the Development of a Common European Legal Thinking: The Example of the Proportionality Principle (from the Italian Perspective)”. In *Common European Legal Thinking: Essays in Honour of Albrecht Weber* (Dir. Hermann-Josef Blanke; Pedro Cruz Villalón; Tonio Klein; Jacques Ziller), Switzerland: Springer, pp. 221-242.

To begin with, any measure that involves a restriction of the citizens' rights and interests should be suitable to achieve the pursued objective (*suitability test*). If the measure is suitable, then it is time to examine whether it is also necessary given that there is no other alternative solution that is less harmful to the citizen and equally suitable to achieve that objective (*necessity test*). In the event that it also complies with this second requirement, it will be subject to a balancing exercise under the proportionality *stricto sensu* test to verify whether it entails more benefits for the public interest than rights' restrictions for the citizens.⁴

On this basis, this paper aims to analyse the role of the principle of proportionality on public procurement. This sector is particularly favourable for the application of this parameter since most of the decisions adopted within the procurement procedure result from the exercise of discretionary powers by contracting authorities. The competitive nature of public tendering implies that public sector entities' actions may have harmful effects on tenderers. Besides, the multiple objectives and interests involved in public procurement, both at the European and national levels, demand the use of this principle to achieve a proper balance between them. This is particularly relevant when including environmental, social, and innovation-related policies as goals of the procurement.

Considering the essential features of the principle of proportionality, it can be claimed that it applies when a decision made by a contracting authority entails a real prejudice to one or more economic operators within a procurement procedure. Furthermore, the evolution of general principles in the last decades supports the use of this parameter as a guideline that should be observed by contracting authorities at the different stages of the procedure, contributing to a more rational public action.⁵ Despite its relevance in protecting economic

⁴ Schlink, B. (2012) "Proportionality (1)". In *The Oxford Handbook of Comparative Constitutional Law* (Eds. Michel Rosenfeld; András Sajó), Oxford: Oxford University Press, pp. 718-737.

⁵ Hoffmann-Riem, W., Schmidt-Assmann, E. (2006) *Grundlagen des Verwaltungsrechts*. Vol. I, München: C.H. Beck, pp. 691-692.

operators and conciliating general principles and objectives, the role of the principle in this arena has not been sufficiently explored in the literature. We aim to provide a general overview of the requirements of this principle and its impact on the various stages of a public contract.

In doing so, we will first examine the origin of the principle of proportionality in EU primary law and its use by the CJEU as a mechanism to assess whether a restriction of the freedoms of the TFEU is legally admissible. In the second section, we will reflect on the consolidation of this principle in Article 18(1) of Directive 2014/24,⁶ and in this regard we will suggest three main arguments that might justify its explicit recognition on public procurement law and explore the implications for public authorities (both legislator and contracting entities). In the subsequent section, we will focus on the main expressions of the principle in the different stages of the procurement procedure, which requires an interpretation of the mentioned Directive and the practice of contracting authorities. The paper will end with a set of conclusions and recommendations for an effective application of the principle.

2. THE PRINCIPLE OF PROPORTIONALITY AS A LIMIT TO RESTRICTIONS OF THE FREEDOMS OF THE TFEU

The principle of proportionality, as a general principle of EU law, plays a prominent role in the interpretation of the Public Procurement Directives.⁷ Rooted in the Treaty on the

⁶ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJEU L94, 28.3.2014).

⁷ Moreno Molina, J.A. (2006) *Los principios generales de la contratación de las Administraciones Públicas*. Albacete: Ed. Bomarzo, p. 19; Esteves De Oliveira, R. (2010) “Os princípios gerais da contratação pública”. In *Estudos de Contratação Pública I* (Dir. Pedro Gonçalves), Coimbra: Centro de Estudos de Direito Público e Regulação, p. 51.

Functioning of the European Union (TFEU)⁸, it operates as a shield to protect the principles and freedoms on which it is based and avoid any restriction thereof by the Member States which go beyond what is necessary to satisfy the legitimate reason that justifies it.⁹

From its earlier decisions, the Court of Justice of the European Union (CJEU) has held that any restriction to the freedoms of the TFEU should be for a legitimate reason and meet the requirements of the principle of proportionality.¹⁰ Although this demand is not expressly outlined in the provisions of the Treaty, it has been deduced from the last sentence of Article 36, which states that such restrictions ‘shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.’¹¹ This provision provided a basis for an extensive body of case-law, which has evolved to place our principle as ‘the most important general principle of the communitarian law.’¹²

⁸ Consolidated version of the Treaty on the Functioning of the European Union [OJEU C 202, 7 June de 2016].

⁹ Schwarze, J. (1991) *European Administrative Law*, London: Office for Official Publications of the European Communities, p. 773.

¹⁰ Trybus, M. (2010) “Public contracts in European Union internal market law: Foundations and requirements”. In *Droit compare des Contracts Publics* (Dir. Rozen Noguellou; Ulrich Stelkens), Brussels: Bruylant, pp. 91-92.

¹¹ Craig, P. (2006) *EU Administrative Law*. Oxford: Oxford University Press, p. 688; Harbo, T. (2015) *The function of proportionality analysis in European Law*. Leiden: Brill Nijhoff, pp. 21-22.

¹² Gündisch, J. (1983) “Allgemeine Rechtsgrundsätze in der Rechtsprechung des Europäischen Gerichtshofs”. In *Das Wirtschaftsrecht des Gemeinsamen Marktes in der aktuellen Rechtsentwicklung* (Dir. Jürgen Schwarze), Baden-Baden: Nomos, pp. 97 et seq.; Schlink, B. (1976) *Abwägung im Verfassungsrecht*. Berlin: Duncker und Humblot, p. 459.

The CJEU has assumed the internal structure of the principle of proportionality,¹³ so that – at least from a theoretical perspective – those restrictions should comply with the three sub-principles: suitability, necessity, and proportionality *stricto sensu*. In practice, however, the Court applies this principle in a flexible manner, giving greater or lesser importance to each of these tests depending on the circumstances of the case.¹⁴ When it comes to assessing the conformity of national measures with the provisions of the TFEU, the Court generally structures the proportionality analysis around the suitability and necessity tests, saving the proportionality *stricto sensu* for those cases that require a higher level of control.

In the first instance, the CJEU assesses whether the national measure is suitable for securing the attainment of the pursued objective. Although there are not many cases in which the declaration of disproportionality of the measure is based on the application of the suitability test, its effectiveness was confirmed in *Contse*.¹⁵ In this case, the Court declared two of the criteria for the supply of services of home respiratory treatments and other assisted breathing

¹³ The internal structure of the principle of proportionality can be clearly perceived in the Judgement of the CJEU of 13 November 1990, *Fedesa*, case C-331/88, ECLI:EU:C:1990:391, which states that: “The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued” (at 13).

¹⁴ *Harbo*, n. 11, p. 22.

¹⁵ Judgment of the CJEU of 27 October 2005, *Contse*, case C-234/03 ECLI:EU:C:2005:644, at 53 et seq. In the same line, Judgement of the CJEU of 27 October 2005, *Commission v Spain*, case C-158/03, ECLI:EU:C:2005:642, at 67 et seq.

techniques in the Spanish provinces of Cáceres and Badajoz to be disproportionate. It is understood that an admission condition requiring an economic operator, at the time the tender is submitted, to have an office open to the public is clearly disproportionate. This condition was irrelevant to achieve the objective of better ensuring the protection of the life and health of patients. The same conclusion was reached in relation to an evaluation criterion that awarded extra points for the existence, at the time the tender is submitted, of oxygen production in plants situated within 1.000 kilometres of the province where the service will be provided.

