15th of July 2022
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Master Thesis
LL.M. Globalisation & Law 2021-2022
Specialisation: Corporate & Commercial Law
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Buying local as a driver for sustainable public procurement in a 'Green Europe'

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Abstract

This work explores the potential for the incorporation of 'buy-local' clauses in public procurement as a driver for sustainable public purchasing within the European Union. A theory is developed, that public procurement regulation may transition from market integration to sustainable localism due to the convergence of three factors. Firstly, the more open attitudes towards sustainable procurement precipitated by the 2014 Procurement Directives. Secondly, the solidification of a 'Fortress Europe' via two developments: the emergence of European green protectionism, and the approval of the International Procurement Instrument. Thirdly, the social, environmental, and strategic incentives for buying local. It is then analysed how such clauses may be integrated across the tendering process in accordance with Directive 2014/24, and affirm that significant hurdles are imposed in that regard. Furthermore, even if compliant with the Directives, such clauses will still need to align with EU primary law. Specifically focusing on the free movement of goods and the free provision of services, we show that the CJEU's case law may yet leave a window for justification of free movement restrictions. Finally, we take a view to the future and speculate on a greater amenability of EU institutions towards sustainable localist procurement practices by Member States.

Key words: buy local, public procurement, sustainability, green protectionism, International Procurement Instrument.

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I. INTRODUCTION

A. Research background

In the words of Professor Bovis, '[a] liberalised and integrated public procurement is an essential component of a system of European economic and legal integration'.[1] Public procurement is the process through which public authorities purchase products, services or works from the most economically advantageous tender. Procurement practices may turn into a non-tariff barrier once preferential treatment and other advantages are systematically conferred upon domestic economic operators to the detriment of foreign ones for comparable products or services.[2] The objectives of liberalised trade are in a strained relationship with procurement policies aiming for a wider policy objective in particular.[3]

The 2014 Public Sector,[4] Utilities,[5] and Concessions[6] Directives are grounded on Article 114 TFEU and the four fundamental freedoms.[7] EU-level coordination of procurement procedures aims to eliminate free movement barriers, hence safeguarding the interests of suppliers established in one Member State wishing to bid in another.[8] Competition and transparency conserve free movement and the prohibition of discrimination under Article 18 TFEU.[9]

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[1] Christopher Bovis, 'Book Review: *Reformation or Deformation of the EU Public Procurement Rules*, edited by Grith Skovgaard Ølykke and Albert Sanchez-Graells. (Cheltenham: Edward Elgar Publishing, 2016)' (2018) 55 Common Market Law Review 705.

[2] Stephanie J Rickard and Daniel Y Kono, 'Think Globally, Buy Locally: International Agreements and Government Procurement' (2014) 9 Review of International Organizations 333, 334.

[3] Opi Outhwaite, 'Human Rights and National Procurement Rules in the World Trade Organization Agreement on Government Procurement' in Olga Martin-Ortega and Claire Methven O'Brien (eds), *Public procurement and human rights: Opportunities, risks and dilemmas for the state as buyer* (Edward Elgar Publishing 2019) 26.

[4] 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 [2014] OJ L 94/65.

[5] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94/243.

[6] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L 94/1.

[7] See Sarah Schoenmaekers, 'Public Procurement, Culture and Mozzarella: "Que Dici?"' (2021) 16 European Procurement & Public Private Partnership Law Review 205, 207.

[8] Case C-507/03, *Commission v Ireland (An Post)* EU:C:2007:676, [2007] ECR I-9777, para 27; Case C-19/00, *SIAC Construction* EU:C:2001:553, [2001] ECR I-7725, para 32; Case C-380/98, *University of Cambridge* EU:C:2000:529, [2000] ECR I-8035, para 16.

[9] Bovis (n 1) 705; see also Christopher Bovis, 'The priorities of EU public procurement regulation' (2020), 21 ERA Forum 283, 284; see Joined Cases C-223/99 and C-260/99 *Agora Srl v Ente Autonomo Fiera Internazionale*

Nevertheless, local preferences continue being used for direct and indirect discrimination against foreign economic operators. The relentlessness of US unilateralism and Brexit have raised ample concerns as to an entrenchment of protectionist practices in the EU procurement market. EU institutions and countless scholars have condemned inward-facing measures in public markets. Scholars posit that the allocation of extra points for maintaining, for example, an office or plant in proximity to the place of performance infringes the general primary law principles and free movement.[10] Moreover, as per settled case law, a Member State cannot require subcontracting a percentage of the works to local operators.[11] Nor may it impose an obligation to employ the host State's own nationals or fulfil a number of administrative formalities, such as securing work permits there, if a foreign operator intends to import labour.[12] Thus, it would appear that local content frustrates the principle of eliminating barriers for foreign undertakings.

Per contra, the present thesis submits that 'buy-local' clauses could be implanted in public procurement with a view to fostering sustainable practices, as long as the rules of public procurement law and the fundamental internal market principles are observed. The proximity of the vision of 'Green Europe' to 'Fortress Europe', in combination with the recently approved International Procurement Instrument, could lead to an endorsement by the Commission and Courts of both European and national 'green protectionism'.

This thesis will be structured as follows: in Part II, we will answer in three parts *why* sustainable localism may supersede integration in public procurement regulation both externally (in relations with third states) and internally (within the EU). The procedural and substantive requirements of the Public Sector Directive for integrating 'buy-local' clauses across the pre-contractual stage will be considered in Part III. Part IV will examine the potential compatibility of sustainable 'buy-local' clauses with internal market law, specifically focusing on the free movement of goods and the free provisions of services. We will conclude by

di Milano EU:C:2001:259, [2001] ECR I-03605; C-360/96, *Gemeente Arnhem Gemeente Rheden v BFI Holding BV* EU:C:1998:525, [1998] ECR 6821; C-44/96, *Mannesmann Anlangenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH* EU:C:1998:4, [1998] ECR 73.

[10] Roberto Caranta, 'Public procurement and award criteria' in Christopher Bovis (ed), *Research Handbook on EU Public Procurement Law* (Edward Elgar Publishing 2016) 156.

[11] Case C-360/89, *Commission v Italy* EU:C:1992:235, [1992] ECR I-03401.

[12] Case C-113/89, *Rush Portuguesa Lda v Office national d'immigration* EU:C:1990:142, [1990] ECR I-01417.

reviewing future prospects for transforming public procurement regulation towards sustainable localism.

B. Research question and Methodology

Localism and protectionism have long formed the subjects of diverse literature.[13] Protectionism has been defined as the 'intended or unintended economic policy of restraining trade between countries through methods such as tariffs (taxes) on imported goods, or restrictive import quotas and regulations designed to discourage imports'.[14] Conversely, localism seeks to bolster a territorial subdivision of a state and immediately derive positive externalities from local production, thus operating within a more confined market compared to the national one.[15] Unlike protectionism, localism does not vie to partition national markets, but to supply an antidote to neoliberalism, prioritising 'quality over quantity, equity over efficiency, and environment and community over externalities'.[16]

Bearing in mind this nuance, we will distinguish the term 'local' from the epithet 'protectionist'. The concept of 'buying local' will be explained in the substantive body of this thesis.

However, at present, the employment of 'buying local' for sustainable outcomes remains largely unexplored. Feasibility studies tend to be sector-specific, for example relating to agriculture[17] and the reduction of 'food miles',[18] or the speeding up of the energy transition to

[13] See Reza Ghorashi, 'Marx on Free Trade' (1995) 59 Science & Society 38; Thomas Piketty, *Capital in the Twenty-First Century* (Arthur Goldhammer tr, Harvard University Press 2014) 691-693; Benn Steil and Manuel Hinds, *Money, Markets, and Sovereignty* (Yale University Press 2009).
[14] Michael Warner, *Local Content in Procurement: Creating Local Jobs and Competitive Domestic Industries in Supply Chains* (Greenleaf Publishing 2011) 11-12.
[15] See Jason A Winfree and Philip M Watson, 'The Welfare Economics of "Buy Local"' (2017) 99 American Journal of Agricultural Economics 971, 974.
[16] David J Hess, *Localist movements in a global economy: sustainability, justice, and urban development in the United States* (MIT Press 2009) 93.
[17] See again Winfree, Watson (n 15).
[18] See indicatively, Ramesh Krishnan and others, 'Redesigning a Food Supply Chain for Environmental Sustainability – an Analysis of Resource Use and Recovery' (2020) 242 Journal of Cleaner Production 1; Federica Monaco and others, 'Food Production and Consumption: City Regions Between Localism, Agricultural Land Displacement, and Economic Competitiveness' (2017) 9 Sustainability 96.

renewables.[19] Public procurement literature specifically has, in our impression, somewhat reduced 'buying local' to a mere tool for electoral favour, neglecting its sustainable appeal.

Therefore, a research gap becomes evident: studies on the employment of buying local for sustainable procurement are lacking. In light of this gap and the novelty of the topic, the following research question will address the research problem:

> '*Should public procurement regulation shift from market integration to sustainable localism under the current state of public procurement law and internal market law and if so, how?*'

Our objective with this research question is to establish the appropriate test for resolving the conflict with the internal market at the level of both primary and secondary EU law. Although 'buy-local' clauses may certainly feature in the contractual stage, we will concentrate on the pre-contractual stage. Due to our focus on EU regulation, the territory of the WTO Government Procurement Agreement exceeds the scope of this thesis.

In order to address the research question, this thesis has been constructed around a dual focus: public procurement literature and case law, on the one hand, and general internal market literature and jurisprudence, on the other. The former has served to answer the question of how sustainable localism may be lawfully embedded in contract notices under the procedural and substantive rules applying to all horizontal policies. The latter has shed light on how sustainable localist clauses may reach a compromise with general internal market law, in case of restrictions on the free provision of services and the free movement of goods. We have elected not to fixate on the freedom of establishment or the free movement of capital, because foreign undertakings most often do not seek to acquire a primary or secondary establishment in the host state, and transfers of capital do not pose a *conditio sine qua non*.[20] Given the inherently multidisciplinary nature of the topic, both investigations necessitated recourse to legal, political economic, agriculture, and environmental academic sources, as well as CJEU case law.

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[19] Jan-Christoph Kuntze and Tom Moerenhout, 'Local Content Requirements and the Renewable Energy industry - A Good Match?' (2012) Environment for Innovation eJournal 1, 4. available at: <https://ssrn.com/abstract=2188607> accessed 5 March 2022.

[20] See Case C-567/07, *Minister voor Wonen, Wijken en Integratie v Woningstichting Sint Servatius,* EU:C:2009:593, [2009] ECR I-09021 and Case C-483/99, *Commission v French Republic* EU:C:2002:327, [2002] ECR I-04781, neither of which adjudicated the disputes under review from the public procurement perspective and instead only interpreted them under the free movement of capital.

