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Paper:

Telles, P. & Ølykke, G. (2017). Sustainable Procurement: A Compliance Perspective of EU Public Procurement Law. *European Procurement & Public Private Partnership Law Review*, 12(3), 239-252.
<http://dx.doi.org/10.21552/epppl/2017/3/7>

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Sustainable Procurement: A Compliance Perspective of EU Public Procurement Law

By Pedro Telles and Grith Skovgaard Ølykke*

1. Introduction

Law and compliance are conceptually linked as law explicitly aims to produce compliance with its rules.¹ In a strict view, compliance simply means abiding (by the law). Considering compliance in a legal context, it is not the only effect of legal rules, as rules may affect behaviour even if compliance is not the result.² Compliance theory has its foundations in rational choice theory and behavioural economics.³ Compliance theory has three main ‘strands’ which, however, have the same general focus on how law abidance should be obtained. For the purpose of this article the first category will be termed “corporate compliance”, the second category “State compliance” and the last “regulatory compliance”. Each of the three strands of compliance theory has an off-set in rational choice theory, where the reply to non-compliance is monitoring and sanctions, and as a “reaction” thereto a line of argumentation relying on behavioural economics, where the reply to non-compliance is capacity building, transparency and interpretation of rules.⁴ The EU public procurement legal regime can be viewed from the perspective of each of the three strands and it can be observed how elements from each are utilised. However, measures that could fruitfully be analysed on the basis of insights from State and regulatory compliance theory dominate. This paper explores how compliance obligations are contained under Directive 2014/24/EU, the main substantive Directive in public procurement. It will be argued that under this Directive there has been an increase in the utilization of public procurement as a means to achieve State and regulatory compliance for policy objectives that sit outside the simple act of buying a good or service. These have expanded over the years in successive legal revisions and can now be observed in all stages of a public procurement procedure. In fact, the increase is so significant that we are now at the cusp of putting the subject matter-contract nexus at risk. The subject matter-contract nexus is a key

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1 K Raustiala and A-M Slaughter, “International Law, International Relations and Compliance” in W Carlnaes, T Risse and B Simmons, (eds), *The Handbook of International Relations* (Sage Publications, 2002), 538-558, 538.

2 *Ibid.*, 539.

3 For an overview of rational choice theory, see e.g. I Gilboa, *Rational choice* (MIT Press, 2010). For an overview of behavioural economics, see e.g. K Mathis and AD Steffen, “From Rational Choice to Behavioural Economics – Theoretical Foundations, Empirical Findings and Legal Implications” in K Mathis (ed) *European Perspectives on Behavioural Law and Economics* (Springer International Publishing, 2015) and specifically on behavioural economics and law abiding, see several chapters in E Zamir and D Teichman (eds) *The Oxford Handbook of Behavioral Economics and the Law* (Oxford University Press, 2014).

4 E.g. K Raustiala and DG Victor, “Conclusions”, in DG Victor, K Raustiala and EB Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Evidence*, (MIT Press, 1998), 659-707.

cornerstone of the entire EU procurement legal framework since it restricts the factors which can be taken into account when awarding a public contract.

Further, the article argues that the growth of compliance in EU public procurement law has not been subject to any logic or specific reasoning but instead appears to be the result of an organic process. This leads to a number of further questions which are briefly addressed but not tackled in this article but warrant further research.

The article is structured as follows. In section 2, corporate compliance theory is outlined and placed in a public procurement context, with examples drawn from Directive 2014/24/EU. In section 3, a State compliance perspective is taken on the public procurement regime, again using examples from Directive 2014/24/EU to illustrate the use of this type of compliance. Section 4 covers regulatory compliance which as it will become visible, is the most prevalent type of compliance within public procurement and the most expanded under Directive 2014/24/EU. In section 5, the compliance ambitions of Directive 2014/24/EU are discussed and our conclusions are put forward in section 6.

2. Corporate compliance

The strand of compliance theory focussing on corporate compliance is based on a part of rational choice theory called Principal-Agent theory.⁵ A Principal-Agent problem arises where one party (the principal) needs the services of another party (the agent), but each party has different interests and information is asymmetric; the principal's challenge is to create an incentive structure which aligns the behaviour of the agent to that desired by the principal. Whereas, traditionally, Principal-Agent theory was concerned with the separation between ownership and management in companies,⁶ the focus of corporate compliance theory is on explaining and advising on how the management level in businesses or public entities may provide incentives to ensure compliance with any rules applicable to the organisation.⁷ By devoting resources to ensuring compliance with legal requirements, managers reduce the risk of the organisation being subject to sanctions and negative public exposure.⁸ In this context, compliance inducement originates from two sources: i) internal compliance measures and ii) external compliance measures imposed by regulation (see further below on regulatory compliance). Internal compliance measures are needed because a culture of non-compliance with legislative requirements may "naturally" stem from the perceived (competitive) advantage of non-compliance.⁹ According to Principal-Agent theory, the solution to

5 DC Langevoort, "Monitoring: the Behavioral Economics of Corporate Compliance with Law", 2002 17(1) *Columbia Business Law Review*, 71-118, 71, footnote 1, and 76.

6 See e.g. EF Fama and MC Jensen, "Separation of Ownership and Control", 1983 26(2) *The Journal of Law & Economics*, 301-325.

7 On Principal-Agent theory applied to employment relationships, see PR Milgrom and J Roberts, *Economics, Organization and Management* (Prentice-Hall, 1992), 179-192. On Principal-Agent theory and law abidance, see e.g. DA DeMott, "Organizational Incentives to Care about the Law", 1997 60(4) *Law and Contemporary Problems*, 39-66.

8 DC Langevoort, "Monitoring: the Behavioral Economics of Corporate Compliance with Law", 2002 17(1) *Columbia Business Law Review*, 71-118, 72.

9 DC Langevoort, "Monitoring: the Behavioral Economics of Corporate Compliance with Law", 2002 17(1) *Columbia Business Law Review*, 71-118, 77.

non-compliance is contractual and/or based on monitoring systems,¹⁰ the latter however being less effective due to asymmetric information¹¹ and the unobtainability of perfect monitoring, as well as the cost of attempting to reach such a perfect level of monitoring.¹² An alternative to these ways of furthering compliance of employees are ethics or integrity based systems which rely on persuasion and the creation of a compliance culture.¹³

2.1 Directive 2014/24/EU from the perspective of corporate compliance theory

Corporate compliance theory does not as such explain the features of the rules on public procurement or predict whether they will be complied with or not, as corporate compliance is concerned with company internal measures to ensure compliance with external requirements. This theory is nonetheless relevant to understand the behaviour of economic operators and contracting authorities.

Member States or contracting authorities themselves may also have systems in place to ensure compliance with the public procurement rules. Such systems may be based on internal or external quality control of (specific) procurements or may be automated through the general mapping of invoices to the public contracts or framework agreements entered into by the contracting authority.¹⁴ Although not directly present in Directive 2014/24/EU, these features are enabled via the mandatory transition to electronic procurement the Directive requires. On the private side, several provisions of Directive 2014/24/EU incentivise economic operators to engage in corporate compliance efforts. For example, the exclusion grounds and the obligation to (possibility of) reject(ing) tenders which do not comply with applicable social, environmental or labour law obligations¹⁵ – “obligations” must be read as legal obligations non-adherence to which may be sanctioned¹⁶ – thus limiting the participation in bidding for public contracts to those economic operators who comply with legal obligations when they conduct business. Another example of corporate compliance in public procurement is the possibility afforded to economic operators to

10 DC Langevoort, “Monitoring: the Behavioral Economics of Corporate Compliance with Law”, 2002 17(1) *Columbia Business Law Review*, 71-118, 83-100.