Then, the Court focuses on the core element of the proportionality analysis in EU law: the necessity test, also known as the “less restrictive alternative test”.¹⁶ According to this test, the national measures will only be justified if the interest pursued cannot be protected by less restrictive means for the common market. In other words, if a Member State can choose between various means which are equally suitable to achieve the goal, it has to opt for the one which is less harmful to the community interests.¹⁷ The existence of less restrictive measures is not always assessed in a visible manner but, in most cases, the CJEU merely notes that the measure is not necessary or – in its own words – goes ‘beyond what is necessary’ to achieve a specific objective.¹⁸

¹⁶ Tridimas, T. (1996) “The Principle of Proportionality in Community Law: From the Rule of Law to Market Integration”. *Irish Jurist*, 31, p. 85.

¹⁷ See, among many others, Judgment of the CJEU of 10 November 1982, *Walter Rau Lebensmittelwerke v De Smedt PVBA*, case 261/81, ECLI:EU:C:1982:382, at 12; and Judgment of 14 July 1988, *Glocken and Others v USL Centro-Sud and Others*, case 407/85, ECLI:EU:C:1988:401, at 10. On the field of public procurement, see Judgment of 11 September 2008, *Commission v Germany*, case C-141/07, ECLI:EU:C:2008:492, at 50; and Judgment of 8 June 2017, *Medisanus*, case C-296/15, ECLI:EU:C:2017:431, at 94.

¹⁸ Judgment of the CJEU of 19 May 2009, *Assitur*, case C-538/07, ECLI:EU:C:2009:317, at 23; Judgment of 22 October 2015, *Impresa Edilux*, case C-425/14, ECLI:EU:C:2015:721,

When it carries out this analysis explicitly, usually takes as alternatives the options provided by the parties or even by the Advocate General in his or her Opinion. For instance, in *Borta* the Court claimed that a provision banning the subcontracting of those works qualified as “main works” by the contracting authority, which applies regardless of the economic sector concerned and does not allow for an assessment on a case-by-case basis, is unnecessary for the proper execution of the works.¹⁹ In order to justify this decision, it brought up the existence of a less restrictive measure that was suggested by the Advocate General in her Opinion.²⁰ It consists of requiring tenderers to specify in the tender the part of the contract which they intend to subcontract, as well identifying proposed subcontractors and demonstrating that those subcontractors are suitable for carrying out the tasks.

The fact that the European case-law focuses on the sub-principles of suitability and necessity does not preclude that, in particularly complex cases, it carries out a balancing exercise that reminds us of the subprinciple of proportionality *stricto sensu*. This was the case in *Medipac*²¹, where the award procedure for the supply of surgical sutures was suspended to apply the safeguard procedure provided for by Articles 8 and 18 of Directive 93/42 concerning medical devices bearing the CE marking. The contracting authority had doubts concerning the technical reliability of the sutures proposed by the company Medipac and considered that, despite bearing the CE marking, their use might pose risks for patients.

at 29; and Judgement of 28 February 2018, *MA.T.I.*, joined cases C-523/16 and C-536/16, ECLI:EU:C:2018:122, at 53.

¹⁹ Judgment of the CJEU of 5 April 2017, *Borta*, case C-298/15, ECLI:EU:C:2017:266, at 53-58.

²⁰ Opinion of AG Eleanor Sharpston delivered on 1 December 2016 in *Borta*, ECLI:EU:C:2016:921, at 51.

²¹ Judgment of the CJEU of 14 June 2007, *Medipac*, case C-6/05, ECLI:EU:C:2007:337, at 60-62.

The CJEU, being aware of the severe consequences of a lack of supply during the period of the suspension, allowed the adoption of such measures that were necessary to ensure the proper running of the hospital, even if they restrict the free movement of goods. Although in this case it did not carry out an explicit proportionality analysis given the absence of a specific national measure, it assessed the potential costs and benefits before deciding in favour of protecting public health. To reach that point, the Court followed the proposal of the Advocate General of using direct negotiations to procure a limited interim supply of essential medical devices.²² As in this situation, in most cases where the Court uses this sub-principle, it is necessary to read between the lines to find the balancing of the conflicting interests.

3. THE CODIFICATION OF THE PRINCIPLE OF PROPORTIONALITY IN DIRECTIVE 2014/24

The consolidation of the principle of proportionality as a cornerstone of the public procurement system has been a slow process that culminated in its recognition in the latest generation of Directives. Article 18(1) of Directive 2014/24 states the duty of contracting authorities to ‘*act in a ... proportionate manner*’. Although the previous Directives in the field did not expressly mention this principle, the idea of giving a proportionate treatment to economic operators has been embedded in the European case-law. In this vein, the CJEU has considered that this principle was latent in Directive 2004/18²³ and was to be applied, in a

²² Opinion of AG Eleanor Sharpston delivered on 21 November 2006 in *Medipac*, ECLI:EU:C:2006:724, at 118-119.

²³ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJEU L134, 30.04.2004).

general way, to procurement award procedures.²⁴ Indeed, it has frequently used this principle to verify that the action of the Member States does not go beyond what is necessary to achieve the aim pursued, in relation with such significant aspects as the exclusion of tenderers,²⁵ the criteria for qualitative selection²⁶ or the evaluation of tenders.²⁷

A clear example of the application of the principle of proportionality, even prior to 2014, was the judgment of the CJEU in *Michaniki*.²⁸ In this case, the Court analysed the compliance

²⁴ Judgment of the CJEU of 14 December 2016, *Connexion Taxi*, case C-171/15, ECLI:EU:C:2016:948, at 32. See also Arrowsmith, S. (2014) *The Law of Public and Utilities Procurement*. Vol. I, 3rd Ed., London: Sweet & Maxwell, pp. 631-632; Steinicke, M., Vesterdorf, P. L. (2018) *EU Public Procurement Law*. Baden-Baden: Nomos, pp. 326-328.

²⁵ Judgment of the CJEU of 23 December 2009, *Serrantoni*, case C-376/08, ECLI:EU:C:2009:808; Judgement of 10 July 2014, *Consorzio Stabile*, case C-358/12, ECLI:EU:C:2014:2063; Judgement of 22 October 2015, *Impresa Edilux*, case C-425/14, ECLI:EU:C:2015:721; and Judgement of 8 February 2018, *Lloyd's of London*, case C-144/17, ECLI:EU:C:2018:78.

²⁶ Judgment of the CJEU of 18 October 2012, *Észak-dunántúli*, case C-218/11, ECLI:EU:C:2012:643; Judgement of 2 June 2016, *Pippo Pizzo*, case C-27/15, ECLI:EU:C:2016:404; Judgement of 7 July 2016, *Ambisig*, case C-46/15, ECLI:EU:C:2016:530; and Judgement of 8 September 2016, *Domenico Politano*, case C-225/15, ECLI:EU:C:2016:645. See also Judgement of the General Court of 10 November 2017, *Jema Energy*, case T-668/15, ECLI:EU:T:2017:796.

²⁷ Judgment of the CJEU *Commission v Spain*, n. 15; Judgement *Contse*, n. 15; and Judgement of 20 September 2018, *Montte*, case C-546/16, ECLI:EU:C:2018:752.