II. WHY TRANSITION TO SUSTAINABLE LOCALISM?

A. The shift in attitudes towards sustainable procurement

Sustainable development is defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[21] It comprises of three interconnected pillars: (a) environmental protection; (b) social welfare (such as respect for human rights, decent working conditions, and positive measures for stakeholder engagement); and (c) economic efficiency (for example, R&D&I, inclusion of SMEs, and value chain competitiveness).[22] The EU legislator construes sustainable development with the same meaning.

The preamble of the 2014 Directives explicitly highlights the importance of sustainability.[23] Public procurement is identified as a vital market-based instrument for the realisation of smart, sustainable and inclusive growth coupled with efficient public expenditure, the primordial objectives of the Europe 2020 strategy.[24] Public market participants are thereby obliged to adhere to horizontal requirements -social, environmental, or innovative- outlined by the contracting authorities.[25]

Empirical evidence from the 2000s recorded that sustainable procurement policies were predominantly centred around buying small and local rather than sustainable. Some scholars inferred from this finding a tension between sustainable procurement, the abolition of national frontiers and the creation of efficiencies within the internal market.[26] For example, pre-2014,

[21] World Commission on Environment and Development, *Our common future* (Oxford University Press, 1987).
[22] See indicatively Robert D Anderson and Nadezdha Sporysheva, 'The Revised WTO Agreement on Government Procurement: Evolving Global Footprint, Economic Impact and Policy Significance' (2019) 3 Public Procurement Law Review 71, 86; see also United Nations General Assembly Resolution 66/288 (27 July 2012) (A/RES/66/288); Ben B Purvis, Yong Mao and Darren Robinson, 'Three Pillars of Sustainability: In Search of Conceptual Origins' (2019) 14 Sustainability Science 681 and references therein.
[23] Recital 2 Directive 2014/24; Recital 4 Directive 2014/25; Recital 3 Directive 2014/23.
[24] European Commission, 'Europe 2020, a strategy for smart, sustainable and inclusive growth' (Communication) COM(2010) 2020.
[25] Miguel Ángel Bernal Blay, 'The Strategic Use of Public Procurement in Support of Innovation' (2014), 9 European Procurement & Public Private Partnership Law Review 3, 4.
[26] Helen Walker and Stephen Brammer, 'Sustainable Procurement in the United Kingdom Public Sector' (2009) 14 Supply Chain Management: An International Journal 128, 135-136; Amy Ludlow, 'The Public Procurement

certain social labels could not be lawfully required if they discriminated against non-certified products[27] or could have the effect of partitioning national markets.[28] Plainly, from the EU institutions' point of view any pursuance of local interests unrelated to concrete and direct efficiency gains amounted to a protectionist agenda.[29] Such national schemes would manifestly stand in the way of institutional attempts to 'neoliberalise' procurement regulation by promoting efficiency, competitiveness, profit maximisation and 'marketisation' over collateral welfare benefits via the exercise of state dominium.[30]

Ultimately, it was for the EU legislator to resolve any conflict between sustainability and the internal market,[31] which is what the 2014 Directives set out to achieve. EU public procurement law is now a weapon in Member States' arsenal for the promulgation of non-economic policies, with a view to remedying market and system failures[32] and shepherding sustainable development.[33] Consequently, after the reform, 'trade-related objections to sustainable public procurement have largely been overcome'.[34]

B. The future of public procurement in isolationist Europe

1. The emergence of Green Europe

Over the past decade, especially in light of the European 'Green Deal', the notion of a 'Green Europe' has been steadily gaining traction in terms of the EU's relations with third

Rules in Action: An Empirical Exploration of Social Impact and Ideology' (2014) 16 Cambridge Yearbook of European Legal Studies 13, 18.

[27] European Commission, *Buying social: a guide to taking account of social considerations in public procurement* (1st edn, European Commission 2010) 31.

[28] See Case C-368/10, *Commission v the Netherlands (Max Havelaar)* [2012], EU:C:2012:284, Opinion of AG Kokott, para 3.

[29] Ludlow (n 26) 18.

[30] Peter Kunzlik, 'Neoliberalism and the European Public Procurement Regime' (2013) 15 Cambridge Yearbook of European Legal Studies 283, 292-300, 318.

[31] Ludlow (n 26) 18.

[32] Bogdana Neamtu and Dacian C Dragos, 'Sustainable Public Procurement: The Use of Eco-Labels' (2015) 10 European Procurement & Public Private Partnership Law Review 93.

[33] Eleanor Fisher, 'The Power of Purchase: Addressing Sustainability through Public Procurement' (2013) 8 European Procurement & Public Private Partnership Law Review 2.

[34] Marta Andrecka, 'Sustainable Public Procurement under Framework Agreements', in Baete Sjåfjell and Anja Wiesbrock (eds), *Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder* (Cambridge University Press 2016) 140; see also David Hickman, 'Horizontal Policies in Public Procurement: Their Use and Effectiveness in EU Law and Policy' (2019) 14 European Procurement & Public Private Partnership Law Review 87; Jörgen Hettne, 'Sustainable Public Procurement and the Single Market – Is There a Conflict of Interest?' (2013) 8 European Procurement & Public Private Partnership Law Review 31, 35.

states. It signifies the shaping of a common European identity based on a belief of European superiority and global leadership in sustainable initiatives.[35] This trend, embodied in three pivotal developments, could, in our opinion, catalytically place public procurement regulation *en route* to sustainable protectionism. At the core of these developments is the EU's role as an exporter of stringent environmental standards ensuring that third states do not lower the bar for environmental ambition.[36]

Firstly, on the 15th of March 2022 the Council approved the contentious Carbon Border Adjustment Mechanism (CBAM)[37] to prevent the relocation of carbon-intensive industries outside the EU as a disguised circumvention of environmental law (carbon leakage).[38] Carbon emissions released in the production of goods imported from third states will be uniformly taxed.[39] Utterly predictably, this sweeping system, essentially raising a non-tariff trade barrier, is already feared as a harbinger of 'green protectionism'.[40]

Secondly, another incendiary development was the CJEU's appraisal of the extraterritorial reach of the Emissions Trading System[41] as fully lawful. In *Air Transport Association of America v Secretary of State*,[42] the Union had decided to levy international airlines landing at and departing from European airports for their carbon emissions during those itineraries. This regulatory approach was deemed compliant with both the Union's environmental competence

[35] Andrea Lenschow and Carina Sprungk, 'The Myth of a Green Europe' (2010) 48 Journal of Common Market Studies 133; Diego Badell and Jordi Rosell, 'Are EU Institutions Still Green Actors? an Empirical Study of Green Public Procurement' (2021) 59 Journal of Common Market Studies 1555.
[36] Anu Bradford, 'Exporting Standards: The Externalization of the EU's Regulatory Power via Markets' (2015) 42 International Review of Law and Economics 158.
[37] Council of the EU, 'Council agrees on the Carbon Border Adjustment Mechanism (CBAM)' (15 March 2022) available at: <https://www.consilium.europa.eu/en/press/press-releases/2022/03/15/carbon-border-adjustment-mechanism-cbam-council-agrees-its-negotiating-mandate/> accessed 25 May 2022.
[38] European Commission, 'Carbon border adjustment mechanism' (*European Commission*), available at: <https://ec.europa.eu/taxation_customs/green-taxation-0/carbon-border-adjustment-mechanism_en> accessed 25 May 2022.
[39] Sakuya Yoshida Sato, 'EU's Carbon Border Adjustment Mechanism: Will It Achieve Its Objective(s)?' (2022) 56 Journal of World Trade 383, 404; Martijn L Schippers, Walter De Wit, 'Proposal for a Carbon Border Adjustment Mechanism' (2022) 17 Global Trade and Customs Journal 10, 17.
[40] Andrey Konoplyanik, 'Energy transition and green energy: the struggle for climate and for a new redivision of the world—and the proposal for a balanced Russia–EU solution' (2022) 15 The Journal of World Energy Law & Business 59, 65.
[41] Directive 2003/87/EC (consolidated version) of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L 275/32 as amended.
[42] Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* EU:C:2011:864 [2011] ECR I-13755. The case has been much analysed in literature; see in particular Glen Plant, 'Air Transport Association of America V. Secretary of State for Energy and Climate Change' (2013) 107 American Journal of International Law 183.

(Article 191(2) TFEU) and customary international law. Although international aviation was then hurriedly excluded from the ETS after a flurry of reactions, the Commission has recently revived its ambition to subject emissions from international aviation to its cap-and-trade system.[43]

Thirdly, a strong indication that the EU will inch closer to 'green protectionism' is the WTO's parallel tolerance towards national horizontal measures. Recent WTO decisions demonstrate a trend of accepting as lawful unilateral measures aimed at wildlife conservation, human rights and labour welfare ('sustainability unilateralism').[44]

Why would the EU turn to public procurement regulation specifically, though, instead of focusing on implementing targeted measures? Besides the direct order to that effect flowing from the internal integration principle (Article 11 TFEU), in practice public procurement could function as the *ultimum refugium*, owing to the dubious effectiveness of existing targeted measures. The Emissions Trading System is embarrassingly susceptible to fraud,[45] the Effort Sharing Regulation[46] has consistently struggled to alleviate energy poverty,[47] while the Carbon Capture and Storage Directive[48] has been firmly locked in an impasse for years.[49]

Faced with these stalemates and in the wake of the Green Deal, the European Institutions are sure to commit with a renewed vigour to embedding sustainable strategies in economic policy areas such as public procurement. Confronted with mounting pressure, it is not at all

[43] European Commission, *Stepping up Europe's 2030 climate ambition*, COM(2020) 562 final 16.
[44] Julien Chaisse, Georgios Dimitropoulos, 'Special Economic Zones in International Economic Law: Towards Unilateral Economic Law' (2021) 24 Journal of International Economic Law 229, 237 and references therein.
[45] Stefan E Weishaar, 'EU Emissions Trading - its Regulatory Evolution and the Role of the Court', in Marjan Peeters and Mariolina Eliantonio (eds), *Research Handbook of EU environmental law* (Edward Elgar Publishing 2020) 446-447.
[46] Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 [2018] OJ L 156/26 as amended.
[47] See indicatively Jon Stenning and others, 'Decarbonizing European transport and heating fuels – Is the EU ETS the right tool?' (Report, Cambridge Econometrics 2020) 5, 26, 33; Artur Runge-Metzger and others, 'Energy-related policies and integrated governance' in Jos Delbeke and Peter Vis, *Towards a Climate-Neutral Europe: Curbing the Trend* (Routledge 2019) 126, 135.
[48] Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 [2009] OJ L 140/114 as amended.
[49] See indicatively Navraj Singh Ghaleigh, 'Carbon capture and storage as a bridging technology' in Daniel Farber and Marjan Peeters (eds), *Climate Change Law* (Elgar Encyclopedia of Environmental Law Series vol 1, Edward Elgar Publishing 2016).

implausible that they may resort to more extreme policy choices and gradually behold localism under a new light both externally and internally.