11 On asymmetric information within Principal-Agent relationships see, JE Stiglitz, “Principal and Agent”, in J Eatwell et al. (eds), *Allocation, Information and Markets*, (Macmillan 1989), 241-243 and JJ Lafont and D Martimort, *A Theory of Incentives* (Princeton University Press, 2002) 46-51 and 93-101

12 Generally, see PR Milgrom and J Roberts, *Economics, Organization and Management* (Prentice-Hall, 1992), 259-267. On the optimal level of monitoring in a company, see DC Langevoort, “Monitoring: the Behavioral Economics of Corporate Compliance with Law”, 2002 17(1) *Columbia Business Law Review*, 71-118, 100-103.

13 DC Langevoort, “Monitoring: the Behavioral Economics of Corporate Compliance with Law”, 2002 17(1) *Columbia Business Law Review*, 71-118, 104-111.

¹⁴The latter is facilitated by Directive 2014/55/EU of the European Parliament and of the Council of 16 April 2014 on electronic invoicing in public procurement, OJ 2014 L133/1. Directive 2014/24/EU does not require electronic invoicing but recital 52 in the preamble encourages digitalizing in wider scope than required by the Directive. In Denmark electronic invoicing to the public sector is a requirement in many transactions, see Bekendtgørelse om elektronisk afregning med offentlige myndigheder, BEK nr 206 af 11/03/2011. For an example, see report on Danish Regions’ compliance, see http://www.regioner.dk/media/3418/rapport-indkoeb-i-regionerne_20160502.pdf (accessed April 2017).

15 Articles 56(1), last sentence, and 69(3) in Directive 2014/24/EU.

16 GS Ølykke, “The provision on abnormally low tenders: a safeguard for fair competition?” in GS Ølykke and A Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar, 2016), 146-169, 163.

'self-clean' in case of wrongdoing that could otherwise lead to exclusion from a public procurement procedure.¹⁷ Since the lapse of time would nonetheless 'clean' the economic operator, adopting measures internally to show a change of practice to avoid the penalty of exclusion are a clear example of the procurement system within Directive 2014/24/EU being used as a means to achieve corporate compliance.

3. State compliance

State compliance theory is concerned with when and why States comply with international treaties and has developed in the fields of international relations and international law, respectively.¹⁸ State compliance theory may be distinguished from the other two strands of compliance theory considered in this paper, as the international enforcement regimes are usually perceived as weak compared to contractual or national enforcement regimes,¹⁹ implying that a deterrence-based approach would not be very useful.²⁰ However, in an EU context, some deterrence based mechanisms exist, such as the breach of Treaty procedure in Article 258 of the Treaty on the Functioning of the European Union (TFEU) and the possibility of imposing fines on Member States that do not comply, cf. Article 260(2) and (3) TFEU; however, it may be argued that the limited resources for 'central' enforcement entails a need for other explanations for compliance,²¹ such as the EU institutions influence, that compliance is in line with national interests and the additional 'decentralized' enforcement conducted at national level by individuals to whom EU law grants rights.²² 'Compliance' is seen as an individual object of research in State compliance theory, which

17 See S Arrowsmith, HJ Priess and P Fritton, *Self-Cleaning – An Emerging Concept in EC Public Procurement Law*, in H Punder, HJ Priess and Arrowsmith (eds), *Self-Cleaning in Public Procurement Law* (Verlag, 2009) 1 and SJ Hjelmeng and T Soreide, *Debarment in Public Procurement: Rationales and Realization* in GM Racca and Yukins (eds), *Inegrity and Efficiency in Sustainable Public Contracts*, 2014.

18 K Raustiala and A-M Slaughter, "International Law, International Relations and Compliance" in W Carlnaes, T Risse and B Simmons, (eds), *The Handbook of International Relations* (Sage Publications, 2002), 538-558, offers a general overview and literature review.

19 E.g. TM Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990), 41 and 43-44; M Finnemore and K Sikkink, "International Norm Dynamics and Political Change", *International Organization*, 1998 52(4), 887-917, 893.

20 Generally, see E Kontorovich and F Parisi (eds), *Economic Analysis of International Law* (Edward Elgar, 2016). For an analysis of empirical examples, see NA Bapat and BR Kwon, "When Are Sanctions Effective? A Bargaining and Enforcement Framework", 2015 69(1) *International Organization*, 131-162. On the theories that relate (non)compliance and power: RB Mitchell, "Regime Design Matters: Intentional Oil Pollution and Treaty Compliance", 1994 48(3) *International Organization*, 425-458, 428 and more recently, KM Milewicz and D Snidal, "Cooperation by Treaty: The Role of Multilateral Powers", 2016 70(4) *International Organization*, 823-844. GW Downs, DM Rocke and PN Barsoom, "Is the good news about compliance good news about cooperation?" 1996 50(3) *International Organization*, 379-406, argue that the high level of compliance to international treaties despite the limited use of sanctions may be explained by the fact that international treaties only require modest changes in State behaviour.

21 Along these lines, see PM Haas, "Compliance with EU directives: insights from international relations and comparative politics", 1998 5(1) *Journal of European Public Policy*, 17-37, 23.

22 F Wilman, *Private Enforcement of EU Law Before National Courts - The EU Legislative Framework* (Edward Elgar, 2015). On the centralised and decentralised enforcement systems in the EU, see J Tallberg, "Paths to Compliance: Enforcement, Management, and the European Union", 2002 56(3) *International Organization*, 609-643, 614 ff.

is clearly distinguished from other concepts, such as e.g. effectiveness.²³ While high levels of compliance can indicate high levels of effectiveness, they can also indicate low, readily met and ineffective standards, as international treaties etc. are often agreed according to the lowest denominator, a critique to which primary and secondary EU law are not immune; however, international treaties may still have an effect on State behaviour even if they are not complied with.

23 For an example, see RB Mitchell, "Regime Design Matters: Intentional Oil Pollution and Treaty Compliance", 1994 48(3) *International Organization*, 425-458, 457-458 or PM Haas, "Compliance with EU directives: insights from international relations and comparative politics", 1998 5(1) *Journal of European Public Policy*, 17-37, 18.

3.1 Directive 2014/24/EU from the perspective of State compliance theory

At a general level, the already mentioned enforcement mechanisms in the TFEU also apply to ensure enforcement of the EU public procurement rules at the Member State level, such as, e.g. timely and correct implementation of each successive generation of public procurement directives. In addition to the enforcement based approach in the Treaties, managerial State compliance theory has over time been visible in the public procurement Directives themselves. For example, specific transitional arrangements have been put in place where the difference in capacity between Member States made the implementation of certain provisions in all Member States at the same time impossible.²⁴ Directive 2014/24/EU constitutes in itself a measure requiring State compliance with EU law, since it must be transposed into national law. Member States were given until April 2016 to transpose the Directive, but to date not all had done so.²⁵ At a more specific level, Directive 2014/24/EU contains compliance obligations for Member States in Article 18(2). These constitute in the first instance an example of State compliance obligations within the definition made above. Under Article 18(2) Member States are obliged to take appropriate measures so that economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to Directive 2014/24/EU. This is a clear situation where Member States are tasked with the enforcement of compliance with legal rules via the monitoring of performance of public contracts. The approach taken by the Directive leaves significant gaps and raises difficulties related to its interpretation, particularly the scope of provisions, the agents covered, the manner in which the enforcement must be conducted, as well as the consequence of non-compliance.