²⁸ Judgement of the CJEU of 16 December 2008, *Michaniki AE*, case C-213/07, ECLI:EU:C:2008:731.

with European law – particularly with Directive 93/37/EEC²⁹ – of a Greek provision which established a system of general incompatibility between the public works sector and the media sector, so that people involved in the latter as owner, main shareholder, partner or management executive should be excluded from the procedure. This provision was justified by the need to avoiding risks of interference of the media in procedures for the award of public contracts, as well as preventing fraud and corruption.³⁰

After recognising the discretion of the Member States to take action to preserve the principles of equal treatment and transparency, the Court claimed that these measures would only be valid if they meet the requirements of the principle of proportionality.³¹ In its opinion, the provision at issue was disproportionate because it had the consequence of excluding from the award procedure to a whole business sector without giving the economic operators the possibility of proving that there was no real risk of compromising the mentioned principles.³² The increasing use of the principle of proportionality in the interpretation and application of public procurement law, where it operates as a boundary to the discretion of the Member States and their contracting authorities when it has harmful consequences for economic operators, made it necessary to give it more visibility at the legislative level. Several arguments might explain the decision of the European legislator to incorporate this principle in Directive 2014/24, but ultimately all of them point in the same direction: protecting the right of economic operators to participate in the procurement procedure.

The first argument in favour of codifying this principle is the willingness to *strengthen its role in the field of public procurement*. The presence of the principle in the body of the

²⁹ Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJEU L 199, 09.08.1993).

³⁰ STJUE *Michaniki*, n. 28, at 58.

³¹ STJUE *Michaniki*, n. 28, at 61.

³² STJUE *Michaniki*, n. 28, at 63.

Directive 2014/24 serves as a reminder to contracting authorities of their duty to act in a proportionate manner and, at the same time, increases its visibility. This regulation includes a number of innovations that clearly result from the application of the principle of proportionality and were implied prior to its approval.³³ Therefore, it can be claimed that the recognition of this principle confirms a tendency or line of thought that began years ago and is now consolidated by including it in the list of basic principles of public procurement. The reform of the public procurement system at the European level demands giving more prominence to such a ductile parameter, so that contracting authorities can have a wider range of options available to meet their needs without losing sight of the consequences that their decisions may have for tenderers' rights.

A second reason would be the function of the principle of proportionality as a *protective shield of the principle of competition against unjustified restrictions*. The simultaneous inclusion of both principles in the European regulation was not a mere coincidence, but rather an evidence of the close relationship that exists between them. An exam of the Directive's provisions shows that in most cases in which the principle of proportionality comes into play, it does so to ensure an effective competition between tenderers. In other words, it aims to prevent any restriction of the competition in the market that is not absolutely necessary to

³³ In 2011, the European Commission mentioned the convenience of setting a ceiling on the economic and financial standing required to economic operators in order to ensure the proportionality of the selection criteria and facilitate the access of SMEs to the market. Moreover, it criticised that Directive 2004/18 did not regulate self-cleaning measures that allow economic operators to remedy a negative situation that prevent them from contracting with the public sector, advocating for taking these measures into account to reach a balance between the grounds for exclusion and the observance of the principles of proportionality and equal treatment. It also rejected the automatic exclusion of companies that participated in the preparation of the contract because it is clearly disproportionate. See *Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market*, 27 January 2011 (COM(2011) 15 final).

safeguard the other principles that discipline this field. In particular, the development of effective competition on public procurement is closely linked to the principle of equal treatment.³⁴ Giving equal treatment to economic operators is essential to ensure their access to the market under fair conditions and avoid eventual distortions of the competition. However, there are situations in which these principles conflict with each other and one of them should be limited for the realisation of the other. Then, the principle of proportionality intervenes to protect the weaker principle (generally the principle of competition) and prevent it from being so severely restricted as to be emptied out. In this scenario, the contracting authority should carry out a balancing exercise to determine which principle should prevail in the specific situation.

One situation where a conflict between the principles of competition and equal treatment may arise is the automatic exclusion of tenderers due to their participation in the preparatory works of the contract. On the basis of the principle of equal treatment, the economic operators that have assisted the contracting authority in the preparation of the contract should be excluded since they might have some information unknown to the other participants and take advantage of the situation to become a contractor. However, the application of the principle of proportionality reveals the existence of another measure that can likewise satisfy the principle of equal treatment and involves less harm for economic operators: giving the concerned tenderer the possibility of proving that the experience or knowledge acquired do not give him an advantage over its competitors.³⁵

³⁴ Sanchez-Graells, A. (2015) *Public Procurement and the EU Competition Rules*. 2nd Ed., Oxford: Hart Publishing, pp. 227 et seq.; S. N. Inês, P.D.; (2018) *Os princípios da contratação pública: o princípio da concorrência*. Publicações CEDIPRE Online, 34, Coimbra, pp. 32-33.

³⁵ Judgement of the CJEU of 3 March 2005, *Fabricom*, joined cases C-21/03 and C-34/03, ECLI:EU:C:2005:127, at 23-36; and Judgement of the General Court of 27 April 2016,

The adoption of proportionate decisions during the procedure makes participation more appealing for economic operators (especially SMEs). This rise in competition allows contracting authorities to better meet their needs by getting better products at a lower price and contributes to achieving one of the main objectives of the Directives, i.e. the efficiency of public spending. Ultimately, an efficient spending results in a greater satisfaction of public interests.

The above reasoning leads to the third argument that supports the express recognition of the principle of proportionality: its status as an *instrument for reconciling the various objectives pursued by European public procurement law*. One of the main objectives of the 2014 Directives, along with ensuring the efficiency of public spending through effective competition, is to promote the strategic use of public procurement to support social, environmental or innovation-related policies. The inclusion of these “secondary or horizontal policies”³⁶ in the different stages of the procurement procedure enables contracting authorities to use their buying power to acquire goods and services with social value, such as the promotion of gender equality or the consideration of minorities, as well as steering economic operators’ behaviour towards more sustainable and socially responsible business models. However, this strategic vision of public procurement shall observe the principle of competition and cannot constitute a barrier to market access for SMEs.

The inclusion of social or environmental considerations generally demands the adoption of costly measures that might discourage companies to participate in the procurement procedure. A clear example of this is the implementation of an environmental management system to identify and control in an organised manner the impact of business activities on the

European Dynamics Luxembourg and Others, case T-556/11, ECLI:EU:T:2016:248, at 43-46.

³⁶ About this issue, Arrowsmith, S. (2010) “Horizontal Policies in Public Procurement: A Taxonomy”. *Journal of Public Procurement*, 10(2), pp. 149-150.

environment.³⁷ This system implies starting up a range of measures, from using renewable energies or environmentally-friendly production processes to buying ecological office supplies, that might not be affordable for a significant number of companies. Contracting authorities may require economic operators to indicate the environmental management measures to be applied during the performance of the contract, as a mean to prove their technical abilities as referred to in Article 58 of Directive 2014/24 (see Annex XII, Part II, section g). In doing so, contracting authorities should carry out a proportionality analysis in order to verify whether the satisfaction of the specific horizontal policy justifies an eventual distortion of competition in the market.³⁸ The aim is to verify that the requirements imposed do not go beyond the scope of the procurement procedure itself and/or entail such a restriction of competition that cannot be offset by the benefits derived from the satisfaction of these horizontal policies.