2. The EU International Procurement Instrument

Defensiveness in the EU's external relations was sure to migrate to procurement regulation as well. On 15th March 2022, the very same day that the Council approved the CBAM, the trialogue between the European Parliament, the Council, and the Commission culminated to an approval of the proposed International Procurement Instrument,[50] a decade after the EU's failed 'Buy European' experiment in 2012. It is a defensive tactic against inward-facing procurement policies by third states which will supposedly contribute to fairness in the international procurement market rather than sanction third states.[51] The timing of both the IPI and the CBAM is exceptionally noteworthy: it seems no accident that the IPI was only agreed upon now, after a decade of stagnant negotiations.

As concerns the scope of the IPI, targeted contracts are works and services valued over EUR 15 million and goods over EUR 5 million - the majority of public contracts with a cross-border interest. Exemptions are reserved for undertakings from least developed states.

Fundamentally, the IPI serves to remedy the asymmetry within global procurement markets, whereby companies incorporated in third states like China win big-league public contracts within the EU, but EU-based companies are precluded from tendering in those states because of 'buy-national' policies. To be sure, there is a delicate balance between openness and reciprocity: faced with discrimination against their own companies, third states may retaliate by closing their markets. Alternatively, free access to foreign markets may incentivise a third state to preserve its own closed off.[52] The IPI tackles this asymmetry by authorising the

[50] Committee on International Trade, 'Second Report on the proposal for a regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries (COM(2016)0034 – C9-0018/2016 – 2012/0060(COD))' (European Parliament 2021), available at: <https://www.europarl.europa.eu/doceo/document/A-9-2021-0337_EN.html> accessed 5 April 2022.

[51] Stefan Kirchner, 'More Fairness in Global Procurement: The European Union's Future International Procurement Instrument Moves Closer to Reality' (*SSRN Electronic Journal*, 27 September 2021) 4, available at: <https://ssrn.com/abstract=3913595> accessed 5 April 2022.

[52] Frank Hoffmeister, 'The EU public procurement regime on third-country bidders – setting the cursor between openness and reciprocity' in H Kalimo and MS Jansson (eds), *EU Economic Law in a Time of Crisis* (Edward Elgar Publishing 2016) 76.

Commission to assess whether a third state enacts or retains discriminatory or restrictive measures or bars EU-based undertakings from its procurement market.[53] The latter state is invited to engage in 'consultation' with the Commission.

In case of a positive finding, the Commission has a mandate to exclude foreign bids or adjust them with a price increase of up to an eye-watering 20%, disadvantaging them against European competitors. The Commission will conduct a proportionality test and investigate alternative sources of supply. For these draconian measures to be averted, 'third countries would only need to stop their restrictive practices'.[54] Thus, the IPI's *effect* is to unilaterally enforce a sanction against third states which have not ceded their national sovereignty to the Union.

As a caveat, contracting authorities have a discretion not to apply the Commission's measure under exceptional circumstances on overriding public interest grounds, such as *environmental protection*, or if no EU undertaking could perform the contract. Therefore, in the name of sustainability, liberal procurement markets may be retained. However, we doubt that any Member State would be much inclined to deviate from the Commission's assessment and risk initiation of infringement proceedings in case of an erroneous interpretation of said 'exceptional circumstances'.

In a climate where international trade is construed narrowly and defensively, commentators have heralded the IPI as an important tool for evening out the global playing field.[55] All the same, only in name is the newest iteration of the IPI removed from the principle of reciprocity.[56] By euphemizing European introversion as a purported contribution to fairness in international procurement, the Instrument may spur Member States to adopt protectionist

[53] See Valentijn De Boe, 'New EU International Procurement Instrument against discrimination by third countries' (*Loyens & Loeff*, 7 December 2021), available at: <https://www.loyensloeff.com/nl/en/news/articles-and-newsflashes/new-eu-international-procurement-instrument-against-discrimination-by-third-countries-n24239/> accessed 5 April 2022.

[54] European Commission, 'EU acts to improve reciprocal access to international procurement' (European Commission, Press Release 1728/22 of 14 March 2022) available at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1728> accessed 5 April 2022.

[55] Daniel Caspary, 'OPINION: International Procurement Instrument – the end of the waiting game' (Borderlex, 31 March 2022) available at: < https://borderlex.net/2022/03/31/opinion-international-procurement-instrument-the-end-of-the-waiting-game/> accessed 5 April 2022.

[56] *Cf,* with respects to the 2016 Amendments, Kamala Dawar, 'The 2016 European Union International Procurement Instrument's Amendments to the 2012 Buy European Proposal: A Retrospective Assessment of Its Prospects' (2016) 50 Journal of World Trade 845, 865.

agendas, and third states affected to launch litigation against the EU or its Member States.[57] This would in effect militate for a 'fortress Europe',[58] or a 'normative empire'[59] *compelling* third states to comply with its own standards.[60]

C. Incentives for 'local preferences'

The above mentioned rise in sustainable protectionism in the EU's external relations leave us deeply perturbed. In this section we will theorise that Member States may be strongly incentivised to have localism become similarly normalised internally, in their competition with one another.

1. Definition

Local preferences are defined as an advantage conferred on tenderers on the basis of pre-determined criteria such as geographical location, residence, or origin of the product or service offered.[61] Non-tariff barriers are raised via onerous customs procedures and restrictive national technical regulations and standards, for example relating to the composition of agricultural produce.[62] 'Buy-local' provisions are enacted in the name of the public interest, explaining their proliferation during the worldwide economic crisis, championed predominantly by the US – though anticipated to tentatively emerge in the UK as well.[63]

[57] *Cf*, with respects to the 2016 Amendments, Albert Sanchez Graells, 'Some thoughts on the European Commission's revised proposal for regulation on third-country access to public procurement' (*How to Crack a Nut* 4 February 2016), available at: <https://www.howtocrackanut.com/blog/2016/02/some-thoughts-on-european-commissions.html> accessed 24 April 2022.
[58] See Albert Sanchez Graells, 'Additional Thoughts on Brexit and Public Procurement' (*How to Crack a Nut*, 30 November 2016), available at: <https://www.howtocrackanut.com/blog/2016/11/30/brexit-and-public-procurement-some-thoughts-after-kcl-seminar.html> accessed 24 April 2022.
[59] Zaki Laïdi, 'The Normative Empire: The Unintended Consequences of European Power' (2008) Centre d'Études Européennes Research Paper 5/2007, available at: <https://hal-sciencespo.archives-ouvertes.fr/hal-00972756/document> accessed 25 May 2022.
[60] Ioanna Hadjiyianni, 'The European Union as a Global Regulatory Power' (2021) 41 Oxford Journal of Legal Studies 243, 261; Gareth Davies, 'International Trade, Extraterritorial Power, and Global Constitutionalism: A Perspective from Constitutional Pluralism' (2012) 13 German Law Journal 1203.
[61] Elena Moreland, *In-State preferences* (National Association of State Procurement Officials 2012) 1.
[62] Paul A Geroski, 'European Industrial Policy and Industrial Policy in Europe' (1989) 5 Oxford Review of Economic Policy 20, 29–30.
[63] Rickard, Kono (n 2) 333.

Although the US has long favoured protectionism,[64] it has yet to justify unilateralism on sustainability concerns. The infamous Trump tariffs have not as yet been reversed by the new government,[65] whilst an intention to reinforce 'Buy American' in government procurement was declared.[66] Whether the Biden Administration will increasingly deploy sustainability concerns to justify 'Buying American' remains to be seen.

Meanwhile, with the Brexit referendum 'widely seen as a kind of populist revolt against a sovereignty-constraining European Union',[67] the UK may also be on track towards sustainable protectionism. Brexit has given rise to uncertainty as to whether the UK's liberation from EU procurement rules and the prohibition of discrimination combined with its strong green and social focus[68] will yield a trade-distortive sustainable procurement policy – especially if pressured by US protectionism-,[69] or propel it to ingrain sustainable procurement patterns even more effectively than before.[70] The UK accession to the WTO's GPA[71] has not assuaged either suspicion.

Thus, so far, 'buying local' has been largely synonymous to currying favour with lobbyist forces or fanning the flames of nationalism. In the following section we will explore how 'buy-local' clauses conduce to both environmental and social sustainability and the furtherance of strategic procurement.

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[64] See indicatively, Bill Dupor and M Saif Mehkari, 'The 2009 Recovery Act: Stimulus at the Extensive and Intensive Labor Margins' (2016) 85 European Economic Review 208; Andrew J Nathan, 'Biden's China Policy: Old Wine in New Bottles?' (2021) 57 China Report 387; Michael A Witt and others, 'De-globalization and Decoupling: Game Changing Consequences?' (2021) 17 Management and Organization Review 6.

[65] Katie Lobosco, 'Why Biden is keeping Trump's China tariffs in place' (*CNN*, 26 January 2022) available at: <https://edition.cnn.com/2022/01/26/politics/china-tariffs-biden-policy/index.html> accessed 3 March 2022;

[66] The White House, 'Executive Order on Ensuring the Future Is Made in All of America by All of America's Workers' (25 January 2021) available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-ensuring-the-future-is-made-in-all-of-america-by-all-of-americas-workers/> accessed 3 March 2022; The White House, 'Fact Sheet: Biden-Harris Administration Issues Proposed Buy American Rule, Advancing the President's Commitment to Ensuring the Future of America is Made in America by All of America's Workers' (28 July 2021) available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/28/fact-sheet-biden-harris-administration-issues-proposed-buy-american-rule-advancing-the-presidents-commitment-to-ensuring-the-future-of-america-is-made-in-america-by-all-of-americas/> accessed 3 March 2022.

[67] Gráinne de Búrca, 'Is EU Supranational Governance a Challenge to Liberal Constitutionalism?' (2018) 85 University of Chicago Law Review 337, 363.

[68] See indicatively Walker, Brammer (n 26).

[69] Robert D Anderson, 'The UK's new role in the WTO Agreement on Government Procurement: understanding the story and seizing the opportunity' (2021) 3 Public Procurement Law Review 159.

[70] See Sue Arrowsmith, 'The implications of Brexit for public procurement law and policy in the United Kingdom' (2017) 1 Public Procurement Law Review 1; *contra* Hickman (34) 95-98.

[71] WTO, 'UK and Switzerland confirm participation in revised government procurement pact' (2 December 2021), available at: <https://www.wto.org/english/news_e/news20_e/gpro_02dec20_e.html> accessed 3 March 2022.

2. The sustainable appeal of 'buying local'

Though much ignored in the past, the sustainable potential of buying local is slowly gaining recognition as remedying the -often hidden- social costs stemming from liberalisation of procurement and globalisation. 'Buying local' counteracts these welfare losses by delivering substantial green, social, and strategic gains.