As for the provisions covered, it appears clear that Article 18(2) needs to be interpreted as an exhaustive list of categories of measures, that is, its command for Member States to enforce provisions is limited to the sources indicated within it. The use of categories of measures makes the actual content of the obligations in Article 18(2) dynamic and difficult to determine. Nevertheless, the enforcement requirement is restricted to provisions originated from within the EU (EU law,

24E.g. amendment 20 in Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts, OJ 1989 L210/1 which postponed the obligation to verify apparently abnormally low tenders prior to their rejection – the transitional arrangement was made on request from Italy; see further Report from the Permanent Representatives Committee to the Council: “Amended proposal for a Council Directive amending Directive 71/305/EEC concerning the co-ordination of procedures for the award of public works contracts”, 11 October 1998, Document No 8589/88 MAP 23. II.8, especially p.11, and furthermore see Advocate General Lenz’ opinion of 29 June 1995 concerning C-143/94 *Furlanis* EU:C:1995:354, [13]. Another more recent example is the possibility to postpone the transition to electronic procurement provided for in Article 90(2) of Directive 2014/24/EU. On transitional arrangements in international treaties, see A Chayes and AH Chayes, “On Compliance”, 1993 47(2) *International Organization*, 175-205, 195 and 200.

25 As of May 2017, only 18 Member States had done so, E Commission, Report from the Commission to the European Parliament and the Council on the review of the practical application of the European Single Procurement Document (ESPD) COM(2017) 242 final.

national law, or collective agreements) and to the international instruments contained in Annex X.²⁶ It does not extend to other provisions, either within or outside the EU, ie legal provisions and collective agreements from third countries, even within the GPA parties or other international conventions. In addition, the applicability of all these obligations²⁷ has to be interpreted in accordance with the general principles of EU law and particularly the four freedoms. As such, they cannot be used to set aside the Posted Workers Directive²⁸ or demand from economic operators to comply with national labour rules²⁹ if workers are based in another Member State, except in the conditions set forth in *Regiopost*.³⁰ Regarding the question of who can be made to comply with those provisions, it is less clear where to draw the boundaries. By definition, a prime contractor would be covered, but what about sub-contractors? Regarding the first category, Article 71 Directive 2014/24/EU extends the compliance obligation to sub-contractors and clearly leaves the monitoring of compliance in the hands of the “competent national authorities”, implying that the monitoring nature is still one of State compliance. However, while the obligation is clear in sub-contracting relationships, can the obligation be passed down the supply chain, as some argue it should?³¹ We argue that the obligation covers only prime contractors and sub-contractors as defined in Article 71, ie those with a clear contractual relationship within the contract being performed and not the wider supply chain. But if that was to be the case, how would we define ‘supply chain’? The definition of a supply chain may seem obvious for the textbook example of garment factories but what about digital services that may be provided via servers? Can the contracting authority demand the economic operator to ensure that the servers used do not use conflict minerals? Even in a scenario whereby the economic operator simply rents the computing power and has no control over what equipment is actually used? As the Directive limits the scope of the applicable rules, it appears that Article 18(2) cannot be used as a justification to extend the reach of EU rules outside of the Union, except for compliance with the international conventions included in Annex X. Regarding

26 Considering the rules contained therein as an implicit mandatory contract performance clause, H Schebesta, “EU Green Public Procurement Policy: Modernisation Package, Eco-Labeling and Framing Measures”, in S. Schoenmakers, W. Devroe and N. Philipsen (eds.), *State Aid and Public Procurement in the European Union* (2014) 129. On the context of Annex X in the “travaux préparatoires” and how the international legal instruments were selected see, EV den Abeele, *Integrating social and environmental dimensions in public procurement: one small step for the internal market, one giant leap for the EU?* (etui working paper 2014.08, 2014) 10.

27 GS Ølykke, “The provision on abnormally low tenders: a safeguard for fair competition?” in GS Ølykke and A Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar, 2016), 146-169.

28 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ 1996 L18/1.

29 What is described by Sanchez-Graells as ‘regulatory substitution’, A Sanchez- Graells, *Regulatory substitutions between labour and public procurement law: the EU’s shifting approach to enforcing labour standards in public contracts*, forthcoming (2018) 24(2) *European Public Law*.

30 Case C-115/14 *Regiopost v Stadt Landau* ECLI:EU:C:2015:760. See also, cases C-346/06 *Ruffert v Land Niedersachsen* ECLI:EU:C:2007:541 and C-549/13 *Bundesdruckerei v Stadt Dortmund* ECLI:EU:C:2014:2235

31 Submissions by the International Learning Lab on Public Procurement and Human Rights and International Corporate Accountability Roundtable to the House of Lords and House of Commons Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability*. On subcontracting chains see also R Craven, “Subcontracting matters: Articles 43 and 71 of the 2014 Directive” in GS Ølykke and A Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules*, Edward Elgar, Cheltenham 2016, Chapter 13.

how the enforcement must be conducted, Article 18(2) leaves a wide discretion to the Member States. Member States may decide to delegate the control of contract performance to contracting authorities or they may decide to rely on already existing administrative structures, such as working environment authorities or environmental authorities.

In any event, it is our view that the obligation created by Article 18(2) is restricted to the *performance* of the contract, thus covering only prime contractors and sub-contractors, but not the entire supply chain. By consequence, the reach of these provisions is much more limited than could originally be anticipated, both in terms of the supply chain (not covered at all) or their application outside the EU, limited to those contractors and sub-contractors which may be based outside the EU.

Finally, what happens if Member States do not take appropriate measures to ensure that the applicable obligations in Article 18(2) are complied with by economic operators when they perform public contracts? Viewed from the perspective of the enforcement approach, the risk of being subject to a breach of Treaty procedure could be flagged up. However, due to the very uncertain and vague wording of Article 18(2), it could also – from the perspective of the cooperation approach – be argued that the provision is merely a ‘reminder’ and that Member States (and/or contracting authorities³²) already fulfil the obligation to monitor and ensure legally compliant contract performance in Article 18(2) to a certain extent.

4. Regulatory compliance

Regulatory compliance offers strategies for regulators to ensure compliance with the rules. There are two main schools of regulatory compliance: the deterrence-based enforcement approach and the cooperative enforcement approach.³³ The former advises a confrontational strategy of sanctioning of violators whereas the latter advises a strategy of cooperative governance, bargaining and persuasion.³⁴ The deterrence-based approach relies on rational choice theory³⁵ and takes a cost-benefit approach to the weighting between: criminals’ gains and costs (of punishment if the crime is detected) versus victims’ harm; public cost of monitoring, investigating, litigating, enforcing and punishing (cost of imprisonment versus economic sanctions); as well as private cost of preventive measures (which for companies may be imposed by law – e.g. self-monitoring systems)³⁶ etc.³⁷

32 Contracting authorities could contractually have volunteered to do some of the monitoring, e.g. by use of social clauses/wage clauses, the fulfillment of which should arguably be monitored to have effect. In some Member States, Unions have an important monitoring and enforcement role with regard to labour law obligations.