The principle of proportionality included in the public procurement Directives is a particularisation of the more general principle of proportionality which applies in EU law. It conditions the elaboration and subsequent application of the law by all public authorities. In the first place, it is the European legislator who must observe this principle when regulating the essential aspects of public procurement. On one hand, ensuring that the regulation does not go beyond what is necessary to achieve the proper functioning of the internal market. The

³⁷ Valcárcel Fernández, P., Gomez-Fariñas, B. (2018) “Criterios de solvencia y exigibilidad de certificados de gestión ambiental”. In *Compra Pública Verde* (Dir. Ximena Lazo Vitoria). Barcelona: Atelier, pp. 79-101.

³⁸ Sanchez-Graells, A. (2016) “Truly Competitive Public Procurement as a *Europe 2020* Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?”. *European Public Law*, 22(2), pp. 377-394. See also Andrecka, M. (2019) “Contracting Authorities and Strategic Goals of Public Procurement –A Relationship Defined by Discretion?”. In *Discretion in EU Public Procurement Law* (Dir. Sanja Bogojević; Xavier Groussot; Jörgen Hettne), Oxford: Hart Publishing, pp. 117-137.

potential negative effects that the harmonisation of procurement procedures may have on the different Member States are countered by a “tool box” approach, allowing national authorities a maximum of flexibility in adapting the procedures and tools to their specific situation.³⁹ On the other hand, writing the provisions of the Directives in such a way that they are fully respectful with the principle of proportionality and make their application simple for contracting authorities. At the same time, national legislators have to take this principle into account when transposing the European provisions into their legal systems.⁴⁰ The national regulation on public procurement has to internalise the diverse expressions of the principle of proportionality established in the Directives, as well as designing a set of general criteria to support its effective realisation and combating those practices that may result in its violation.

At the application level, contracting authorities have to observe the expressions of the principle included in the Directives and interpret the regulatory provisions in line with the proportionality requirements.⁴¹ It is in this dimension where the principle reaches its climax, turning away from the abstract regulation and having the support of the concrete circumstances of the case. In other words, *the regulation on public procurement must be interpreted and applied according to the principle of proportionality*, so that award-related decisions do not hide actions that are excessively damaging to economic operators. To give

³⁹ European Commission (2011) *Proposal for a Directive of the European Parliament and of the Council on public procurement*. Brussels, 20.12.2011 (COM(2011) 896 final), p. 7.

⁴⁰ Jans, J.H. (2000) “Proportionality Revisited”. *Legal Issues of Economic Integration*, 27(3), 2000, pp. 242-243.

⁴¹ Barnes, J. (1998) “El principio de proporcionalidad. Estudio preliminar”. *Cuadernos de Derecho Público*, 5, p. 28; Philippe, X. (1990) *Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative françaises*. Marseille: Ed. Economica, pp. 82-87.

an example, in case that a contracting authority requires economic operators to have a minimum yearly turnover to prove their economic and financial standing, as a general rule this requirement cannot exceed two times the estimated contract value (Article 58.3 Directive 2014/24). Otherwise, the decision will be deemed as disproportionate. However, authorities shall also take into account the complexity and scope of the contract when determining the specific level of suitability in order to ensure that it is proportionate. It is important to point out that there is not a one-size-fits-all solution and the circumstances of the case play a key role when adopting the correct measure or imposing a specific requirement.

Traditionally the principle of proportionality has been conceived as a parameter used by the courts to control the discretion of public authorities and expel from the legal system those decisions that are absolutely disproportionate (negative dimension or “prohibition of excess”). It verifies that the decisions of contracting authorities do not result in such an intense restriction of the economic operators’ rights that cannot be compensated with the advantages for the public interest. As a minimum standard, it does not seek to ensure that every company participating or wishing to participate in the procedure for the award of a public contract receive the most lenient treatment, but simply to disqualify those acts which do not meet the minimum level of proportionality required to be acceptable.

On the positive dimension, the principle of proportionality does look for the decision that best satisfies the public interest. It guides contracting authorities when writing up the contract specifications so that each of them individually considered results proportionate. At the same time, it is important to examine the clauses as a whole to ensure that the sum of all of them is not disproportionate because it imposes an excessive burden on economic operators, or favours one or more of them over the others. Indeed, the inclusion of disproportionate conditions in the tender documentation is one of the more frequent deficiencies when preparing the contract and it can jeopardise the success of the procedure. Furthermore, it also conditions the specific application of those clauses to each economic operator in view of the relevant circumstances.

4. THE APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY IN THE DIFFERENT STAGES OF THE PROCUREMENT PROCEDURE

The principle of proportionality, just like any other general principle of EU law, has a transversal character.⁴² This means that contracting authorities must observe the requirements of this principle in all stages of the procurement procedure (preparation, award, and performance of the contract) in order to avoid any unnecessary restriction of the economic operators' rights. The various measures aimed at formalising the contract and ensuring its correct performance have to be consistent and under no circumstances can go beyond what is necessary to satisfy the public interest. This reasoning leads to an understanding of the procurement procedure as a *decision-making mechanism* that guides public entities towards a more rational performance and ensures that each decision is the most proportionate.⁴³

This view of the procedure as a sequence of stages that follow one another over time is relevant to understand the impact of the principle of proportionality at the different moments in the life of a public contract. It will be greater or lesser depending on the intensity with which the action of the contracting authorities affect the rights of economic operators and, where appropriate, of the citizens as final users of the contracted service. In the following pages, we will focus on those aspects of the procurement procedure that are most controversial in practice since they may lead to disproportionate decisions. Concerning each of them, we will analyse the incidence of the principle of proportionality and how it has shaped the EU regulation on public procurement.

⁴² Judgement of the CJEU of 12 December 2002, *Universale-Bau AG*, case C-470/99, ECLI:EU:C:2002:746, at 93; Judgement of 10 April 2003, *Commission v Germany*, joined cases C-20/01 and C-28/01, ECLI:EU:C:2003:220, at 36; and Judgement of 21 December 2011, *Chambre de commerce et d'industrie de l'Indre*, case C-465/10, ECLI:EU:C:2011:867, at 56.

⁴³ Barnes, J. (2008) "The meaning of the principle of proportionality for the administration". In *Constitutional Principles in Europe*, Societas Iuris Publici Europaei, Fourth Congress, Göttingen (Germany), p. 247.

4.1. Division of the contract into lots

One of the main problems for economic operators that want to participate in the award of a public contract is the excessive size of the contract, either due to the wide scope of the subject-matter or the duration. This circumstance makes it difficult for many companies (especially SMEs) to participate in the award procedure as they are not capable of submitting an offer for the whole contract, resulting in a considerable limitation of competition in the market.⁴⁴ While in some cases this negative effect on market dynamics is inherent to the nature of the good or service, in others we are facing a case of disproportionality of the public contract itself.

When analysing this issue, we should bear in mind that contracting authorities have a significant degree of discretion to design the subject matter of the contract according to their needs and in a manner that best serves the public interest. A public contract can be awarded to meet different purposes, from the satisfaction of public entities' basic needs (for instance, the supply of office equipment) to carrying out projects of great complexity and magnitude (such as building a new airport). For that reason, there is not a unique solution and the correctness of the contract should be analysed on a case-by-case basis. The decision of tendering a public contract as an indivisible unit or splitting it into several lots involves a component of technical discretion that must necessarily take into account the characteristics of the contract and the current market situation.