As concerns social costs, import competition increases the odds for job displacement, prolongs unemployment periods, hitches up the cost of reallocation to another position, and exacerbates employees' mental stress.[72] By contrast, local preferences raise development opportunities for disadvantaged undertakings and local economies, while levelling the playing field and conferring on smaller businesses a fair chance to partake in the competitive market by repelling international giants.[73] This is crucial because SME inclusion was identified as a key policy objective in the negotiations preceding the 2014 procurement reform. Additionally, capacity-building and sector-specific job creation may be furthered via conditions in regional works contracts pertaining to the provision of training and apprenticeship opportunities,[74] repressing population leakages and internal migration, responsible for the oversaturation of both population and skills in conurbations. Lastly, shortened production and delivery periods enable adaptability to changing circumstances thus averting adverse social impacts, such as by saving more patients in public hospitals or containing a health crisis.[75] All of these benefits directly contribute to greater social sustainability.

Furthermore, although localism is not inherently green by itself, it is linked to green values and may yield ecological advantages. Some of these values are reflected in its interplay with

[72] Chiara Carboni, Elisabetta Iossa and Gianpiero Mattera, 'Barriers Towards Foreign Firms in International Public Procurement Markets: A Review' (2018) 45 Journal of Industrial and Business Economics 85, 88-91 and references therein.
[73] Hess (n 16) 93; Sherzod Shadikhodjaev, Industrial Policy and the World Trade Organization: Between Legal Constraints and Flexibilities (Cambridge University Press 2018) 148; for a more extensive discussion see also Laura Panadès-Estruch, 'Competition in British Overseas Territories' Public Procurement: Going for Gold or a Race to the Bottom?' (2020) 15 European Procurement & Public Private Partnership Law Review 20, 21.
[74] Abby Semple, 'Socially Responsible Public Procurement (SRPP) under EU Law and International Agreements' (2017) 12 European Procurement & Public Private Partnership Law Review 293, 294.
[75] See Joseph Sarkis, 'Supply chain sustainability: learning from the COVID-19 pandemic' (2020) 41 International Journal of Operations & Production Management 63, 67; see also Alex Davies, 'The high-stakes race to build more ventilators' (*WIRED*, 2 April 2020), available at: <https://www.wired.com/story/race-build-more-ventilators-coronavirus/> accessed 2 March 2022.

local agricultural clusters, reuse centres, the usage of alternative fuels in public transport, or locally-sourced construction materials.[76] Swift adaptation to urgent local needs, a social benefit in itself, accompanies ecological advantages such as minimised energy and resource consumption,[77] or reduced carbon emissions and waste generation by virtue of fewer kilometres being traversed by products[78] and employees alike.[79] In addition, shorter supply chains equate to a lesser need for packaging materials[80] or inventory storage.[81] This is noteworthy because packaging in particular is evaluated as one of the most adversely environmentally impactful stages within the life cycle of a product.[82] Subsequently, after-sales service is easily accessible in the same state as the production site.[83]

Local content is intrinsically affiliated with the objectives of strategic procurement too by supporting local entrants in novel industries, predominantly renewables and eco-innovation.[84] One must not overlook the 'political reality that high financial support to renewable energy programmes might not be publicly supported if there are no local benefits attached to it',[85] and a lack of such support would disincentivise market entry. Through the latter, competition and innovation in green technology may swell in the medium-term, with a subsequent drop in the pricing of environmentally friendly technology. Heavy investments that will be inevitable at first will be offset by long-term efficiency gains.[86]

The above incentives analysis shows that local preferences may be legitimately motivated by parameters other than isolationist ones. Market-based regulation via public procurement in particular has vast potential to yield long-term social, environmental, and strategic benefits.

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[76] David J Hess, *Alternative Pathways in Science and Industry: Activism, Innovation, and the Environment in an Era of Globalization* (MIT Press 2007), 227.
[77] Sarkis (n 75) 67.
[78] Krishnan and others (n 18) 13.
[79] Sarkis (n 75) 67.
[80] Krishnan and others (n 18) 13.
[81] Sarkis (n 75) 67.
[82] Krishnan and others (n 18) and references therein.
[83] Vinod Rege, 'Transparency in Government Procurement Issues of Concern and Interest to Developing Countries' (2001), 35 Journal of World Trade 489, 496.
[84] See Shadikhodjaev (n 73) 147; Gary C Hufbauer and others, Local Content Requirements: A Global Problem (Peterson Institute for International Economics 2013) 2; Kuntze, Moerenhout (n 19) 4.
[85] Kuntze, Moerenhout (n 19) 28.
[86] Kuntze, Moerenhout (n 19) 5.

In this section we demonstrated why contracting authorities may turn to buying local, and whether they will be doing so with the Union's own blessing. Highly tellingly, in a recent soft law document the Commission explicitly and repeatedly endorsed the use of Socially Responsible Public Procurement to advance local social objectives.[87] Having elucidated the motivations, both national and supranational, for encouraging buying local, we will turn to its practical implementation across all phases of the pre-contractual stage.

III. Integrating local content in the pre-contractual stage

Contracting authorities may contemplate non-economic considerations across the pre-contractual stage, if only they are linked to the subject-matter of the contract, do not confer on them an unrestricted freedom of choice, are expressly mentioned in the contract documents or tender notice (to secure transparency and equal treatment), and observe the fundamental principles of EU law, chiefly the principle of non-discrimination. [88]

The tendering process is divided by several stages. In the beginning, the subject-matter of the contract is determined by the public purchaser, namely the kind of product, service or work that it seeks to acquire. This is transmuted into detailed and measurable technical specifications facilitating economic operators to establish their competitive capacity. Selection criteria spell out minimum standards of technical, economic and professional capacity that tenderers must meet. The public buyer then weighs and ranks the tenders against one another, to identify the one that is the most economically advantageous under certain award criteria, including Life Cycle Costing.[89]

Horizontal criteria across all of the above stages are tested for being linked to the subject-matter of the contract. Firstly, contracting authorities are precluded from inspecting undertakings' wider social or green policies on matters escaping their actual purchasing

[87] European Commission, *Buying social: a guide to taking account of social considerations in public procurement* (2nd edn, European Commission 2021), 7, 24, 44, 60, 66.
[88] Case C-513/99, *Concordia Bus Finland* EU:C:2002:495, [2002] ECR I-7213.
[89] Marc Martens and Stanislas de Margerie, 'The Link to the Subject-Matter of the Contract in Green and Social Procurement' (2013) 8 European Procurement & Public Private Partnership Law Review 8, 11.

needs.[90] This would in effect camouflage a selection criterion, rendering it inadmissible.[91] Secondly, *reasonableness* and *proportionality* preclude contracting authorities from reaching beyond what is necessary to ensure compliance with green or social conditions.[92] All things considered, solely a handful of activities can represent a benchmark against which undertakings that do discharge their environmental and social responsibilities will be measured. Since the remit of permissible sustainable considerations is restricted, scholars have noted the high degree of probability that narrowly-defined activities will be imbued with a localised focus.[93]

Overall, under the EU procurement regime, commentators have dismissed the lawfulness of criteria which demonstrate a preference for local or locally established tenderers.[94] It has been pointed out that since Article 18 of Directive 2014/24 proscribes the arrangement of a tendering process for the purpose of artificially restricting competition, recourse to 'buy-local' measures is off-bounds.[95] In this section we will respond to this doctrinal approach through an analysis of each step of the tendering procedure where local considerations may be interlaced.

A. Technical specifications

Technical specifications are 'the required characteristics of a product or a service',[96] and, in relation to works contracts, 'the characteristics required of a material, product or supply, so that it fulfils the use for which it is intended by the contracting authority'.[97] Because they sketch out the public purchaser's needs in an exhaustive manner, technical specifications encapsulate the subject-matter of the contract.[98] Non-compliant tenders must be excluded.[99]

[90] Abby Semple, 'The Link to the Subject-Matter: A Glass Ceiling for Sustainable Public Contracts?' in Baete Sjåfjell and Anja Wiesbrock (eds), *Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder* (Cambridge University Press 2016) 50.
[91] Lennard Michaux and Joris Gruyters, 'Life Cycle Costing: The Final Step Towards a True Rule of Reason in Public Procurement Law?' (2020) 15 European Procurement & Public Private Partnership Law Review 61, 63 [n 14].
[92] Martens, de Margerie (n 89) 17.
[93] Semple (n 90) 69.
[94] Caranta (n 10) 158.
[95] Schoenmaekers (n 7) 213.
[96] Article 42(1) Directive 2014/24.
[97] Annex VII 1(a),(b) Directive 2014/24.
[98] Martens, de Margerie (n 89) 11.
[99] Articles 56(1) Directive 2014/24; See also Case C-243/89 *Commission v Kingdom of Denmark* ('*Storebaelt'*) EU:C:1993:257, [1993] ECR I-03353, para 37 and Case C-561/12 *Nordecon AS and Ramboll Eesti AS v Rahandusministeerium* ('*Nordecon'*), [2013] EU:C:2013:793, paras 37–9.

According to Recital 99 Directive 2014/24, the sole social criteria that may form technical specifications are those relating to end users -such as disability access- rather than trading or working conditions in general. This materially limits the scope for *socially* sustainable localist technical specifications, such as a requirement that a percentage of the work force must be local unemployed youth.

Another limitation is presented by Article 42(4) Directive 2014/24/EU, which expressly prohibits discrimination on the basis of the origin of the products or services. Technical specifications must not refer to a designated make, source, origin, production or production process with the effect of favouring or eliminating certain undertakings or products. Only exceptionally will such reference be permitted, as long as it is justified by the subject-matter of the contract, a sufficiently precise and intelligible description of which is impossible, while equivalent products must be accepted.

The wording of Article 42(4) impedes[100] but does not render unfeasible any local preference. For instance, in the first months of the pandemic, when international transport was paralysed, a technical specification devised by a public hospital requiring locally-produced ventilators to economise time and transport miles could be justified, in view of the complete inability of any foreign undertaking to urgently provide equivalent products. In food procurement, local manufacturers may be the only ones possessing know-how of traditional production processes.[101] Crucially, organic farming -which may be lawfully required as a technical specification-[102], is intrinsically tied to local sourcing.[103] The Commission itself has fully embraced local organic food procurement in a best practices document.[104]

[100] Albert Sanchez Graells, 'Against the Grain? Member State Interests and EU Procurement Law' in Marton Varju (ed), *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer 2019) 181.
[101] Schoenmaekers (n 7) 206.
[102] See *Max Havelaar* (n 28) para 61: '… [T]he technical specifications may be formulated in terms of performance or functional requirements which may include environmental characteristics. According to recital 29 in the preamble to [Directive 2004/18/EU], a given production method may constitute such an environmental characteristic'.
[103] See Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007 [2018] OJ L 150/1, Recital 17: 'This Regulation should provide the basis for the sustainable development of organic production and its positive effects on the environment, while ensuring the effective functioning of the internal market in organic products and fair competition, thereby helping farmers to achieve a fair income, ensuring consumer confidence, protecting consumer interest and encouraging short distribution channels and local production'. Furthermore, see indicatively Rocsana Bucea-Manea-Țoniș and others, 'Green and Sustainable Public Procurement—an Instrument for Nudging Consumer Behavior. A Case Study on Romanian Green Public Agriculture Across Different Sectors of Activity' (2020) 13 Sustainability 12, 19.
[104] Commission (n 87) 28, 60.