33 JT Scholz, “Cooperation, Deterrence, and the Ecology of Regulatory Enforcement”, 1984 18(2) *Law & Society Review*, 179-224, provides an overview of the early literature.

34 S Oded, *Corporate Compliance – New Approaches to Regulatory Enforcement* (Edward Elgar Publishing, 2013) 15-16.

35 *Ibid*, 16 ff.

36 DC Langevoort, “Monitoring: the Behavioral Economics of Corporate Compliance with Law”, 2002 17(1) *Columbia Business Law Review*, 71-118, 77.

37 *Ibid*, 17; an early application of rational choice theory and cost-benefit analysis in the context of compliance is GS Becker, “Crime and Punishment: An Economic Approach”, 1968 17(2) *Journal of Political Economy*, 169-217. See also e.g. D Kahan, “The Secret Ambition of Deterrence”, 1999 113(2) *Harvard Law Review*, 413-500; TR Tyler, *Psychology and the Design of Legal Institutions* (Wolf Legal Publishers, 2007).

Important elements in the deterrence-based approach include the risk of detection³⁸ and the dissuasive effect of sanctions.³⁹ According to the deterrence-based approach, sanctions will effectively prevent breaches of the rules if the appropriate balance, between the cost of committing the breach and the violator's personal utility from committing the violation, is reached.⁴⁰ Thus, the deterrence-based approach advises legislators to balance the above mentioned elements in to ensure that any potential violator's personal utility is maximized by obeying the rules rather than by breaching them.⁴¹ From the regulated entity's perspective, in the present context an economic operator or a contracting authority, the goal is individual utility maximization (e.g. profit maximization or cost minimization) and the optimal level of compliance results from a cost benefit analysis, including the organisational specific costs and benefits only.⁴² The cooperative approach relies on behavioural sciences and was developed in the sphere of criminal law focusing on explaining individuals' law abidance. However, the rationale could be transferred to the behaviour of companies and emanations of the State when they act in a regulated area, such as public procurement, rather than in a supervisory function.⁴³ According to the cooperative approach, morality and legitimacy are two important concepts in explaining compliance with the law. Regarding the former, weight is attributed to the law-abiding nature of humans and their morality (complying with the law because it is the right thing to do) as factors explaining individuals' motivation to abide even in the absence of the threat of severe punishment.⁴⁴ Regarding the latter, it is argued that if legal institutions act according to principles of procedural fairness, it will help to sustain and strengthen the ability of legal authorities to encourage individuals and organisations to regulate themselves.⁴⁵ Violations of law are explained by incompetence, misinterpretation of the law, or ignorance.⁴⁶ The cooperative approach advises that compliance with the law should be encouraged by persuasion, cooperation and conciliation; potential violators should have the benefit of doubt, minor violations should be tolerated, and a rule of reason approach should be adopted to

38 RB Mitchell, "Regime Design Matters: Intentional Oil Pollution and Treaty Compliance", 1994 48(3) *International Organization*, 425-458, 449, points out that high levels of transparency enabling detection will deter violations and thereby reduce the perceived competitive disadvantage of complying to regulation.

39 Ibid, 176 ff. and 184.

40 GS Becker, "Crime and Punishment: An Economic Approach", 1968 17(2) *Journal of Political Economy*, 169-217 and S Oded, *Corporate Compliance – New Approaches to Regulatory Enforcement* (Edward Elgar Publishing, 2013), 20.

41 On optimal deterrence and sanctioning, see S Oded, *Corporate Compliance – New Approaches to Regulatory Enforcement* (Edward Elgar Publishing, 2013), 20 ff. and the references therein. Oded also offers an overview of the main lines of critique of the deterrence-based approach; see 35 ff.

42 DC Langevoort, "Monitoring: the Behavioral Economics of Corporate Compliance with Law", 2002 17(1) *Columbia Business Law Review*, 71-118, 79.

43 E.g. RA Kagan and JT Scholz, "The 'Criminology of the Corporation' and Regulatory Enforcement Strategies" in E Blankenburg and K Lenk (eds), *Organisation und Recht* (Westdeutscher Verlag, 1980), 352-377; JT Scholz, "Cooperation, Deterrence, and the Ecology of Regulatory Enforcement", 1984 18(2) *Law & Society Review*, 179-224, 182.

44 Oded, *Corporate Compliance – New Approaches to Regulatory Enforcement* (Edward Elgar Publishing, 2013), 50.

45 E.g. S Schulhofer, T Tyler and A Huq, "American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative" 2011 101(2) *Journal of Criminal Law and Criminology*, 335-375, 338; J Jackson, B Bradford, M Hough, A Myhill, P Quinton and TR Tyler, "Why do People Comply with the Law?: Legitimacy and the Influence of Legal Institutions", 2012 52(6) *The British Journal of Criminology*, 1051-1071, 1052.

46 RA Kagan and JT Scholz, "The 'Criminology of the Corporation' and Regulatory Enforcement Strategies" in E Blankenburg and K Lenk (eds), *Organisation und Recht* (Westdeutscher Verlag, 1980), 352-377, 367-368.

allow for well-reasoned violations.⁴⁷ The cooperative approach acknowledges that businesses may be tempted by non-compliance to pursue profits but nevertheless assumes that the majority of corporations are law abiding.⁴⁸ The relevance of the deterrence approach is not completely diminished but it should be used only as a last resort for serious violations.⁴⁹

4.1 Directive 2014/24/EU from the perspective of regulatory compliance theory

The addressees of the public procurement rules are contracting authorities. From a general perspective, the public procurement rules included in Directive 2014/24/EU induce compliance by contracting authorities through tools from both the deterrence approach and the cooperation approach.⁵⁰ The deterrence approach is visible e.g. in the Remedies Directive⁵¹ which subjects non-compliance by contracting authorities to specific sanctions.⁵² Enforcement is taking place at both the EU and the national levels. At EU level, it is achieved through investigations and infringement procedures initiated by the Commission. At national level, national review bodies rule on complaints from economic operators, who are ‘utilised’ to monitor contracting authorities’ compliance,⁵³ possibly after having made preliminary references to obtain interpretation of the public procurement rules from the CJEU.⁵⁴ The cooperation approach is e.g. visible from the interpretive guidelines, standard forms etc.⁵⁵ and from the annual Public Procurement Indicators published by the Commission.⁵⁶ Nevertheless, as already indicated above in section 2, the public procurement rules also require compliance by economic operators; thus, below the inducements of compliance in the public procurement rules are made on the basis of regulatory compliance theory for both regulatees contracting authorities and economic operators.

It is fundamental to understand that the regulatory compliance required from contracting authorities and economic operator operates at two distinct levels. The first level ensures that internal

47 JT Scholz, “Cooperation, Deterrence, and the Ecology of Regulatory Enforcement”, 1984 18(2) *Law & Society Review*, 179-224, 182-183.