⁴⁴ European Commission (2008) *European code of Best practices facilitating access by SMEs to public procurement contracts*. Brussels, 25 June 2008 (SEC(2008) 2193), p. 7. In the literature, Trybus, M. (2014) "The promotion of Small and Medium Sized Enterprises in Public Procurement: A Strategic Objective of the New Public Sector Directive?". In *Modernising public procurement: the new Directive* (Francois Lichere; Roberto Caranta; Steen Treumer), Copenhagen: DJØF Publishing, p. 262.

Given the consequences of this resolution for economic operators, contracting authorities should observe the principle of proportionality when using their discretion to determine whether the contract should be divided into lots.⁴⁵ As stated above, the larger the size of the contract, the fewer the number of companies that are qualified for its performance, which might dramatically constraint the range of options available to contracting authorities to meet their needs. From the supplier's perspective, it generally implies an important restriction of their right to bid for a public contract and become a contractor. It is worth noting, however, that the principle of proportionality does not pretend to guarantee that all companies have access to the public procurement market, which will depend to a large extent on their business approach, but simply that their right to participate in the tendering process is not limited beyond what is strictly necessary. In this vein, the contracting authority's decision concerning the scope of the contract may well be in line with the principle of proportionality even if it means that smaller companies are excluded from the market in that particular case. Whether it chooses to tender a large contract to take advantage of scale economies and achieve greater efficiency, or to divide it into smaller portions in order to increase the competition in the market, this decision must entail a benefit for general interests that can compensate for the harm caused to those economic operators whose expectations of access to the market have been frustrated.

Article 46(1) of Directive 2014/24 empowers contracting authorities to decide to award a contract in the form of separate lots and determine the size and subject-matter of such lots. Although this possibility already existed under Directive 2004/18, the current legislation mentions it expressly and regulates the conditions for using it. If the contracting authority decides not to divide the contract, it will need to explain main reasons in favour of that decision. This possibility of departing from the general rule is known as "divide or explain"⁴⁶, which means that public authorities have to follow the provision of the Directive unless

⁴⁵ Sanchez-Graells, n. 34, p. 264.

⁴⁶ This rule is an expression of the principle "comply or explain", according to which contracting authorities have the duty to comply with the general rule set in the law but, at the

they have good reasons not to do so.⁴⁷ It grants a convenient degree of flexibility to adapt the public action to the factual circumstances and the features of the specific contract.

From the perspective of the principle of proportionality, it can be claimed that in many cases the division of the contract into lots represents a *perfectly valid alternative* to the tendering of the entire contract as an indivisible unit, since it is less restrictive of the competition. This happens when the division into lots achieves the objective of satisfying the public need in an optimal manner, providing that it is possible in view of the nature of the good, work or service to be awarded and does not compromise the correct performance of the contract. In those cases, tendering such a large contract that results in the exclusion of most of the companies usually operating on the market is considered unnecessary and therefore disproportionate. This principle also plays a relevant role in the design of the lots. The goal of ensuring a fair level of competition in the market without unduly sacrificing procurement efficiency

same time, have certain flexibility to depart from it when there are reason that justify so. This principle is frequently used, for example, in the British and Dutch legal systems. See Hebly, J.M., Meesters, J. (2014) “The proportionality principle in the Dutch Public Procurement Act”. *European Procurement & Public Private Partnership Law Review*, 9(4), p. 268; Trybus, M., Andrecka, M. (2017) “Favouring Small and Medium Sized Enterprises with Directive 2014/24/EU?”. *Public Procurement Law Review*, 3, p. 229.

⁴⁷ Assis Raimundo, M. (2018) “Aiming at the market you want: a critical analysis of the duties on division into lots under Directive 2014/24/EU”. *Public Procurement Law Review*, 167, pp. 175-177. See also Anchustegui, I. (2016) “Division into lots and demand aggregation –extremes looking for the correct balance”. In *Reformation or Deformation of the EU Public Procurement Rules* (Dir. Grith Skovgaard Ølykke; Albert Sanchez-Graells), Cheltenham: Edward Elgar Publishing, pp. 133-135

presuppose an adequate design of the lots.⁴⁸ It can be argued that the division of the contract into lots that are too large is not appropriate and may even distort the very nature of this figure, unless it is not feasible to divide it into smaller parts. On the other hand, it would be equally inappropriate to divide the subject matter of the contract into an excessive number of lots or lots of insignificant size if there is no reasonable justification to do so, as this could make it difficult to manage them separately and discourage economic operators from participating in the tendering procedure given the low profitability of the contract. It would lead to such a level of inefficiency that it could not be compensated by the increase in competition, and it may even be the case that companies would choose to increase the prices as a compensatory measure or that some lots would remain unawarded. This problem can be avoided if, from the beginning, the contracting authority carries out a suitable design of the lots in view of the features of the contract and market conditions.

4.2. Qualitative selection of tenderers

As a general rule, participation in award procedures is open to all economic operators who have legal capacity. Nevertheless, contracting authorities has the power to select the tenderers by considering their individual situation, so that only those who meet specific requirements (both positive and negative) will be able to celebrate a contract with the public sector. The “positive requirements” take into account companies’ capacity, economic and financial situation, technical knowledge or professional competence. At the same time, public procurement law demands that the economic operator is not involved in certain situations that call into question his good reputation, such as criminal offences, dishonest practices, or other reprehensible circumstances (“negative requirements”). The aim is to ensure the

⁴⁸ Trybus, M. (2018) “The division of public contracts into lots under Directive 2014/24: minimum harmonisation and impact on SMEs in public procurement?”. *European Law Review*, vol. 43(3), pp. 313-342.

contractor's suitability to take on the obligations arising from the contract, while at the same time avoiding contracting with unreliable or dishonest persons.

The non-compliance with any of the previous requirements has a clear consequence for economic operators: the exclusion of the award procedure. It means that they will neither be able to participate in this procedure nor submit their tenders. The exclusionary nature of the qualitative selection of tenderers makes it a favourable scenario for the application of the principle of proportionality since the decisions taken at this stage will have a direct impact on the economic operators' right to participate in the procedure.

In practice, contracting authorities show a disturbing tendency to include unnecessary or overly demanding selection criteria in the contract documents, with the consequently restrictive effects on competition.⁴⁹ Obviously the argument of pursuing a high level of competition is not enough on its own to justify contracting with companies that do not deserve the trust of the public authorities, but such a restriction on the access to the public procurement market should not go beyond what is strictly necessary to ensure the proper performance of the contract.⁵⁰ Indeed, this deficiency has been identified as one of the main barriers to SMEs participation in award procedures,⁵¹ sometimes as a consequence of an

⁴⁹ Treumer, S. (2016) "Exclusion, Qualification and Selection of Candidates and Tenderers in EU Procurement". In *Qualification, Selection and Exclusion in EU Procurements* (Ed. Martin Burgi; Martin Trybus; Steen Treumer), Copenhagen: DJØF Publishing, pp. 15-16.

⁵⁰ Sanchez-Graells, n. 34, p. 247.

⁵¹ Fana, M., Piga, G. (2013) "SMEs and public contracts. An EU based perspective". In *The Applied Law and Economics of Public Procurement* (Eds. Gustavo Piga; Steen Treumer), Oxon: Routledge, pp. 280 et seq. The European Commission has also highlighted this problem in various communications and working papers, such as *Public Procurement in the European Union*, 11 March 1998 (COM (98) 143 final), pp. 19-20; *European code of Best practices facilitating access by SMEs to public procurement contracts*, 25 June 2008 (SEC(2008) 2193), pp. 16-18; *Green Paper on the modernisation of EU public procurement*

inadequate configuration of the subject-matter of the contract but other times due to the contracting authority's eagerness to cover its own back against a possible breach by the contractor.