At last, as concerns fair trade, a requirement for a particular domestic label may disadvantage foreign undertakings whose products bear a different label.[105] As a consequence, it is contrary to the principles of non-discrimination and the opening-up of public procurement to competition (Article 42(2) read in combination with Article 18(1) Directive 2014/24/EU).[106]

In sum, we may note that technical specifications are the hardest stage in which to incorporate buying local *de lege lata*. The text of the Directives is downright discouraging, though recent practice shows some margin of feasibility in extreme circumstances of complete absence of foreign competition or in idiosyncratic sectors, food procurement for one.

B. Selection criteria

As stated in Article 56(1) of Directive 2014/24, operators must demonstrate, by means of certificates and educational or professional qualifications *inter alia*, that they possess the technical, professional and financial capability to perform the contract, or face exclusion.[107] Selection criteria are exhaustively enumerated and produce direct effect.[108]

Selection criteria must be interpreted with a technical meaning, so that tenderers are able to manufacture the goods or provide the services or works that form the subject-matter of the contract.[109] The CJEU objects to any sort of a wording that hints the pursuance of a general public or social policy.[110] It follows that local considerations may merely be factored into this appraisal indirectly, whenever the contract relates to a sector necessitating the employment of traditional knowledge or techniques, such as food procurement.

In this stage, it is also relevant to consider whether the discretionary exclusion of abnormally low tenders may offer protection against discriminatory practices. On the one hand, past experiences have revealed that local suppliers may be chosen due to government

[105] *Max Havelaar* (n 28) Opinion of AG Kokott, para 65.
[106] *Id*.
[107] Article 58(4) Directive 2014/24.
[108] See Case C-76/81, *SA Transporoute et travaux v Minister of Public Works* EU:C:1982:49, [1982] ECR 457; see also Christopher H Bovis, *EU Public Procurement Law* (1st edn, Edward Elgar Publishing 2008) 378.
[109] *Max Havelaar* (n 28) judgement, paras 105-106; Laurens Ankersmit, 'The contribution of EU public procurement law to corporate social responsibility' (2020) 26 European Law Journal 17, 21.
[110] Ankersmit (n 109) 21.

subsidisation[111] or state ownership, as in the case of shipyards, automobile manufacturers, or the defence industry.[112] This financial support may lead to the submission of an abnormally low offer. Said term has not as yet been defined in CJEU jurisprudence. It is a quantitative standard that entails the exercise of the contracting authorities' discretion.[113] According to Article 69(2)(f), an abnormally low price may be explained by the reception of state aid. In that case, local tenderers may be excluded, though not before being given the opportunity to prove that the aid is compatible with the internal market under Article 107 TFEU. Thus, although the decision ultimately depends on the discretion of the contracting authority, foreign competitors may rest assured that should a local bidder be elected, this will not be imputable to state support. On the other hand, foreign tenderers are shielded from arbitrary exclusion, if they attribute their abnormally low price to the innovative or exceptionally cost-effective character of their offer pursuant to Article 69(2)(a)-(c), thereby ensuring free movement.[114] As a consequence, this provision helps even out the playing field by securing that any local preference will not be motivated by state subsidisation or bias.

In short, selection criteria and the provisions on abnormally low tenders involve a balancing test between guaranteeing that the operator will have the means to perform the contract, and sheltering them from disproportionate requirements susceptible to protectionist-motivated abuse.[115] The scope for local content is narrow and precarious, since it may only be lawfully interwoven on condition that as it complies with these provisions and does not question undertakings' wider policies.

C. Award criteria

1. The MEAT criterion

[111] See Andreas R Engel and others, 'Managing Risky Bids' in Nicola Dimitri and others (eds), *Handbook of Procurement* (Cambridge University Press 2006) 339.
[112] Shelena Keulemans, Steven and Van de Walle, 'Cost-effectiveness, domestic favouritism and sustainability in public procurement: A comparative study of public preferences' (2017) 30 International Journal of Public Sector Management 328, 330.
[113] Christopher Bovis, 'The principles of public procurement regulation', in Christopher Bovis (ed), *Research Handbook on EU Public Procurement Law* (Edward Elgar Publishing 2016) 50-51.
[114] See Grith Skovgaard Ølykke and Johan Nyström, 'Defining abnormally low tenders – A comparison between Sweden and Denmark' (2017), 13 Journal of Competition Law & Economics 666, 667 and references therein.
[115] Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change* (Oxford University Press 2007) 544.

Departing from the 2004 regime, under Article 67(1) of Directive 2014/24 contracts will be awarded to the most economically advantageous tender amongst those that have not been excluded. Where the suitability of the economic operator constitutes the centrepiece of selection criteria, award criteria revolve around the tender itself.[116] Two are the key elements of award criteria: the intention behind them to ensure that the contract will benefit the contracting authorities to the fullest, in addition to the elimination of barriers within the internal market.[117]

Article 67(2) clarifies that a cost-effectiveness approach may be used, such as life cycle costing, or a best price-quality ratio, which includes an assessment of qualitative, environmental, or social aspects linked to the subject-matter of the contract. In this manner, the above provision differentiates between 'price' and 'cost', and associates cost with cost effectiveness.[118]

By allowing environmental considerations, Article 67 codifies the well-known *Concordia*[119] and *EVN and Wienstrom*[120] jurisprudence. The margin for local preferences is wider than might be anticipated. For instance, it may be inferred from *Braunschweig*[121] that a preference for a technological method benefitting domestic operators is permissible but subject to due substantiation.[122] Germany only failed because it did not prove its claim that public health and the environment could be imperilled by long-distance transport of waste thus justifying on-site thermal treatment.

Contracting authorities are also empowered to compute social considerations, such as the 'the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons'.[123] Once more, the room left for sustainable localism is

[116] See Case C-532/06 *Lianakis and Others,* EU:C:2008:40 [2008] ECR I-251.
[117] Caranta (n 10) 149.
[118] Caranta (n 10) 152.
[119] *Concordia* (n 88) para 34.
[120] Case C-448/01, *EVN AG and Wienstrom GmbH v Republik Österreich* EU:C:2003:651, [2003] ECR I-14527.
[121] Joined Cases C-20/01 and C-28/01, *Commission v Germany* (*Braunschweig*) EU:C:2003:220 [2003] ECR I-3611, paras 64-65.
[122] Maarten Meulenbelt, 'Protectionism on the rise? Modernization of EU public procurement rules during the economic crisis' in H Kalimo and MS Jansson (eds), *EU Economic Law in a Time of Crisis* (Edward Elgar Publishing 2016) 57, 60.
[123] *Max Havelaar* (n 28) judgement, para 85; see also Opinion of AG Kokott, paras 107–113.

surprisingly generous. For example, in *Nord-Pas-de-Calais*[124] and *Beentjes*,[125] the Court did not reject the possibility of stipulating a requirement linked to a local campaign for combatting unemployment, as long as it is proportionate and transparent.

Contracting authorities then have a large margin of discretion to draw up, determine the weighting of and balance quantitative with qualitative criteria,[126] albeit subject to certain constraints to obstruct abuses.[127] Nevertheless, Sanchez Graells points out that in effect the determination of a best price-quality ratio may conceal untransparent practices and compromise the integrity of the procedure.[128] Thusly, it would be a particularly useful weapon in the toolbox of a contracting authority looking to further a protectionist agenda.

In effect, despite the link to the subject-matter of the contract and the principle of equal treatment, there are multiple loopholes in the award stage, particularly in light of the connection between regional development and strategic procurement. The latter hinges on the assumption that heightened demand for a sustainable product will boost supply, which means that at the outset of the product development stage, inevitably the circle of undertakings who can fulfil the sustainability criteria will be limited. Case in point, an innovative decontamination scheme may necessitate a heightened degree of familiarity with the particular features of the polluted site and the environmental priorities of the region, in order to develop a product more closely tailored to the contracting authority's needs.[129]

The compatibility of strategic procurement with the internal market has divided the scholarship. Prominently, Sanchez Graells insists that solely the green and innovative components of strategic procurement are compatible with the internal market, while rejecting social and labour ones as outright incompatible by cause of their inherently protectionist

[124] Case C-225/98 *Commission v French Republic* (*Nord-Pas-de-Calais*) EU:C:2000:494, [2000] I-07445, para 50.
[125] Case 31/87 *Gebroeders Beentjes BV v Netherlands* EU:C:2000:494 [1988] ECR 04635, paras 30, 36.
[126] See Martin Dischendorfer, 'The Rules on Award Criteria Under the EC Procurement Directives and the Effect of Using Unlawful Criteria: The EVN Case' (2004), 3 Public Procurement Law Review 74, 82.
[127] See Caranta (n 10) 158.
[128] Albert Sanchez Graells, 'Making public procurement great again? Comments on the Commission's Communication of 3 October 2017' (*How to Crack a Nut*, 17 November 2017), available at: <https://www.howtocrackanut.com/blog/2017/10/17/making-public-procurement-work-in-and-for-europe-some-comments.html> accessed 24 April 2022.
[129] See OECD, 'Mainstreaming strategic public procurement to advance regional development. An experiment to support public buyers achieving Cohesion Policy objectives' (unpublished) available at: <https://www.oecd.org/gov/public-procurement/country-projects/public-procurement-and-cohesion-policy-objectives/FINAL-REPORT-Mainstreaming-strategic-procurement.pdf> accessed 18 April 2022.

effects.[130] Others subscribe to the view that the narrowing down of tenderers in strategic procurement is not by itself incompatible with the objective of stimulating effective competition.[131] In *Concordia*, the Advocate General pointed out that the two tenderers, only of whom one was able to supply the subject-matter of the contract, were not in comparable situations hence could not be treated similarly. As a result, the difference in the number of points awarded to them did not infringe the principle of equal treatment.[132] The Court found the same to apply when a green criterion may only be met by few economic operators.[133] Therefore, debarring the contracting authorities from employing objective award criteria would defeat the very purpose of directly comparing and contrasting the tenderers with one another to identify the MEAT.[134]

To sum up, the MEAT criterion is understood as an 'overriding concept as all winning tenders should finally be chosen in accordance with what the individual contracting authority regards as the economically best solution among those offered.'[135] Its relative broadness offers significant scope for the integration of local preferences, particularly if those are construed by the contracting authority in express connection with the objectives of strategic procurement. Exceedingly useful in that regard is the Life Cycle Costing methodology.