48 Oded, *Corporate Compliance – New Approaches to Regulatory Enforcement* (Edward Elgar Publishing, 2013), 51, who also accounts for criticism of the cooperation approach at 65 ff.

49 JT Scholz, “Cooperation, Deterrence, and the Ecology of Regulatory Enforcement”, 1984 18(2) *Law & Society Review*, 179-224, 182-183, argues that the cooperation approach should be applied to “good” (generally law abiding) corporations whereas the deterrence approach should be applied to “bad” corporations. See also Oded, *Corporate Compliance – New Approaches to Regulatory Enforcement* (Edward Elgar Publishing, 2013), 53.

50 This is a general feature of EU law, cf. J Tallberg, “Paths to Compliance: Enforcement, Management, and the European Union”, 2002 56(3) *International Organization*, 609-643, 614.

51 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ 1989 L395/33 as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ 2007 L335/31.

52 Such as annulment of decisions and economic sanctions.

53 J Tallberg, “Paths to Compliance: Enforcement, Management, and the European Union”, 2002 56(3) *International Organization*, 609-643, 620 ff., ascribe the empowerment of private individuals to the CJEU, as the principles of direct effect and State liability are not foreseen in the Treaties.

54 According to Article 267 TFEU.

55 See the material made available by the Commission at: http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en (accessed April 2017).

56 The Public Procurement Indicators are available at: http://ec.europa.eu/growth/single-market/public-procurement/studies-networks_en (accessed April 2017).

rules constraining procurement as an activity are followed up and these are directly connected with the process or act of purchasing works, goods or services. For example, transparency requirements or the need to adopt specific award criteria can be understood within this context, *ie* the regulatory compliance is internal (or intrinsic) to the act of buying. From this perspective, transparency requirements are a first line of defence against corruption, which in itself is intrinsic to procurement, as corrupt procedure will affect its outcome from a competitive perspective. Imposing e.g. specific procedures or award criteria can be viewed on the basis of the same logic: enforcing specific ways for contracting authorities to award contracts which are still connected with the act of buying itself.

The second level of regulatory compliance is one that is not internal to the process or act of purchasing works, goods or services. Instead, these instances of regulatory compliance constitute the instrumentalisation of public procurement as a means to ensure that *external* regulatory rules or objectives are complied with. The focus in this section will be on this second level of regulatory compliance as provisions requiring or facilitating the obtaining of external rules and in particular external objectives expanded in scope in Directive 2014/24/EU and provide new constraints on how procurement is to be conducted – without being directly connected with the process of buying. In other words, they exist not to improve procurement itself, but to facilitate and improve compliance with external (State level/Union level) policy objectives, which may or may not have a regulatory nature. As will be clarified, this second level, with a focus on obtaining objectives external to the procurement process or contract object itself, is very visible in the compliance required by economic operators whereas contracting authorities are not as such constrained. They rather serve as promoters or enforcers of the policies external to procurement where the final regulatees are the economic operators.

The various compliance requirements imposed on economic operators are discussed below from a regulatory compliance theory perspective. Due to the high number of observations of regulatory compliance within Directive 2014/24/EU and to frame a systematic discussion, this section follows the stages of public procurement, i.e. selection, award and performance.

4.2.1. Selection stage

At selection stage it is possible to see provisions inducing regulatory compliance to general legal rules at play in general in the exclusion grounds of Article 57 Directive 2014/24/EU. These can be mandatory or discretionary for the contracting authority to apply, but overall they establish a set of obligations economic operators need to comply with so that they can be accepted for a tender. There is a strong deterrent based consequence: non-compliant economic operators are excluded from the competition for public contracts, not just from particular contract procedures, but (possibly) from participating in any procedures for a given period of time. What makes the exclusion grounds relevant for the purposes of this article is that for the majority of these, their nature and objectives are disconnected to the actual contract being tendered. They constitute external policy or regulatory compliance objectives, which are being pursued or enforced via public procurement. However, not

all exclusion grounds in Article 57 constitute external regulatory compliance requirements. Bankruptcy,⁵⁷ competition violations in that particular procedure,⁵⁸ prior failures to fulfil public contracts,⁵⁹ and misrepresentation⁶⁰ are all examples of exclusion grounds that are intrinsically connected to the task of awarding the contract and influence the decision-making process. They may be connected to policy goals external to that procurement procedure, but at least they do have an internal function in determining which economic operators pose a risk in the performance of that particular contract.

The remaining grounds, however, are external to the procedure and can be aggregated by type:

- Criminal activities such as participation in criminal organisations, corruption, fraud, terrorist offenses, money laundering and child labour;⁶¹
- Tax-related offenses, including payments for tax and social security contributions;⁶²
- Professional misconduct;⁶³
- Protection of competition;⁶⁴

All these exclusion grounds⁶⁵ are not connected with the task at hand of awarding a contract, but instead constitute a way to achieve distinct legal and policy objectives; they could to some degree be seen as further sanctions adding to those which traditionally are imposed to incentivise economic operators' regulatory compliance outside the sphere of public procurement.⁶⁶ It is possible to observe as well that some of these compliance mechanisms, under the right circumstances, may be set aside by lawmakers or contracting authorities, so that economic operators can nonetheless participate in the procedure. For example, it is possible for criminal activities under Article 57(1) it i for the economic operator to argue it has changed its practices and undertaken self-cleaning⁶⁷ as mandated by Article 57(6) Directive 2014/24/EU. The same provision offers economic operators found guilty of professional misconduct and competition violations similar respite from exclusion. Even offenses related to the payment of taxes, social contributions, and debts to the public sector can be overlooked, however, only if arrangements to pay have been made or if the Member States decide to provide an exceptional derogation due to overriding reasons of public interest. The possibility to self-clean is a sign of the cooperative enforcement approach: economic operators are given the option to adjust their behaviour and prevent future non-compliance.

57 Article 57(4)(b) of Directive 2014/24/EU.

58 Article 57(4)(e)(f) and (I) of Directive 2014/24/EU.

59 Article 57(4)(g) of Directive 2014/24/EU.

60 Article 57(4)(h) of Directive 2014/24/EU.

61 Article 57(1) of Directive 2014/24/EU.

62 Article 57(2) of Directive 2014/24/EU.

63 Article 57(4)(c) of Directive 2014/24/EU.

64 Article 57(4)(d) of Directive 2014/24/EU.

65 On exclusion grounds under Directive 2014/24/EU see, Sanchez-Graells (2014) Exclusion, Qualitative Selection and Short-listing in Lichere, Caranta & Treumer (eds), *Modernising Public Procurement. The New Directive*, Vol. 6 European Procurement Law Series, p. 97-129.

66 Along these lines, see Schoenmaekers, Sarah: »The EU debarment rules: legal and economic rationale«, *Public Procurement Law Review* 2016 no. 3, 91-104.

67 See S Arrowsmith, HJ Priess and P Fritton, *Self-Cleaning – An Emerging Concept in EC Public Procurement Law*, in H Punder, HJ Priess and Arrowsmith (eds), *Self-Cleaning in Public Procurement Law* (Verlag, 2009) 1.