Exclusion of tenderers. Article 57 of Directive 2014/24 provides for specific situations that can lead to the exclusion of economic operators from the procurement procedure, distinguishing between mandatory and discretionary grounds for exclusion. In the first case, contracting authorities shall exclude an economic operator who has been convicted by final judgement for one of the offences mentioned in Art. 57(1). This mandatory nature involves that the Member States have to include them into their national legislation, in order to reinforce European policies against crime.⁵² In the case of discretionary grounds for exclusion, contracting authorities may exclude any economic operator in any of the situations set in Art. 57(4) if, after analysing the seriousness of the conduct in the concrete case, this measure is proportionate.

As a general principle of EU law, the principle of proportionality applies to all exclusion decisions and serves as a corrective standard to assess the legality of authorities' actions.⁵³ Recital No. 101 expressly mentions this principle in relation to discretionary grounds for exclusion. It states that contracting authorities should pay particular attention to the principle of proportionality, clarifying that "minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator." Another example of its

policy. Towards a more efficient European Procurement Market, 27 January 2011 (COM(2011) 15 final), pp. 31-32; and Public procurement guidance for practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds, February 2018.

⁵² Arrowsmith, n. 24, pp. 1275-1276.

⁵³ Priess, H. (2014) "The rules on exclusion and self-cleaning under the 2014 Public Procurement Directive". *Public Procurement Law Review*, 23 (3), p. 113.

relevance at this stage can be found in Art. 57(3), which provides an exemption to the mandatory ground for exclusion based on non-payment of taxes or social security contributions where this measure would be *clearly disproportionate* given the unpaid amount, or because the economic operator was informed of the exact amount due at such time that it could not remedy the situation before the expiration of the deadline for requesting participation or submitting its tender.

Once the contracting authority has decided that is necessary to exclude an economic operator, the principle of proportionality should still be applied to determine the duration of the exclusion. Art. 57(7) specifies the maximum period of exclusion for the case that it has not been set by final judgment (five years from the date of the conviction by final judgment) and for discretionary exclusions (three years from the date of the relevant event). However, the maximum period cannot be applied automatically but should be set on a case-by-case basis for the time absolutely necessary to avoid a breach of integrity.

Self-cleaning measures. The clearest expression of the principle of proportionality is the possibility that economic operators affected by a ground for exclusion adopt measures to avoid that consequence.⁵⁴ The self-cleaning measures can be defined as corrective actions implemented by companies in order to restore their reliability and remedy the negative consequences derived from their behaviour, as well as adopting effective measures to prevent such behaviour from happening again in the future. Although this figure has been regulated for the first time by Directive 2014/24, it was already used prior to 2014 in countries such as

⁵⁴ The close relationship between the principle of proportionality and self-cleaning measures has been highlighted by the CJEU in the Judgement of 20 January 2020, *Tim SpA*, case C-395/18, ECLI:EU:C:2020:58, at 49. See also Steinicke, M. (2015) “Qualification and Shortlisting”. In *EU Public Contract Law. Public Procurement and Beyond* (Eds. Martin Trybus; Roberto Caranta; Gunilla Edelstam), 3^a Ed., Brussels: Bruylant, pp. 105-123; Williams-Elegbe, S. (2012) *Fighting corruption in public procurement: a comparative analysis of disqualification or debarment measures*. Oxford: Hart, pp. 248-249.

Germany, Austria, The Netherlands or Italy.⁵⁵ Now, Article 57(6) of the Directive recognises the economic operator's right to prove that it has taken sufficient measures to demonstrate its reliability despite the existence of a relevant ground for exclusion. The concrete measures to be adopted are three: (i) paying or committing to pay compensation of damages caused by the criminal offence or misconduct, (ii) clarifying the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities, and (iii) taking concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

At the same time, contracting authorities have to evaluate the evidence provided by the economic operator in relation to the implemented measures, considering the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are sufficient, the economic operator shall not be excluded from the procurement procedure. It can be argued that the efforts to repair any damage and regain the confidence of public authorities mean that there is no longer an advantage over their competitors and there is no reason for their exclusion. In a way, the costs of implementing these measures compensate for the advantages they could have obtained in the past as a result of their dishonest conduct.⁵⁶ In fact, these operators may enjoy greater credibility than other participants in the competition who have not taken any preventive measures.⁵⁷

⁵⁵ These measures were also recognised in other countries, such as France and Greece, but in practice contracting authorities do not take into consideration the actions of the economic operators. In this regard, Arrowsmith, S., Priess, H. and Friton, P. (2009) "Self-cleaning as a defence to exclusions for misconduct: an emerging concept in EC public procurement law?". *Public Procurement Law Review*, 6, pp. 257-282.

⁵⁶ Arrowsmith et al., n. 55, pp. 47-49.

⁵⁷ Hjelmeng, E., Søreide, T. (2014) "Debarment in Public Procurement: Rationales and Realization". In *Integrity and efficiency in sustainable public contracts. Balancing Corruption Concerns in Public Procurement Internationally* (Dir. Gabriella Racca;

If the measures are insufficient, they do not operate as an alternative to the exclusion and the contracting authority should ban the economic operator from the procedure. Likewise, those economic operators excluded by final judgment from participating in award procedures are not entitled to use this possibility (Art. 57(6)). But, even in these cases, the principle of proportionality should be observed to adjust the length of the exclusion.

Selection criteria. According to Article 58(1) of Directive 2014/24, contracting authorities may only impose requirements that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. These requirements should be related and proportionate to the subject-matter of the contract. The qualifying nature of this step involves that all candidates or tenderers who do not meet the minimum level of solvency required will be directly excluded from the competition. The principle of proportionality aims to prevent the exclusion of economic operators who are fully capable of performing the contract due to excessive solvency requirements. It is essential to set these requirements in a suitable manner by taking into account the technical complexity of the contract and its economic dimension, given that the lack of proportionality to any of these factors would lead to an undue restriction of competition.

The requirement of a minimum level of *economic and financial standing* aims to ensure that economic operators have sufficient resources to remain in the market for the duration of the contract and deal with any liability that may arise.⁵⁸ Article 58(3) mentions various means to prove this point, such as having a minimum yearly turnover, providing information on annual accounts, or an appropriate level of professional risk indemnity insurance. It is for contracting

Christopher Yukins), Brussels: Bruylant, pp. 226-227. In this regard, see also Pünder, H. (2009) “Self-Cleaning: A Comparative Analysis”. In *Self-Cleaning in Public Procurement Law* (Dir. Hermann Pünder; Hans-Joachim Priess; Sue Arrowsmith), Köln: Heymann, pp. 187-205.

⁵⁸ Arrowsmith, n. 24, p. 1190.

authorities to decide whether to require one or more of these means, as well as to determine the specific amount that will operate as a minimum threshold in each case. For this purpose, they must carry out an adequate assessment of the risks inherent to the performance of the contract, so that the economic standing required from tenderers is sufficient to cover them and is proportionate to the magnitude of the contract. As concluded by the CJEU in *Édukövízig*,⁵⁹ the requirement of a minimum level constitutes a positive indication of the existence of a sufficient economic and financial basis for the performance of that contract, but it cannot go beyond what is reasonably necessary for that purpose.