2. Life Cycle Costing

The 2014 reform introduced Life Cycle Costing (LCC) across all stages of the procurement process in consonance with the substitution of the 'lowest price' by the MEAT criterion. The new Directives empower contracting authorities to 'think outside the (price) box'[136] and calculate the totality of costs engendered during the entire life cycle of an asset in the award stage[137] and contract performance conditions.[138] Still, the assessment should be

[130] Sanchez Graells (n 128).
[131] Catherine Weller and Janet Meissner Pritchard, 'Evolving CJEU Jurisprudence: Balancing Sustainability Considerations with the Requirements of the Internal Market' (2013) 8 European Procurement & Public Private Partnership Law Review 55, 58.
[132] *Concordia* (n 88) Opinion of AG Mischo, paras 149-150.
[133] *Concordia* (n 88) judgement, para 85-86.
[134] Weller, Pritchard (n 131) 58.
[135] Recitals 89 Directive 2014/24 and 94 Directive 2014/25.
[136] Dacian C Dragos and Bogdana Neamtu, 'Sustainable Public Procurement: Life-Cycle Costing in the New EU Directive Proposal' (2013) 8 European Procurement & Public Private Partnership Law Review 19.
[137] Articles 68 Directive 2014/24 and 82 Directive 2014/25; see also Recitals 92 and 97 respectively.
[138] Articles 70 Directive 2014/24 and 87 Directive 2014/25.

linked to the subject-matter of the contract,[139] non-discriminatory and grounded on objectively verifiable criteria.[140]

LCC takes off from the premise that purchase price is not indicative by itself as to the benefits -both financial and non-financial- deriving from goods, services, or works with superior social or environmental performance in the course of their operation and use.[141] Purchasers evaluate a tender on the basis of all costs engendered during a product's life 'from the cradle to the grave', ergo upfront cost and all related costs (delivery, installation and insurance), future operating costs (energy, fuel, water use, spares and maintenance) and end-of-life costs (decommissioning, dismantling and disposal) or residual value (revenue from sale).[142] However, the wording of the Directives enjoins contracting authorities from taking into account any other types of externalities -such as adverse social impacts- besides environmental ones if they cannot be monetised.[143]

An LCC methodology could pave the way for a perfectly lawful incorporation of local content 'through the back door'. If contract performance takes place in the locality of the contractor's headquarters or offices, transportation costs are reduced, as is resource consumption of this undertaking and its supply chain. As a consequence, the contracting authority's LCC will have fewer environmental externalities to take stock of, ergo this particular tender ends up the most economically advantageous.

An added benefit is that local content will by default be linked to the subject-matter of the contract. According to the most correct opinion, under Article 67(3), every cost incurred during the life time of a product, service or work is inherently linked to the subject-matter.[144] Although at first transportation seems to be unrelated to the product, service, or work to be supplied, it does constitute a monetisable externality computable in a LCC methodology hence linked to the subject-matter of the contract.

[139] Articles 67(3) Directive 2014/24 and 82(3) Directive 2014/25.
[140] Articles 68(2) Directive 2014/24 and 83(2) Directive 2014/25
[141] Dragos, Neamtu (n 136) 20.
[142] Maria R De Giacomo and others, 'Does Green Public Procurement Lead to Life Cycle Costing (LCC) Adoption?' (2019) 25 Journal of Purchasing and Supply Management 100500 1, 2.
[143] Articles 68(1)(b) Directive 2014/24 and 83(1)(b) Directive 2014/25; see also Michaux, Gruyters (n 91) 64; Dragos, Neamtu (n 136) 24-25.
[144] Caranta (n 10) 159.

Nevertheless, some scholars have rebutted the possibility of using LCC on environmental grounds to promote regional development.[145] Their argumentation relies on the wording of Articles 67(4) and 68(2)(a) Directive 2014/24, which interlocks with consistent CJEU case law repelling criteria prescribed for the benefit of local economic operators, particularly the ones which are already providing the service in question,[146] or the local economic tissue, requiring for example the use to the greatest possible extent of domestic materials, consumer goods, labour and equipment.[147] Regardless, in our view, these concerns are sufficiently addressed by the requirement that LCC is undertaken in a general context rather than tailored to a specific procurement procedure.[148]

Lastly, Dragos and Neamtu have remarked that during a recession, 'buy national' policies may actually impair the effectiveness of LCC owing to the limited resources available.[149] That is particularly in the case of 'Buy American', where the law itself expressly gave precedence to domestic over overseas undertakings.[150] It is true that the complexity of LCC multiplies administrative costs by necessitating external advisors,[151] so that in times of austerity, simply entrusting the contract to a local supplier is the easiest, cheapest, and least labour-intensive route. Nonetheless, as the same scholars admit, recent efforts have concentrated on minimising administrative costs,[152] and are gradually catching on, albeit with substantial roadblocks along the way.[153] Thus, in our view, while the above argument certainly held merit at the aftermath of the 2008 recession, the posterior progress in capacity-building renders it somewhat weaker at present. Both localism and LCC seek to balance out economic efficiency with an elimination of externalities, making their function complementary rather than mutually exclusive.

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[145] Sanchez Graells (n 100) 181.
[146] Case C-234/03, *Contse and Others* EU:C:2005:644, [2005] ECR I-09315, para 79.
[147] *Storebaelt* (n 99) para 45.
[148] Recital 96 Directive 2014/24.
[149] Dacian C Dragos and Bogdana Neamtu, 'Life Cycle Costing for Sustainable Public Procurement in the European Union', in Baete Sjåfjell and Anja Wiesbrock (eds), *Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder* (Cambridge University Press 2016) 135.
[150] Dacian C Dragos and Bogdana Neamtu, 'Sustainable public procurement in the EU – experience and prospects', in François Lichère, Roberto Caranta, Steen Treumer (eds), *Modernising public procurement: the new directive* (DJØF Publishing 2014) 333; Steinar Vagstad, 'Promoting Fair Competition in Public Procurement' (1995) 58 Journal of Public Economics 28, 284 [n 2].
[151] Kirsi M Halonen, 'Is Public Procurement Fit for Reaching Sustainability Goals? A Law and Economics Approach to Green Public Procurement' (2021) 28 Maastricht Journal of European and Comparative Law 535, 545 and references therein.
[152] Dragos, Neamtu (n 149) 126.
[153] See De Giacomo and others (n 142) 3.

It becomes quickly apparent that as public procurement rules currently stand, it will be challenging to lawfully incorporate localist criteria, which will have to be non-discriminatory and linked to the subject-matter of the contract. The latter test will be met in projects with a heavy regional focus, where not much cross-border interest would be exhibited to begin with. LCC could provide a useful avenue due to its presumption of a link to the subject-matter, though reliant on the inclination of each contracting authority to expend administrative costs on such an intricate methodology.

Still, even if the Procurement Directives are adhered to, there is no guarantee that a given criterion will be in and of itself compatible with the internal market, as we will show in the following section.

IV. THE (IN)COMPATIBILITY WITH THE INTERNAL MARKET

Since EU secondary legislation on public procurement attaches to the normative framework on the free movement of goods and the freedom to provide services, the legality of sustainable 'buy-local' clauses must be assessed on a case-by-case basis.[154] The latitude of the contracting authorities' discretion is contingent on the existence and scope of relevant EU harmonisation rules and exemptions.[155]

The depth and coverage of harmonisation (minimum or exhaustive) delineates the ambit for the inclusion of sustainability requirements in procurement documents.[156] For example, eco-labels and social labels have not been harmonised at EU level, since it is mostly NGOs or private entities that set up certification schemes. Thus, national rules on buying local may be grounded on the Environmental Chapter of the TFEU or Article 153(2)(b) TFEU concerning labour.[157] We could likewise mention the shared competence between Member States and the

[154] Hettne (n 34) 31.
[155] Berend Jan Drijber and Hélène Stergiou, 'Public procurement law and internal market law' (2009) 46 Common Market Law Review 805, 844.
[156] Hettne (n 34) 32; see also Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 Cambridge Yearbook of European Legal Studies 439, 445.
[157] Hettne (n 34) 33.

Union on economic, social, and territorial cohesion under Article 4 TFEU, implemented in Articles 174-178 TFEU. Member States must always respect the principles of non-discrimination, mutual recognition and proportionality, though.[158]

Public contracts fall under the remit of the four fundamental Treaty freedoms insofar as they give rise to a cross-border interest.[159] This is distinctly salient for contracts falling below the thresholds of the Directives, which are subject to national procurement rules.[160] A sustainable localist clause may give rise to such an interest, if foreign operators would be interested in bidding. However, in projects with a heavily localised orientation, and particularly if they fall below the thresholds of the Directives, it is not inconceivable that the confinement of the procedure within a single Member State and the participation of exclusively local undertakings could lead to a finding of a purely internal situation outside the scope of the Treaty.[161]

A more generous view opines that internal market law jurisprudence must likewise apply analogously to contracts *within* the remit of the Procurement Directives – despite the existence of harmonising legislation as *lex specialis*.[162] Should a contract be deemed to restrict these freedoms, it would then be recognised as an exceptional measure under the Treaty (Articles 36, 61, 51 and 52, after cross-reference from Article 62), or justified by virtue of an overriding reason of general interest in accordance with CJEU jurisprudence.[163] In order to secure the effectiveness of the rights conferred by the Treaty, the scope of potential exceptions is extremely narrow, with Member States shouldering the evidential onus in each individual case.[164] The same argument could thus apply to the evaluation of the lawfulness of buying local.

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[158] Hettne (n 34) 33.
[159] *An Post* (n 8) para 29.
[160] Case C-275/98, *Unitron Scandinavia and 3-S A/S, Danske Svineproducenters Serviceselskab v Ministeriet for Fødevarer, Landbrug og Fiskeri* EU:C:1999:567, [1999] ECR I-8291, para 29; C-324/98, *Telaustria and Telefonadress* EU:C:2000:669, [2000] ECR I-10745, para 60.
[161] Portion of the literature considers the 'internal situation' test to be closely linked to but conceptually distinct from the 'cross-border interest test', see Drijber, Stergiou (n 155) 815-817; Sue Arrowsmith, *The Law of Public and Utilities Procurement*, vol 1 (3rd edn, Sweet & Maxwell 2014) 242-252 and references therein. We interpret 'internal situations' and 'cross-border interest' as belonging in different steps along the scale, the former further down and away from the scope of EU rules compared to the latter.
[162] Albert Sanchez Graells, *Public procurement and the EU competition rules* (Hart Publishing 2011) 219.
[163] Case C-260/04 *Commission v Italy* EU:C:2007:508 [2007] ECR I-07083, para 26.
[164] See Case C-337/05, *Commission v Italy* EU:C:2008:203, [2008] ECR I-02173, paras 57-58 and case law cited therein.