It is clear that the list of exclusion grounds in Article 57 Directive 2014/24/EU is longer than it was in Article 45 Directive 2004/18/EC and contains more examples of compliance requirements, there are others which might have been included and where interest groups have pushed for including them. For example, in the UK the Sourced campaign launched in 2016 by the Christian Aid⁶⁸ and Fair Tax Mark⁶⁹ pushed for local authorities in the UK to refuse awarding contracts to economic operators not paying their fair share of tax. The campaign did not aim to enforce the current rules, *ie* that economic operators found in breach of tax/social security obligations should be excluded as per Article 57(2) Directive 2014/24/EU,⁷⁰ but that those using tax avoidance schemes which are yet to be declared illegal should be excluded from public procurement altogether. It should not go unnoticed that the Fair Tax Mark happens to sell a certification scheme for economic operators which checks understanding what tax has been paid and why and [looks] for a tax policy which commits to good practice.⁷¹ As such it has a special interest in ensuring tax-related exclusion grounds are moved from a strictly binary analysis of a legal obligation to a higher standard.

4.2.2 Award stage

Traditionally, the award stage is focused on identifying the best bid in accordance with the award criteria set out at the beginning of the procedure. Even though there were questions under previous generations of Directives of what types of not purely economic criteria the contracting authority could use, the Court of Justice held that all award criteria needed to be linked to the actual subject matter of the contract being performed.⁷² Therefore, until Directive 2014/24/EU, the thin red line for an award criterion to be legal or illegal was the degree of connection to the subject matter of the contract at hand.⁷³ As long as a criterion was connected to the contract it would be considered legal, even if it had a social or environmental component. That has (partly) changed under Directive 2014/24/EU due to its Articles 18(2) and 56(1).⁷⁴

Article 56(1) of Directive 2014/24/EU maintains that contracts are to be awarded in accordance with the award criteria set at the beginning of the procedure as per Article 67 to 69 of the same Directive. It does include, however, an obligation for the contracting authority to check the tender

68 www.christianaid.org.uk/campaigns/tax-justice-campaign, accessed April 5th 2017. It is not the only campaign in the UK with this aim, with others such as . And internationally the Tax Justice Network (www.taxjustice.net) and Global Alliance for Tax Justice Network (www.globaltaxjustice.com).

69 Fairtaxmark.net, accessed on April 5th 2017.

70 Which in addition to the legal requirement was subject to guidance from the Crown Commercial Service, Procurement Policy Note: Measures to Promote Tax Compliance - Action Note 03/14 for all central Government contracts valued at 5 million or more. This policy mandated Central Government to interpret any non-compliance with tax requirements of the Public Contracts Regulations 2006 as a mandatory exclusion.

71 www.fairtaxmark.net/criteria/ accessed April 5th 2017.

72 Case C-31/87 Gebroeders Beentjes v The Netherlands [1989] ECR 4365, Case C-225/98 Commission v French Republic (Nord-Pas-De-Calais) [2000] ECR I-7745, Case C-523/99 Concordia Bus Finlandia v Helsingin Kaupunki et HKL-BUssiliikenne [2002] ECR I-7213, Case C-448/01 EVN AG, Wiestrom GmbH v Austria [2003] I-14558, Case C-368/10 Commission v Netherlands (Dutch Coffee) ECLI:EU:C:2012:284.

73 The exception being Case T-331/06, Evropaiki Dynamiki v European Environment Agency ECLI:EU:T:2010:292 although this was decided under the Commission Regulation (EC, Euratom) No 2343/2002 of 25 June 2002 (Financial Regulation) and not the Procurement Directives.

74 In this regard, see A Semple, "The Link to the Subject-Matter: A Glass Ceiling for Sustainable Public Contracts?" in B Sjåfell and A Wiesbrock (eds), *Sustainable Public Procurement under EU Law - New Perspectives on the State as Stakeholder* (Cambridge University Press, 2015), Chapter 3.

and bidder compliance with all requirements and selection criteria once again. This is understandable, as those requirements should maintain their relevance all throughout the procedure to avoid strategic behaviour of economic operators. However, paragraph 1 of the said Article 56(1) extends the compliance checks with external legal obligations that are not necessarily (strictly) connected with the contract as it refers to the obligations included in Article 18(2) Directive 2014/24/EU.⁷⁵

Depending on how the obligations of Article 18(2) have been transposed into national law, the obligation contained therein may be passed from Member States down to the contracting authorities, which then act as enforcing mechanisms for those legal obligations. This is bound to be problematic in practice for at least two reasons. First, all contracting authorities - irrespective of their capacity - are now under the obligation to check the compliance with these legal obligations at the award stage and then during contract performance.⁷⁶ Second, it increases the transaction costs for economic operators since they will actively have to prove their compliance with a myriad of legal provisions they may not know in advance whether apply to them or not, and logic dictates that smaller economic operators will find this more difficult. Third, it may easily be misinterpreted as imposing compliance in all activities of the economic operator. This is the real issue raised by Article 18(2) and it is already present, for example, in the United Kingdom.

In England and Wales, the requirements of Article 18(2) are treated at the selection stage, where the focus is on the economic operator and not the tender or the performance of the contract. In fact, Section 3 of the Standard Qualification Questionnaire template⁷⁷ entitled “[g]rounds for discretionary exclusion” includes questions about breaches, in the past three years, of environmental, social or labour law obligations *anywhere in the world*.⁷⁸ Although Article 18(2) limits the compliance check to environmental, social and labour law established by Union law, national, collective agreements, as well as those international conventions listed in Annex X of the Directive, contracting authorities in England and Wales are expected to check for *any* non-compliance by the economic operator *anywhere in the world* over the last three years. This provision covers, for example the obligation of commercial organisations operating in the United Kingdom and with a yearly turnover larger than 36 million per year to prepare a slavery and human trafficking statement for each financial year.⁷⁹ Even though there is no clear obligation not to award the tender to a bidder at fault⁸⁰ there appears to be a clear nudge in that direction. Furthermore,

75 In fairness, Article 56(1)1 still refers to *tender* compliance with the requirements set by Article 18(2), but the latter moves the compliance check to the performance of the contract, therefore having a broader scope of application than just the tender itself.

76 These will be discussed in more detail in the next section.

77 Crown Commercial Service, Procurement policy note 8/16: Standard Selection Questionnaire, revised in February 2017.

78 This is based on Regulation 58(8)(a) of the Public Contracts Regulations 2015 which cross-refers to Regulation 56(2) (epigraphed General principles in awarding contracts etc) which effectively transposes Article 18(2) of Directive 2014/24/EU. On the issues raised by this transposition, see Sanchez-Graells & Telles (2016), Commentary to the Public Contracts Regulations 2015, available at: www.pcr2015.uk

79 Article 54 of the Modern Slavery Act 2015.

80 Regulation 56(2) gives the contracting authority the discretion to do so or not, as does Article 56(2) of Directive 2014/24/EU.

whereas Article 56 emphasises *tender* compliance, e.g. refusing to award a contract to the most economically advantageous tender because it would imply staff would be paid less than the minimum wage, in England and Wales compliance is being asked of the bidder at large: has the bidder violated any of these norms during the last three years? This is a clear extension of the compliance requirements from Directive 2014/24/EU beyond what is admissible under Article 57 of the Directive and a break with the subject matter-contract link.

