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RegioPost and Labour Rights Conditionality: Comparing the EU Procurement Regime with the WTO Government Procurement Agreement

Maria Anna Corvaglia

I. Introduction

Following its 'Global Revolution', the liberalisation of international procurement markets represents a major driver behind the negotiation and the conclusion of a growing number of international trade agreements addressing the regulation of public procurement. International and regional trade agreements have progressively prompted governments to liberalise their procurement markets on a non-discriminatory basis, requiring clear commitments on procurement market access.[1] The World Trade Organisation (WTO) Government Procurement Agreement (GPA) and many Preferential Trade Agreements (PTAs), including the European Union (EU) as a regional trade organisation,[2] share the common objective of the elimination of procurement practices representing non-tariff barriers to cross-border trade flows on the basis of the principle of non-discrimination.

When compared to international regulatory instruments such as the UNCITRAL Model Law,[3] or to the World Bank's Procurement Framework, international trade agreements have traditionally been described as the most intrusive regulatory instruments of procurement regulation, with a great impact on the freedom to include

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[1] S Arrowsmith, 'National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?' in S Arrowsmith and A Davies (eds), *Public Procurement: Global Revolution* (London, Kluwer, 1998) 3.

[2] For the purpose of this analysis, the EU will not be analysed under its constitutional aspects but as a model of regional trade integration, in its most advanced form. It is interesting to note that, according to the latest WTO reserch on the classification of PTAs regulating public procurement, the EU paradoxically belongs to the category of PTAs that does not address the field of government procurement at all in its funding treaties. The EU Treaties do not contain any specific public procurement provisions in their wording but only in secondary EU legislation (Directives) it is expressively mentioned. RD Anderson et al, 'Government Procurement Provisions in Regional Trade Agreements: A Stepping Stone to the GPA Accession?' in S Arrowsmith and RD Anderson (eds), *The WTO Regime on Government Procurement: Challenges and Reform* (Cambridge, Cambridge University Press, 2011) 561.

[3] For further discussion, see the contribution by Nicholas in ch 13 of this book.

labour clauses in the domestic regulation of public procurement activities.[4] The implementation of labour rights in general, and the enforcement of minimum wages in particular, has proved particularly controversial in the context of the GPA, the plurilateral agreement regulating public procurement in the WTO.[5] The preamble to the revised GPA clarifies that the primary function of the agreement is to establish an 'effective multilateral framework for government procurement, with a view to achieving greater liberalization and expansion of, and improving the framework for, the conduct of international trade'. The goal of the GPA to liberalise the field of public procurement is achieved through the de iure and de facto implementation of the principle of non-discrimination in the conduct of the procurement activities covered by the GPA commitments.[6]

As highlighted in *RegioPost*,[7] the use of procurement to enforce minimum working conditions has the potential to create conflicts with the fundamental economic freedoms in the EU internal market.[8] As clarified in paragraph 69 of the judgment, the imposition of respect for minimum wages by national provisions in tenders and subcontracts 'constitutes an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State … capable of constituting a restriction within the meaning of Article 56 TFEU'. On a parallel basis, tensions are inevitable between the enforcement of minimum wages in public contracts and the principle of non-discrimination as imposed in Article IV GPA.[9] The inclusion of labour

[4] MA Corvaglia, *Public Procurement and Labour Rights Towards Coherence in International Instruments of Procurement Regulation* (Oxford, Hart Publishing, forthcoming).

[5] The WTO regime of procurement regulation was first elaborated in 1979 with the 'Tokyo Round Code on Government Procurement' and then established in the GPA agreement, signed in Marrakesh in 1994 and which entered into force in 1996. P Van Den Bossche, *The Law and Policy of the World Trde Organization. Text, Cases and Materials* (Cambridge, Cambridge University Press, 2005) 53–54. After a long renegotiating process, the last comprehensive revision of the GPA text was agreed at the WTO Ministerial Conference in December 2011, and the 2012 Revised Agreement on Government Procurement formally entered into force in April 2014. RD Anderson, SL Schooner and C D Swan, 'The WTO's Revised Government Procurement Agreement – An Important Milestone Toward Greater Market Access and Transparency in Global Procurement Markets' (2012) 54 *Government Contractor* 1.

[6] BM Hoekman and P Mavroidis, 'Basic Elements of the Agreement on Government Procurement' in ibid (eds), *Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement* (Ann Arbor, MI, University of Michigan Press, 1997) 13.

[7] Judgment of 17 November 2015, *RegioPost*, Case C-115/14, EU:C:2015:760.

[8] B Hoekman, 'International Cooperation on Public Procurement Regulation' in A Georgopoulos, B Hoekman and PC Mavroidis (eds), *The Internationalization of Government Procurement Regulation* (Oxford, Oxford University Press, 2017) 568.

[9] Art IV GPA defines the standard of of non-discrimination in the WTO regulation of public procurement, articulated in the most favoured nation (MFN) clause and the national treatment principle as explored later in this contribution. Art IV:1(a) ensures respect for the national treatment principle, while Art IV:1(b) accords MFN treatment, stating that 'With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or

considerations alongside the procurement process may imply direct or indirect forms of discrimination in favour of domestic suppliers, potentially in violation of the procurement regulatory architecture established in the GPA. A fundamental regulatory question remains unresolved in the academic discourse on the international trade regulations of public procurement: how can we balance the legitimate goal of ensuring the protection of minimum labour rights in procurement contracts with the objective of the progressive elimination of cross-border discriminatory procurement practices, common to all international trade instruments of procurement regulation?