We will now turn to the question of whether sustainable local content imposes a restriction on the fundamental Treaty freedoms, and if so, whether it may be justified, bearing in mind that no single 'free movement test' exists and that Treaty provisions are interpreted broadly.[165]

A. Does 'buying local' restrict the four fundamental freedoms?

1. A restriction within the meaning of article 34 TFEU

Article 34 TFEU forfends Member States from enacting quantitative restrictions on the free movement of goods or measures having equivalent effect. Its scope encompasses national measures which have the object or effect of restricting the patterns of imports and exports in this way conferring a special advantage to national production or the domestic market.[166]

As stated in *Keck-Mithouard*, measures of equivalent effect which may oblige foreign goods to meet certain requirements pertaining to 'designation, form, size, weight, composition, presentation, labelling, packaging'[167] are prohibited, even if they apply to domestic and imported products alike.[168] Measures having equivalent effect are interpreted broadly, covering all national trading rules capable of hindering, directly or indirectly, actually or potentially, trade between Member States (*Dassonville* formula).[169] Notably, the Court has so far implicitly confined the product requirements to physical characteristics of the goods.[170]

In essence, the complication with imported products is that both the home state and the importing state may set product requirements. Imports are thereby subjected to two different sets of requirements and thereupon additional economic burdens which domestic products do not have to shoulder. As a resolution, a 'double-burden test' is promoted with the far-reaching

[165] See indicatively Drijber, Stergiou (n 155) 816; Alexandre Saydé, 'One Law, Two Competitions: An Enquiry into the Contradictions of Free Movement Law' (2011) 13 Cambridge Yearbook of European Legal Studies 365, 376.
[166] Case C-237/82 *Jongenell Kaas* EU:C:1984:44, [1984] ECR 483, para 22.
[167] Joined Cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard* EU:C:1993:905, [1993] ECR I-6097, para 15.
[168] *Id*.
[169] Case C-8/74 *Procureur du Roi v Dassonville* EU:C:1974:82 , [1974] ECR 837, para 5.
[170] Laurens Ankersmit, *Green Trade and Fair Trade in and with the EU: Process-based Measures within the EU Legal Order* (Cambridge University Press 2017) 86.

objective of precluding discrimination and protectionism.[171] Be that as it may, this case law must be viewed through a sharper lens and under nuanced conceptual distinctions: the original *Dassonville* formula examined a measure under the scope of Article 34 regardless of its protectionist or discriminatory nature. In contrast to this latitude, ensuing judgements closely associated this formula with a verification of discrimination.[172] In any event, buying local for sustainable procurement will almost always be caught in Article 34 and constitute a *prima facie* restriction.

Finally, it has not yet been entirely resolved whether Article 34 applies solely to measures with a degree of consistency and generality or also to single contracts.[173] In our view, because localist policies have traditionally been and will probably continue to be systematic in nature, such clauses will always fall under the scope of Article 34.

2. A restriction within the meaning of Article 56 TFEU

In procurement cases, if the EU has enacted sector-specific secondary legislation, it does not render Article 56 extraneous and instead the Court tends to apply both at the same time to cover any legislative gaps.[174] If no harmonising legislation exists, the Court subjects both concessions and works contracts to an assessment under Article 56.[175] Notably, the free provision of services may apply in procurement disputes without having to prove the cross-border element, because the inherent function of the Procurement Directives is the inauguration of a level playing field for EU-based undertakings to compete unrestrained by national regulatory particularities.[176]

A restriction under the meaning of Articles 49 and 56 may be imposed in public procurement by a localised award criterion requiring that the tenderer own a production plant within a set proximity to the region where the service will be provided.[177] The undertaking

[171] Miguel P Maduro, 'Harmony and Dissonance in Free Movement' (2001) 4 Cambridge Yearbook of European Legal Studies 315, 336.
[172] Maduro (n 171) 316.
[173] See Arrowsmith (n 161) 240-242 and references therein.
[174] See Vassilis Hatzopoulos, Thien Uyen Do, 'The case law of the ECJ concerning the free provision of services: 2000-2005' (2006) 43 Common Market Law Review 923, 931-932.
[175] See *Nord-Pas-de-Calais* (n 124) para 83.
[176] *Storebaelt* (n 99) para 33.
[177] *Contse* (n 146).

would have to proceed to considerably more sizable investments compared to, say, simply maintaining an office in the region. The latter condition would be much easier to fulfil in repeated occasions or even when required by different procurement procedures, than where the existence of a production or processing plant depends on an investment that cannot be replicated more than once, nor yield a return outside the scope of this specific contract. Therefore, undertakings who already have such a plant in place would be better off compared to those who would have to set up a secondary establishment on the spot, just for the purposes of a given contract. In *Contse*, the permanent character of said secondary establishment was fortified by the fact that the award criterion spoke of 'ownership' of the plant, not its mere availability.[178]

B. Justification of the restriction

We will next investigate whether sustainability-oriented 'buy-local' clauses that do constitute a restriction on the free provision of services or the free movement of goods could be justified by an overriding reason of public interest and hence not prohibited under Articles 56 TFEU and 34 TFEU.

1. Free movement of goods

National measures restricting free movement of goods within the internal market may ultimately be compatible with Article 34 by virtue of a justification on public interest grounds. These non-exhaustive reasons may derive from unwritten mandatory requirements or from the derogations enumerated in Article 36 TFEU.[179]

The first option for a justification are the public policy grounds of Article 36, as long as they do not conceal arbitrary discrimination or a restriction on intra-Union trade. Of relevance for sustainable procurement are the grounds of public policy, which could be invoked in connection with the socioeconomic strengthening of local communities; and the protection of health and life of humans, animals or plants. Based on the wording of this provision, not all

[178] *Contse* (n 146) para 57.
[179] See Ankersmit (n 170) 80-81.

environmental measures could be caught within its remit; anyhow, the CJEU has construed this particular derogation generously.[180]

The second option is to invoke the CJEU's case law on the 'rule of reason' (*Keck*) or 'mandatory requirements' (*Cassis de Dijon*).[181, 182] Absent any relevant EU legislation, Member States are entitled to impose certain limitations to intra-Union movement in order to guarantee specific interests or values relevant to, inter alia, 'the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer'.[183] The non-exhaustive list has also been expanded to include environmental protection[184] and the improvement of working conditions.[185] Both of these last two grounds are profoundly relevant for sustainable buying local.

In non-harmonised areas, restrictions are lawful to the extent that they apply irrespective of the origin of the product. They must be necessary for the fulfilment of the interest or value pursued such as consumer protection and fair trading and adhere to the proportionality principle, so that Member States bear an obligation to implement the option that restricts free movement the least.[186] After all, the analogous application of the second sentence of Article 36 TFEU precludes any measures constituting a means of arbitrary discrimination or disguised restriction of trade.[187]

In order to conclude that a measure is not discriminatory, the Court will examine its purpose and the particular features of the market in question. In *PreussenElektra*, the Court held that a national measure promoting renewable electricity generation was compatible with the free movement of goods despite it favouring domestic suppliers,[188] which could likewise

[180] Case C-67/97, *Criminal proceedings against Ditlev Bluhme* EU:C:1998:584, [1998] ECR I-08033, paras 33-38.
[181] Case C-120/78, *Cassis de Dijon* EU:C:1979:42 , [1979] ECR 649.
[182] See Laurence W Gormley, 'Silver Threads among the Gold. 50 Years of the Free Movement of Goods' (2008) 31 Fordham International Law Journal 1637, 1684.
[183] *Cassis de Dijon* (n 181) para 8.
[184] See Case C-302/86, *Commission v. Denmark* EU:C:1988:421, [1988] ECR 4607, para 9; see also Case C-2/90 *Commission v Belgium* (*Walloon Waste*) EU:C:1992:310, [1992] ECR I-4431 and Case C-379/98 *PreussenElektra AG v Schleswag AG* EU:C:2001:160, [2001] ECR I-2099.
[185] See for example Case C-155/80, *Summary Proceedings Against Oebel* EU:C:1981:177, [1981] ECR 1993, paras 12-16; Case C-312/89, *Union Départementale des Syndicates CGT de I'Aisne v SIDEF Conforama* EU:C:1990:418, [1991] ECR 1-997, para 11; Case C-332/89, *Criminal Proceedings Against Marchandise* EU:C:1991:94, [1991] ECR 1-1027, para 17 and others.
[186] Case C-407/85 *3 Glocken GmbH* EU:C:1988:401, [1988] ECR 4233, para 10.
[187] Gormley (n 182) 1686.
[188] *PreussenElektra* (n 184) para 68-81.

apply to buying local for sustainable procurement. Indistinct applicability is thus not a prerequisite for a measure to be justifiable.[189] The promotion of renewable energy sources was deemed appropriate to attain environmental protection to boot, given Member States' international obligations to mitigate climate change, while also in line with the internal integration principle (Article 11 TFEU).[190] On that account, in relation to the *purpose* of the measure in particular, the judgement could justify local energy procurement or local development projects aiming for energy efficiency.

The CJEU's case law on the *nature* of the good in connection with environmental protection as a mandatory requirement may be further recruited to justify buying local in public procurement. In *PreussenElektra*, the particular features of the electricity market lay in the difficulty to assess the origin of electricity (both geographically and its provenance from renewable energy sources or fossil fuels) once funnelled into the transmission or distribution grid.[191] In *Walloon Waste*,[192] the Court qualified waste as falling under the concept of a 'good' due to its intrinsic commercial value, though of a *sui generis* nature owing to its liability to pose environmental and health hazards.[193] The Court paid particular attention to the principle that environmental damage must be remedied at the source, precluding transportation and dumping of waste in another Member State.[194] As a result, due to the disparities between waste produced in different regions and the linkage between the waste and its place of production, the measure was not discriminatory.[195] Consequently, 'buy-local' clauses in the procurement of waste treatment facilities or energy generation could be deemed as trade-distortive but *de lege lata* justified based on the same reasoning.

The CJEU's judgements in *Walloon Waste* and *PreussenElektra* are apt examples of the jurisprudential trend to tip the balance in favour of the environmental protection as a value overriding free trade. [196] The rule of reason should leave ample space for trade-restrictive procurement, as long as a legitimate public interest objective is served and pursued in a proportionate manner. One might contemplate that no public interest objective would be strong

[189] Arrowsmith (n 161) 280-281.
[190] *PreussenElektra* (n 184) para 72-78.
[191] *PreussenElektra* (n 184) para 79.
[192] *Walloon Waste* (n 184) para 23.
[193] *Walloon Waste* (n 184) para 30.
[194] *Walloon Waste* (n 184) para 34.
[195] *Contra* Marina Wheeler, 'The Legality of Restrictions on the Movement of Wastes under Community Law' (1993) 5 Journal of Environmental Law 133 and references therein; Gormley (n 182) 1650 [n 67].
[196] See Wheeler (n 195) 148.

enough to outweigh the pro-competitive focus of the Directives.[197] We may respond that while this argument certainly held true prior to the 2014 reform, it may have been rendered nugatory by the strong sustainable direction of the Procurement Package,[198] leaving a sliver of space open for the justification of buying local.