One example of the application of the principle of proportionality is the legal limitation of contracting authorities' discretion to demand a minimum yearly turnover. Except in duly justified cases where there are special risks linked to the nature of the works, services or supplies, this requirement shall not exceed two times the estimated contract value. If the contract is divided into lots, that limit will apply in relation to each individual lot, or group of lots in the event that the successful tenderer is awarded several lots to be executed at the same time. Once again, the existence of a maximum limit that – as a general rule – cannot be exceeded by the contracting authority does not mean that it can be used by default. On the contrary, it should examine in each situation whether the amounts indicated in the tender specifications are objectively admissible because they are proportionate to the subject matter of the contract, without being possible to establish in abstract terms a percentage or amount that is always proportionate.

The *technical and professional ability*, on the other hand, aims to ensure that the economic operator possesses the necessary human and technical resources and experience to perform the contract to an appropriate quality standard (Art. 58(4)). Contracting authorities shall only require those skills that are absolutely essential to perform the contract. The demand of other competences that are not relevant or are very specific could result in a disproportionate action. In particular, they may require that economic operators have a sufficient level of

⁵⁹ Judgement of the CJEU of 18 October 2012, *Édukövízig*, case C-218/11, ECLI:EU:C:2012:643, at 29.

experience demonstrated by suitable references from contracts performed in the past. In addition to the time limits established in the Directive 2014/24,⁶⁰ the principle of proportionality is relevant to determine the number of references of the works carried out, or the supplies or services delivered or performed, that should be submitted by the economic operator. This number should be proportionate to the subject-matter of the contract and cannot go beyond what is necessary to prove the ability of the company. As a general rule, it would be disproportionate to request more than one reference for each relevant competence, except in cases where the particularities of the contract require so.⁶¹

Finally, it should be noted that the use of previous experience as the only way to prove technical and professional ability is contrary to the principle of proportionality.⁶² Provided that many economic operators have difficulties in demonstrating their abilities by using this mean, they should be given the possibility of using alternative means of proof.

4.3. Award criteria and non-compliant tenders

At this stage of the procedure, the principle of proportionality conditions the design and subsequent application of criteria used to award the contract to the most economically advantageous tender.⁶³ Contracting authorities should ensure the proportionate nature of their action when choosing the most suitable criteria and the relative weighting to be given to each

⁶⁰ Annex XII, Part II (a).

⁶¹ Instituut Voor Bouwrecht (2019) *Gids Proportionaliteit*, IBR Publications, The Netherlands, p. 45.

⁶² Sanchez-Graells, n. 34, p. 311.

⁶³ Bordalo Faustino, P. (2014) “Award Criteria in the New EU Directive on Public Procurement”. *Public Procurement Law Review*, 23, pp. 124-133.

of them. This duty is particularly relevant when including *environmental, social, or innovation-related goals as award criteria* since the strategic dimension of public procurement needs to be conciliated with other key objectives, such as equal treatment, a fair level of competition, and efficiency of public spending.⁶⁴ In this case, the application of the principle of proportionality results in a duty to guarantee that the strategic award criterion has not an excessively high weight compared with the other criteria.⁶⁵

The weight given to each award criterion determines the influence it has in the final evaluation of tenders. Generally, the contracting authority is free to decide what weight to give to strategic criteria, as long as this decision is proportionate. When doing so, it has to consider how important are those goals for the contract compared with other considerations (eg. cost or quality of the tender) and how many points can be allocated to them given the nature of the product or service and the market conditions. For instance, if there is a low degree of variation in the price of the product but the environmental performance varies significantly, then it makes sense to allocate more points to assess environmental characteristics.⁶⁶

⁶⁴ Doménech Pascual, G. (2012) “La valoración de las ofertas en el Derecho de los contratos públicos”. *Revista General de Derecho Administrativo*, 30, 2012, pp. 42-43; Gallego Córcoles, I. (2017) “La integración de cláusulas sociales, ambientales y de innovación en la contratación pública”. *Revista Documentación Administrativa. Nueva Época*, 4, pp. 102-104.

⁶⁵ Gallego Córcoles, I. (2019) “Posibilidades y límites generales de las cláusulas sociales y medioambientales como criterios de adjudicación y desempate”. In *Inclusión de cláusulas sociales y medioambientales en los pliegos de los contratos públicos* (Dir. María Magnolia Pardo López; Alfonso Sánchez García), Cizur Menor: Aranzadi-Thomson Reuters, p. 117.

⁶⁶ European Commission (2016) *Buying green! A handbook on green public procurement*. 3rd Ed., Luxembourg: Publications Office of the European Union, p. 54

In *EVN Wienstrom*, the CJEU ruled that the application of a weighting of 45% to an environmental award criterion concerning the production of a defined amount of electricity from renewable energy sources is not incompatible with the EU legislation on public procurement,⁶⁷ provided that it does not violate the basic principles of this arena and the contracting authority is capable of verifying whether the tenders satisfy that criterion.⁶⁸

On the other hand, the principle of proportionality also applies to those tenders that do not comply with the award specifications, include minor errors, or are incomplete or unclear (*non-compliant tenders*). At first glance, the consequence of submitting a non-compliant tender would be its rejection without carrying out a further assessment. This solution is endorsed by the principle of equal treatment, which demands that all the tenders comply with the award conditions in order to ensure an objective comparison between them.⁶⁹ However, Directive 2014/24 provides contracting authorities with the possibility of requesting the economic operators concerned “to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency” (Art. 56(3)).⁷⁰ This power had already been recognised by the CJEU in *Slovensko* for exceptional

⁶⁷ Judgement of the CJEU of 4 December 2003, *EVN Wienstrom*, case C-448/01, ECLI:EU:C:2003:651, at 43.

⁶⁸ *EVN Wienstrom*, at 44 et seq.

⁶⁹ Judgement of the CJEU of 22 June 1993, *Commission v Denmark [Storebaelt]*, case C-243/89, ECLI:EU:C:1993:257, at 37-38.

⁷⁰ This provision was included in the proposal of the European Council when the fourth generation of Directives was being discussed in May 2012. Initially it was suggested that the request for clarification should be a *duty* for contracting authorities, but after a period of negotiations with the Member States it was decided to introduce it as a voluntary measure. On the process of including the possibility of rectifying non-compliant tenders, see Risvig

situations where it is clear that the tender requires a mere clarification or the correction of obvious material errors, as long as such amendment does not lead in practice to the submission of a new tender.⁷¹

The choice of one option or another will be the result of a case-by-case analysis that considers, for instance, the nature of the error or omission and the time passed since the expiration of the deadline for submission of tenders.⁷² From the perspective of the principle of proportionality, the correction of tenders is a valid alternative to the rejection as long as the principle of equal treatment is not unduly affected.⁷³ It can be even argued that there are situations where contracting authorities have a *duty* to give economic operators this

Hamer, C. (2016) “Requesting additional information – increase flexibility and competition?”. In *Reformation or Deformation of the EU Public Procurement Rules* (Dir. Grith Skovgaard Ølykke; Albert Sanchez-Graells), Cheltenham: Edward Elgar Publishing, pp. 235-252.

⁷¹ Judgement of the CJEU of 29 March 2012, *Slovensko*, case C-599/10, ECLI:EU:C:2012:191, at 40-44. See also Judgement of the CJEU of 10 October 2013, *Manova*, case C-336/12, ECLI:EU:C:2013:647; and Judgement of 7 April 2016, *PARTNER Apelski Dariusz*, case C-324/14, ECLI:EU:C:2016:214.