The provision on abnormally low tenders contained in Article 69 Directive 2014/24/EU is also relevant in the context of regulatory compliance and its increase in scope over the years. The current version displays significant changes compared to its previous version. First, the provision entails an obligation for contracting authorities to verify any tender which appears to be abnormally low.⁸¹ This obligation is of a wide scope, and could be used by contracting authorities – and by unsuccessful competing tenderers – to unveil any assumptions or strategies which the low tender is based on. Whereas the obligation to verify enables contracting authorities to make rational and enlightened decisions about whether a tender is sound or not – which is closely related to the subject matter-contract nexus – it might also uncover any illegal practices and thereby be considered as a tool in ensuring regulatory compliance.⁸² Second, the provision entails an obligation to reject tenders which are abnormally low due to non-compliance to applicable Article 18(2) obligations.⁸³ From the perspective of regulatory compliance, this obligation introduces deterring incentives for contracting authorities, as private enforcement is facilitated and the failure to reject is subject to the usual remedies available in the context of public procurement. Note that the roles are changed, as economic operators (complainants) – instead of contracting authorities – are instrumental in ensuring enforcement in this context and that the compliance obligation covers both the contracting authority (which is supposed to act in a certain way) as well as the economic operator which had to comply with the requirements of Article 18(2) in the first place.

4.2.3 Performance stage

It is possible to observe in the procurement regime's regulation of the performance stage of a public contract that the focus on regulatory compliance with external obligations has evolved over time. Whereas Directive 2004/18/EC was silent in terms of how a contract should be performed and managed,⁸⁴ Directive 2014/24/EU includes a small number of rules on contract performance in

81 Article 69(1) of Directive 2014/24/EU.

82 In recent case law, the General Court has developed the concept of an (apparently) abnormally low tender and – in addition to emphasising that the price must cover social legislative requirements (wages and social contributions) and all costs of conducting the technical aspects of the tender – it mentioned the legal requirement not to sell at a loss which is embedded in national legislation of some Member States and which goes beyond the measures mentioned in Article 18(2) of Directive 2014/24, see e.g. Case T-638/11, *European Dynamics Belgium and others v EMA*, EU:T:2013:530, [68]; Case T-90/14, *Secolux v Commission*, EU:T:2015:772, [61-62]. See also Order T-644/13 R, *Serco Belgium and others v Commission*, EU:T:2014:57, [55] and Case T-700/14, *TV1 GmbH v Commission*, ECLI:EU:T:2017:35, [41].

83 Article 69(3) of Directive 2014/24/EU. The introduction of the obligation to reject under *some* circumstances, as inspired Member States to adopt a wider obligation to reject all tenders which are abnormally low, see e.g. the Swedish Procurement Act, 16 kap. 7§ in Lag (2016:1145) om offentlig upphandling, where a general obligation to reject abnormally low tenders has been introduced. Historically, there has been no such obligation in Sweden.

84 Including on the use of sustainability, R Caranta, *Sustainable public procurement in the EU* in R Caranta and M Trybus (eds), *The law of green and social procurement in Europe* (Djof 2010) 15-53.

Articles 18, 70, 71 and 72.⁸⁵ Articles 71 and 72 sustain the idea that contract performance should be broadly ruled by the same logic as the contract award, that is, that any modifications that are significant should be considered as breaking the award criteria-contract nexus and as such leading to a re-tendering of the contract.⁸⁶ Articles 18(2) and 70, however, push the boundaries of the nexus a bit further. The first was explored in detail in sections 2.1 and 4.2.2, the focus will now be on the latter.

According to Article 70, contracting authorities are entitled to impose as conditions for the performance of the contract, any special conditions as long as those are linked to the subject-matter of the contract. The same article provides as examples economic, innovation-related, environmental, social and employment-related performance conditions.

The conditions of Article 70 can be interpreted in two different ways. First, it provides contracting authorities with yet another legal basis to verify if economic operators are complying in the contract performance with legal requirements within the concept of compliance defined in section 4, thus furthering the compliance element of Directive 2014/24/EU as an incidental way to ensure other legal provisions are complied with.

Second, it gives the contracting authority a *new* legal basis to introduce contract performance clauses that match its policy interests, and as such, the examples provided are an indication of the types of clauses the Directive expects contracting authorities to use.⁸⁷ Although these are not the focus of this article – in particular because they are of a contractual rather than a regulatory nature – it is important to note three points. First, again, this provision enables contracting authorities to push the envelope of what contract conditions may be laid down, further blurring the lines of what is connected to the subject matter of the contract. For example, is a contract performance clause that requires the creation of apprenticeships for the building of a school connected to the subject matter of the contract? It can be argued both ways: on the one hand, it is connected to the subject-matter of the contract as it is still relevant for the main contract or can be considered to be a second contract within a mixed contract.⁸⁸ On the other hand, if those apprenticeships are created elsewhere by the contractor (say on a private building project), the policy objective would still be achieved, but there would be no connection with the actual contract itself. Second, this provision of the Directive could be utilised by Member States to make inclusion of certain contract conditions – such as the obligation to create apprenticeships if relevant to the contract object – mandatory by national legislation and thereby use public procurement to achieve policy goals (a deterrence- or cooperation based tool depending on the specific form).⁸⁹ Third, this provision of the Directive needs to be interpreted within the context of EU general law principles of equal treatment and non-discrimination, as well as free movement of people, goods and services and therefore cannot be

85 In addition to Recital 37-40 of Directive 2014/24/EU.

86 On Article 72 see, Treumer, Regulation of contract changes in the new public procurement Directive, in Lichere, Caranta & Treumer 2014 Modernising public procurement. The new directive, p. 281 - 300.

87 And certainly behind policy approaches such as Community Benefits in Scotland and Wales.

88 Although if that was the case then it should be subject to its own award criteria.

89 In Denmark, a guidance in the use of social clauses has been issued and it requires contracting authorities to use social clauses or explain why they do not, in all contracts which are defined as “relevant” in the guidance, see Vejledning om sociale klausuler i udbud, VEJ nr 9954 af 21/09/2016.

used to discriminate against economic operators based in another Member State or be used to distort trade in any way or form.⁹⁰

5. Questions raised by the increase of external compliance via public procurement

Sections 2 to 4 showed that the current EU public procurement framework is no longer simply a system designed to achieve a specific aim to help (or constrain) the public sector purchasing activity. It is now clear that the current legal regime contains a significant number of compliance constraints that are not inherent in the act of buying but nonetheless end up shaping the buying decision.

Out of the three types of compliance (corporate, state and regulatory), it is by far the latter that is most prevalent in public procurement today. In addition, it appears most regulatory compliance demands filter down from the Member States and are put ultimately on the shoulders of the economic operators – contracting authorities are means to achieve this compliance. These changes warrant further reflection which are presented here as questions.

5.1 Is there any logic to the expansion of compliance requirements in public procurement?

There is no indication that the growth and expansion of compliance has been subject to a specific logic and it appears instead to have grown organically in the normal push-pull of any legislative effort.⁹¹ This is particularly visible in the choice of international labour obligations contained in Annex X to Directive 2014/24/EU– why have those and only those been selected? It could be asked why a similarly exhaustive list has not been produced for the other areas contained in Article 18(2) Directive 2014/24/EU? At a national level, one relatively straightforward reply would be that it is impossible to list all national legislative acts etc. Moreover, the national measures may be dynamic in a sense which the international conventions are not. Therefore, it is up to the Member States to decide on details in the implementation of Article 18(2) Directive 2014/24/EU.⁹² This fact however also implies that economic operators will meet different levels of assistance in national law with regard to the fulfilment of the obligations which will be decisive for their successful participation in public procurement procedures.