2. Free provision of services

Buying local for sustainable procurement could also be justified under the CJEU's case law on the free provision of services. National provisions liable to prevent or render the exercise of this freedom less attractive must meet four conditions in order to be consistent with Article 56 TFEU. They must be applied in a non-discriminatory manner, justified by imperative requirements in the general interest, appropriate and proportionate for the attainment of the objective pursued (*Gebhard* test).[199]

CJEU case law in defence procurement hints the Court's amenability to accepting existing exceptions hinging on the rule of reason, as well as new ones.[200] In *Agusta helicopters*, Italy directly awarded a contract instead of initiating an open competitive procedure to preserve the homogeneity of its helicopter fleet. Although this public interest ground escaped the exhaustively enumerated list of circumstances meriting recourse to the negotiated procedure, the ground was not outright dismissed as a matter of principle.[201] Nor did the Court declare that harmonising rules trump the scope for the applicability of other derogations.[202] It is not unlikely that in the future, the Court may accept the development of local communities as a public interest ground capable of justifying restrictions on trade imposed by buying local in public contracts.

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[197] Sanchez Graells (n 162) 219.
[198] See European Commission, *Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market*, COM(2011) 15 final, 3. Sanchez Graells evidently attempted to address this change in his article 'Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?' (2016) 22 European Public Law Journal 377. However, the theory developed there has not as yet found support in Commission practice or CJEU case law.
[199] see Case C-55/94 *Gebhard* EU:C:1995:411, [1995] ECR I-4165, para 37; Case C-19/92 *Kraus* EU:C:1993:125, [1993] ECR I-1663, para 32; and Case C-243/01 *Criminal proceedings against Piergiorgio Gambelli and Others* EU:C:2003:597, [2003] ECR I-13031, paras 64-65.
[200] See Drijber, Stergiou (n 155) 835-837, 839.
[201] *Commission v Italy* (n 164) paras 55-59.
[202] See Drijber, Stergiou (n 155) 835.

Such trade distortions could also be justified on public health grounds, a material component of social sustainability, as illustrated by the leeway left by both the Court and the Commission in the *Contse* judgement. In that case, the Court slammed localised award criteria. The public interest objective pursued was the protection of human life and health via suitable and diversified production in proximity to the place of consumption by end users. In this context, the reliability of supplies in the healthcare system could be *prima facie* permissibly taken into consideration during the search of the MEAT.[203] We could assume the same to apply in relation to buying local in procurement for healthcare or other social services.

Even so, the measures in *Contse* were inappropriate for the attainment of this objective.[204] Among other reasons, the geographical radius by which the distance between the production plant and the region of contract performance was measured was unsuitable. No matter how long or short a distance or transport time was elected as an award criterion, contracting authorities would invariably act arbitrarily.[205] Moreover, the allocation of extra points using as indicators the total annual production rather than that of the procured product led to a simultaneous lack of a link to the subject-matter of the contract and inappropriateness of the measure.[206]

Compelling, however, was the Court's reasoning as to why the award criterion in question failed the proportionality test, because it may have inadvertently provided guidance on how to bypass the stringent rules against protectionism. The Court held that the objective pursued, ergo the security of supplies, could be equally well achieved through less restrictive means, such as conferring additional points to storage facilities with gas reserves that would be *provisionally* called to action when transport from the production or processing facilities was halted or disrupted.[207] In this light, a trade-off is reached, since a local *storage* facility is far less permanent and significantly less costly to establish than a production or processing plant and hence a relevant award criterion would seem more palatable to both the Commission and the Court.

[203] The Court made an analogous application of its judgement in Case C-324/93 *Evans Medical and Macfarlan Smith* EU:C:1995:84, [1995] ECR I-563, para 44.
[204] *Contse* (n 146) para 61.
[205] *Contse* (n 146) para 62.
[206] *Contse* (n 146) para 69-70.
[207] *Contse* (n 146) para 67.

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To recapitulate, the contracting authorities may still possess some wiggle room to find a middle ground between buying local and free movement, provided that the measure is necessary, proportionate, non-discriminatory and justified by an imperative requirement in the public interest. Said public interest grounds will most probably be derived from CJEU jurisprudence rather than the list provided within the text of the Treaty.

In this thesis we concentrated on the integration of 'buying local' as clauses in contract notices relating to all phases of the tendering procedure. There is, however, another option. The Court controversially held in *Spezzino*[208] that a direct award of emergency ambulance services to local voluntary associations is fully compliant with the internal market, owing to Member States' discretion in organising their health and social security system in combination with the contractors' non-profit-making purpose.[209]

In this vein, one must not rule out that internal market case law may recoil and turn back to its roots, by tying once more a breach of the fundamental freedoms to discrimination on grounds of nationality rather than merely a restriction of trade. The interpretation of infringements of the fundamental freedoms as entailing *distortions* has only minimally impacted trade yet created ambiguity about the extent to which liberalisation is desirable. In some scholars' view, construing primary law breaches as signifying discrimination against foreign economic operators once again would *de lege ferenda* contribute to enhanced clarity and normative certainty.[210] We are inclined to agree. In fact, in our opinion, given the convergence of the factors explored under Chapter II it is not unlikely that such a shift may take place in the very near future.

[208] Case C-113/13 *Azienda sanitaria locale n.5 'Spezzino' and Others v San Lorenzo Soc. Coop. sociale and Croce Verde Cogema cooperative sociale Onlus* [2014] EU:C:2014:2440, paras 57-65.
[209] Meulenbelt (n 122) 66; see also Roberto Caranta, 'After Spezzino (Case C-113/13): A Major Loophole Allowing Direct Awards in the Social Sector' (2016) 11 European Procurement & Public Private Partnership Law Review 14.
[210] Martin Höpner and Suzanne K Schmidt, 'Can We Make the European Fundamental Freedoms Less Constraining? A Literature Review' (2020) 22 Cambridge Yearbook of European Legal Studies 182, 197.

V. CONCLUSION: PUBLIC PROCUREMENT IN TRANSITION

Until recently, introversion has been regarded as setting back sustainability initiatives. This impression was best exemplified by the international outcry against President Trump's decision to withdraw from the 2015 Paris Climate Agreement, which he lamented as 'simply the latest example of Washington entering into an agreement that disadvantages the United States to the exclusive benefit of other countries, leaving American workers — who I love — and taxpayers to absorb the cost in terms of lost jobs, lower wages, shuttered factories, and vastly diminished economic production'.[211]

This thesis has striven to deconstruct any illusion of incompatibility between sustainability and local preferences by illustrating the significant equity gains derived from buying local. We have attempted to demonstrate the *feasibility* of sustainable procurement for the development of local communities under the current state of EU law and the global political climate.

We have theorised that in effect, public procurement regulation may shift from market integration towards sustainable localism, owing to the confluence of three factors. Firstly, the more open attitudes towards sustainable procurement precipitated by the 2014 procurement reform. Secondly, the solidification of a 'Fortress Europe' in the EU's *external* relations via the emergence of green protectionism and the approval of the International Procurement Instrument. Thirdly, the economic and non-economic incentives for buying local in Member States' relations *internally*.

We have furthermore noted that across all stages of the pre-contractual phase, tenders may be compared against one another on grounds of environmental or social benefits or development opportunities for local communities. Unlike technical specifications, a failure to meet award criteria does not trigger an automatic exclusion, which somewhat attenuates their effectiveness. Yet, it is in award criteria where contracting authorities are generally the most facilitated in implanting sustainability requirements,[212] providing that those are clearly defined,

[211] The White House, 'Statement by President Trump on the Paris Climate Accord' (1 June 2017) available at: <https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-trump-paris-climate-accord/> accessed 23 June 2022.
[212] See also Ankersmit (n 109) 14-15.

linked to the subject-matter of the contract, adhere to the rules on advertising, and comply with the principle of equal treatment. Life Cycle Costing may hold further promise, though not without scepticism from part of the scholarship. Even so, mere compliance with the Procurement Directives is no guarantee.

Sustainable 'buy-local' clauses must go through another loop: compliance with the fundamental Treaty freedoms. Since the applicability of primary law depends on the extent of relevant harmonisation, this step entails an investigation of whether exhaustive or minimum harmonisation is in place. If Member States have not transferred their legislative authority to the Union, then national procurement measures must adhere to primary law.

Overall, the Court elects a broad interpretation of the Treaty prohibitions. A justification for measures fettering free movement may be gleaned by both Treaty provisions and the rule of reason. Notwithstanding the narrow interpretation of exceptions, the CJEU does not appear disinclined to recognise other procurement-specific exceptions as overriding reasons in the public interest. Environmental protection, social cohesion or development opportunities *at a local scale* could constitute such an exception.

Nevertheless, as soon as Member States attempt to elude their EU law obligations, the CJEU's approach is characteristically unhospitable.[213] As a result, even if sustainable 'buy-local' clauses remain a theoretical possibility, *under the current state of the law* a successful outcome in practice is dubious and case-specific.

In spite of that, we would not be astonished, should the onslaught of environmental disasters and social strife cumulatively dismantle the Commission's and the CJEU's resolve in the near future. Turbulences across the supply chains induced by Brexit and the US-China trade war combined with the COVID-19 crisis have activated a pattern of overwhelming 'de-globalisation'.[214] A resurgence of 'localised' production patterns is anticipated, whereby production established in China would return to the EU, North and South America ('back-

[213] Drijber, Stergiou (n 155) 846.
[214] See Christoph Dörrenbächer, Mike Geppert, Aline Hoffmann, 'Contemporary restructuring trends in European multinational corporations: rationale and impact on labour and workers' participation' (2020) 17 Critical Perspectives on International Business 637.

shoring').[215] An implicit reformation of public procurement law via a changeover in case law and Commission practice in favour of a 'Green Europe' as a variant of 'Fortress Europe' would legitimise this shift.

[215] See Remko Van Hoek, 'Research opportunities for a more resilient post-COVID-19 supply chain–closing the gap between research findings and industry practice' (2020) 40 International Journal of Operations and Production Management 341; Robert B Handfield, Gary Graham and Laird Burns, 'Corona Virus, Tariffs, Trade Wars and Supply Chain Evolutionary Design' (2020) 40 International Journal of Operations & Production Management 1649, 1650.

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