⁷² Brown, A. (2014) “The Court of Justice rules that a contracting authority may accept the late submission of a bidder’s balance sheet, subject to certain conditions: Case C-336/12 Danish Ministry of Science, Innovation and Higher Education v Manova A/S”. *Public Procurement Law Review*, 1, pp. 1-3.

⁷³ Codina García-Andrade, X. (2015) “Why Manova is not Slovensko: a new balance between equal treatment of tenderers and competition”. *Public Procurement Law Review*, 4, pp. 109-117; Dekel, O. (2008) “The Legal Theory of Competitive Bidding for Government Contracts”. *Public Contract Law Journal*, 37(2), pp. 237-239.

possibility, for instance when the correct content can be easily deduced from the terms of the offer or the circumstances of the case, provided that significant factors of the tender, such as price or quality aspects serving as a basis to determine the most advantageous tender, are not affected.⁷⁴

4.4. Modification of the contract

The spirit of moderation inherent in the principle of proportionality goes beyond the award of the contract and extends to its performance. Although the impact of this principle on the execution of the contract is lower than in the previous stages, given that the contracting authority only deals with the contractor, it is still relevant when the former wants to amend one or more of the conditions that discipline the contractual relationship. Any change in the contract conditions might not only be prejudicial for the contractor, but also affects the principles of equal treatment and transparency since the terms governing the award of the contract, as originally laid down, would be distorted.⁷⁵

As the CJEU noted in *Presstext*, the modification of a public contract during the execution is incompatible with EU law when it constitutes a new award. It happens when the amendments are materially different in character from the original contract and demonstrate

⁷⁴ Judgement of the General Court of 10 December 2009, *Antwerpse Bouwwerken NV*, case T-195/08, ECLI:EU:T:2009:491, at 56. This position had already been upheld by the GC in its earlier Judgement of 27 September 2002, *Tideland Signal*, case T-211/02, ECLI:EU:T:2002:232, at 43.

⁷⁵ Judgement of the CJEU of 29 April 2004, *CAS Succhi di Frutta SpA*, case C-496/99 P, ECLI:EU:C:2004:236, at 118-120.

the intention of the parties to renegotiate the essential terms of that contract.⁷⁶ In this vein, the Court states that an amendment ‘may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted’⁷⁷, or when it extends the scope of the contract considerably to encompass services not initially covered.⁷⁸

Article 72 of Directive 2014/24 enumerates a number of situations where a public contract can be amended without a new procurement procedure. The first provision refers to a case where the modifications have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses (Art. 72(1)(a)). Given that these documents meant to discipline any step of the contract, the eventual disproportion in their configuration would be a case of *lack of proportionality in the law*. The principle of proportionality operates here in its positive dimension, as a guideline that should be followed by public authorities when writing up the conditions that will apply during the performance of the contract. When doing so, they should foresee potentially objective circumstances that would justify an alteration of the contract conditions and reflect them in the procurement documents, after balancing the various interests concerned.

In the other situations, where the modifications have not been included in the documents, we are facing a case of *lack of proportionality in the application of the law*. According to this principle, contracting authorities should only carry out such amendments of the contract that are strictly necessary to satisfy the reason that requires them. Directive 2014/24 mentions the “necessity” of the amendment on various occasions. Firstly, Article 72(1)(b) provides

⁷⁶ Judgement of the CJEU of 19 June 2008, *Pressetext*, case C-454/06, ECLI:EU:C:2008:351, at 34.

⁷⁷ *Pressetext*, at 35.

⁷⁸ *Pressetext*, at 36-37.

contracting authorities with the possibility of modifying the contract for the completion by the original contractor of additional works, services or supplies that have become necessary and were not included in the initial procurement. However, this measure will only be proportionate if there is no other option that fully ensures compliance with the principles of equal treatment and transparency. In this line, the provision limits this possibility to those cases where a change of contractor is not possible for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations, and it would cause significant inconvenience or substantial duplication of costs for the contracting authority. In any case, the amendment cannot exceed 50% of the value of the original contract.

Secondly, Article 72(1)(c) contemplates the amendment of the contract as a response to unforeseeable circumstances that could have not been predicted by a diligent contracting authority when preparing the initial award. As in the previous case, the adoption of this measure should be limited to specific cases in which the situation cannot be addressed by other means. Even in these cases, the amendment has to meet the maximum limit of 50% of the value of the original contract and cannot alter the overall nature of the contract.

The application of the principle of proportionality to contract modifications is characterised by a clear primacy of the necessity test. However, the proportionality *stricto sensu* test also plays a relevant role when deciding about this issue due to the need to conciliate multiple interests. Contracting authorities should balance the consequences of amending the contract against the effects of a possible termination, taking into account – among other factors – the complexity of the work, supply or service, and the time period needed to perform it;⁷⁹ the longer this period or the greater the difficulties inherent to the performance of the contract, the stronger the arguments in favour of the modification.

⁷⁹ Bogdanowicz, P. (2016) “The application of the principle of proportionality to modifications of public contracts”. *European Procurement & Public Private Partnership Law Review*, 11(3), pp. 194-204.

5. CONCLUSIONS

In such a complex scenario as public procurement law, the principle of proportionality has proven to be an extraordinary instrument to conciliate the rights of the economic operators with the successful execution of the contract. At the same time, it has a ductile nature that allows contracting authorities to optimise the different goals embedded in the procurement and, in particular, to ensure efficiency when including strategic policies for a common good. The Directive 2014/24 provides a legal framework that pursues diverse objectives that can conflict with the basic purpose of the procurement, i.e. buying the products or services needed in the most advantageous conditions in terms of price and quality, and the principle of proportionality plays a key role in reaching a balance among them.

The consolidation of this principle in the 2014 Directives makes it explicit the duty of contracting authorities to treat economic operators in a proportionate manner, following the posture held by the CJEU for many years. As stated above, this parameter operates from the preparation of the contract to its complete execution, ensuring that the discretionary decisions of contracting authorities do not go beyond what is necessary to satisfy public interests. Disproportionate decisions not only limit market competition and constitute an unfair barrier for SMEs, but also prevent public entities from obtaining the best purchasing conditions. Ultimately, it may affect the quality of the services that will be delivered to the citizens.

The study of the impact of the principle of proportionality throughout the procurement procedure has allowed us to reach two main conclusions. First, in most cases, it aims to avoid excessive restrictions of the competition in situations where the principle of equal treatment might be affected. In this regard, the EU public procurement law introduces several mechanisms to optimise both principles that are rooted in the idea of proportionality. Second, the positive dimension of this principle, which operates as a guideline that directs the action of contracting authorities to the most proportionate decision in each case, has a prominent role in this field. Public entities have to ensure that their performance is proportionate when designing the subject-matter of the contract, writing up the contract specifications, in particular the selection and award criteria, and applying those conditions to the diverse situations that may arise in practice. Even during the performance of the contract, they should ensure the proportionality of the decisions and the observance of the other general principles.

Furthermore, the fact that the intensity of application of this principle decreases as contracting authorities move forward through the procedure shows the close relationship with the principle of competition. It can be argued that the greater the risk of competition restrictions, the more intense the role of the principle of proportionality. In essence, it contributes to a fairer and more efficient procedure that takes into account the interest of all parties and optimises them in the best possible manner.