In addition, why were only these international conventions selected for inclusion in Annex X and not other international instruments? Furthermore, what about new international relevant instruments created in the meanwhile, such as, perhaps the Paris Accord?

90 With a similar view, Arrowsmith, Application of the EC Treaty and directives to horizontal policies: a critical review in Arrowsmith & Kundzlik, *Social and Environmental Policies in EC Procurement Law*, (2009), p.159-160, although the author considers unlikely most would distort trade.

⁹¹ For a political science approach to Directive 2014/24/EU, see GS Ølykke and A Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar, 2016).

⁹² In Sweden, the legislator has implemented Article 18(2) in a manner which provides some guidance to economic operators, cf. 17 kap. 2-5§ in Lag (2016:1145) om offentlig upphandling, where in particular social and labour law requirements are fleshed out. At the other end of the scale is Denmark, where Article 18(2) has not been implemented, see e.g. GS Ølykke and R Nielsen, *EU's Udbudsregler – i dansk kontekst*, 2. ed., DJØF Publishing 2017, chapter 10.

5.2 Why using procurement to pursue external compliance objectives?

As mentioned in the previous sub-section, there appears to be no specific logic or reasoning behind how compliance requirements have grown in public procurement. In consequence, it is unlikely that an overarching sustaining reason for this can be found. We can posit, however, that the haphazard expansion occurred due to the action of pressure groups, which irrespective of their laudable (or not) policy goals have seen public procurement as a tool to achieve their objectives. One of such pressure groups could be Member States acting on behalf of contracting authorities, which previously faced considerable legal uncertainty trying to incorporate political objectives – such as avoiding to award contracts to dishonest tenderers to the detriment of fair competition. Other pressure groups with narrow agendas which, once again, might be laudable but lead us to further questions though: what price is being paid (in higher transaction costs for example) so that those objectives can be pursued? And who is paying those costs of what effectively amounts to private enforcement? Either contract prices are going up (public sector pays), quality goes down (public sector pays), or the cost is absorbed by the economic operators (private sector pays). It would appear though that the cost is not being borne by the beneficiaries (or proponents) of the extra compliance requirements, but a more in depth analysis is required to answer this question comprehensively.

5.3 Is compliance via procurement the best way to achieve any given policy goal that requires compliance?

Although the expansion of procurement as a compliance tool has been established, what has not been provided is the analysis of the question if public procurement is the best way to achieved the underlying policy goals and what trade-offs this implies. The answer to this particular question requires significant research beyond the scope of the current article and support from other disciplines such as economics. However, it is relevant to at least consider some of the legal implications contained within it.

As suggested in the previous sub-section, it may be assumed that one issue is cost but other potential trade-offs can be put forward. For example, compliance adds complexity to the system and it has been well established that increases in procurement regulatory complexity lead to a reduction of SME participation in public procurement. It also may lead to a reduction in competition – by increasing compliance requirements it is conceivable fewer economic operators might be able to meet the requirements. Even good intentions may lead to unintended consequences with public procurers (and economic operators) questioning rule changes on information from economic operators that were designed to reduce bureaucracy but so far are having the opposite effect.⁹³

Having said that, it is possible to look at Article 18(2) as an example of a pro-competition regulatory requirement, or at least one that has the effect of deterring economic operators of non-compliance with the underlying labour or environmental obligations and thereby ensuring fair

93 On this topic see the P Telles, *The European Single Procurement Document*, *Upphandlingsrättslig Tidskrift* (2017) 1 and the following blogposts, P Telles: *Further thoughts on the ESPD*, available at <https://www.telles.eu/blog/2017/6/2/x890ptheo7ymqkqmk1t45wlrobtbve> and M Turunen, *Sometimes I feel like I am Sherlock*, <https://www.hansel.fi/blogi/2017/05/16/sometimes-i-feel-i-am-sherlock/>

competition. At the same time, we can return to the opposing view by asking why those specific obligations (and not others) are being imposed? Is it not possible to level the playing field with other requirements or even without those requirements at all?

5.4 What are the limits to the compliance being required?

The compliance requirements set forth in Directive 2014/24/EU do not exist in a vacuum and as they are based on a secondary source of EU law (a directive) the interpretation of their reach needs to comply with EU primary law. As such, the boundaries of their interpretation are set by the general principles of EU law (equal treatment and non-discrimination, legal certainty and subsidiarity) and the four freedoms (free movement of goods, capital, services and labour).⁹⁴ In consequence, all compliance requirements mentioned in sections 2 to 4 will have to be subject to a restrictive interpretation if and when they constitute an exception to those principles. For example, self-cleaning, the rules for which are not entirely clear and are prone to a casuistic take, is a prime candidate for a compliance mechanism that may well lead to the violation of equal treatment.

Looking at Directive 2014/24/EU, the exact reach of some of its compliance provisions is unclear, particularly Article 18(2) and Article 57 encompassing all three strands of compliance. This issue can be subdivided in two: supply chain (“passing down”) and territorial application which we covered above in section 2. They do not apply to all compliance requirements and certainly do not apply to all circumstances. But as above, there are situations where they can be observed.

As for the supply chain, this is still subject to other specific EU rules such as those arising from the customs union, ie rules of origin or customs duties or the Reduction on Hazardous Substances Directive (Directive 2011/65/EU). It is conceivable that some obligations contained elsewhere in EU law may overlap with those of Article 18(2), but the legal obligation would arise from such specific EU rules and their enforcement would be via relevant mechanisms and not as compliance checks within procurement procedures.

6. Conclusion

In this article we have taken a view of Directive 2014/24/EU from the perspective of compliance theory. The three main strands of compliance theory were described and it was observed that all three (corporate, State and regulatory compliance) can be detected within Directive 2014/24/EU. This is not as such surprising, as the multilevel legal order of the EU warrants compliance tools at all levels of the system. The State and regulatory strands of compliance theory are in particular very prevalent and their influence on the achievement of compliance with rules or objectives, which are not as such inseparable from the act of procuring. In other words, a number of compliance requirements in EU public procurement law appear to have the function of checking (and enforcing) if legal obligations are being observed which are not directly connected with the act of buying.

⁹⁴ GS Ølykke, “The provision on abnormally low tenders: a safeguard for fair competition?” in GS Ølykke and A Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar, 2016), 146-169, 163 ff, who in particular highlights the principles of transparency and mutual recognition in this context.

Our analytical focus was on regulatory compliance since it is prevalent at all stages of procurement processes. Some compliance obligations, such as those of Article 18(2), straddle two compliance strands. In this particular case, both State and regulatory compliance are pursued.

The reasoning and logic behind the organic growth of compliance requirements aiming at external rules or objectives in EU public procurement law is unclear. This led to discussion of a number of further questions that warrant further research, such as why is public procurement being used as a compliance mechanism, why the compliance requirements have expanded over time, if procurement is the best means to achieve any policy goal, and the limits to the proliferation of compliance obligations in the context of public procurement.