To add to the discussion around this open question, this chapter will site the analysis of the *RegioPost* judgment in a broader and multi-layered framework, establishing a comparative analysis between the EU and the WTO approaches to the regulation of public procurement. Starting from the clarifications reached by the Court of Justice in *RegioPost* on the possibilities for the enforcement of minimum wages in the EU procurement regulatory framework, the chapter will address the regulatory opportunities offered under the WTO regulation of public procurement for the inclusion of minimum labour rights in procurement practices. This comparative exercise will focus essentially on the interpretation of the principle of non-discrimination, a funding principle of both the WTO and the EU regulation of public procurement. The key question this contribution aims to answer is the following: To what extent does the inclusion of domestic requirements aiming at respect for labour standards and at the imposition of minimum wages pose a challenge to respect for the principle of non-discrimination under both the WTO and the EU procurement frameworks? The WTO and the EU provide two different regulatory approaches to this unsettled, open regulatory tension between the enforcement of labour rights and respect for the principle of non-discrimination. The comparative analysis will underline certain regulatory commonalities and the significant divergences between the WTO and the EU interpretations of the principles of non-discrimination in their procurement regulations, as rooted in various regulatory and institutional variables.

This chapter will discuss the differences and the commonalities between the WTO and the EU layers of procurement governance, on the basis of the conclusions reached in the *RegioPost* judgment. The analysis will focus on four major aspects of the discussion, first addressing the regulation under the EU procurement system and then analysing the WTO procurement regulation. The standard and the function of non-discrimination will be analysed in both the WTO and the EU regulatory approaches to public procurement, emphasising the challenges posed by the inclusion of minimum working conditions in public contracts. The analysis will then turn to the regulation of production methods and processes in the interpretation of the principle of non-discrimination, highlighting the regulatory divergences between the EU and the WTO in the development of regulation of production and delivery processes in the context of public procurement. The derogations and the exceptions guaranteed for procurement practices in violation of the principle of non-discrimination will then be addressed in both the WTO and the EU procurement systems, particularly exploring the flexibilities offered in the coverage of the plurilateral regulation of public procurement under the GPA. The analysis will be completed by turning to the WTO and the EU treatment of the regulation of transparency and non-discrimination, imposed via special

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services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to: a) domestic goods, services and suppliers; and b) goods, services and suppliers of any other Party'.

conditions relating to the performance of public contracts, at the centre of the controversies in the *RegioPost* case. Finally, conclusions will be drawn from these findings, seeking to compare the modes of protection in procurement contracts and to emphasise commonalities and differences.

However, shifting the focus of the analysis from the EU to the WTO regulation of procurement, two significant aspects of the *RegioPost* judgment will not be taken into consideration in this comparative study. First, this chapter will not assess the significance of this judgment in light of the previous jurisprudence of the Court of Justice on social clauses in public procurement, particularly its deviation from the more restrictive approach to the use of minimum wage requirements in public procurement established in the *Rüffert*[10] and *Bundesdruckerei*[11] cases. Secondly, the role played by the interpretation of the Posted Workers Directive[12] will not be taken into consideration in the analysis. In the context of the WTO architecture of international trade regulation, the discipline of the transnational provision of services and the movement of people and service providers fall within the regulatory scope of the General Agreement on Trade in Services (GATS), while this chapter will essentially focus on the GPA, the WTO plurilateral agreement regulating public procurement. The reader will find extensive analysis of both issues in previous chapters of this book.

II. The Tension Between Non-Discrimination and Labour Rights' Conditionality in Public Procurement

At the core of the controversies in the *RegioPost* dispute – which factual aspects are extensively explored in other chapters of this book – was the obligation imposed on contractors and subcontractors to ensure the payment of minimum wages to their workers, as imposed by the Rhineland-Palatinate's regional legislation, only at level of the *Länder*. In order to be awarded the public contracts for the distribution of postal services, contractors and subcontractors were required to provide proof of the commitment to pay a minimum hourly wage to the workers involved in the execution of the public contracts by submitting written certification.[13]

In line with the previous case law of the Court of Justice, the *RegioPost* judgment reaffirmed that the imposition of certain minimum working conditions, like hourly minimum wages, can represent a distortion of the

[10] Judgment of 3 April 2008, *Rüffert*, Case C-346/06, EU:C:2008:189.

[11] Judgment of 18 September 2014, *Bundesdruckerei*, Case C-549/13, EU:C:2014:2235.

[12] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (Posted Workers Directive) [1997] OJ L18/1.

[13] F Costamagna, 'Minimum Wage between Public Procurement and Posted Workers: Anything New after the RegioPost Case?' (2017) 42 *European Law Review* 101.

fundamental freedom of movement of the EU internal market, in this case the freedom to provide services according to Article 56 TFEU.[14] As stated by the Court of Justice in paragraph 69:

> [T]he imposition, under national legislation, of a minimum wage on tenderers and their subcontractors, if any, established in a Member State other than that of the contracting authority and in which minimum rates of pay are lower constitutes an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State.

The economic burden imposed by the requirement to respect minimum labour conditions may imply direct or indirect forms of discrimination between suppliers competing for the public contract. It potentially clashes with the essence itself of the principle of non-discrimination in international economic law, which aims to guarantee equality of opportunity in the market, without additional requirements and conditionality imposed by national governments.[15]

The main regulatory objective of the GPA is to guarantee respect for the principle of non-discrimination in the procurement practices covered by the threshold and by the Schedule of Commitments agreed between the GPA Signatory Parties.[16] The principle of non-discrimination has two dimensions in the context of the GPA: national treatment and the MFN clause, as set out in Article IV:1 of the Revised GPA. First, Article IV:1(a) aims at ensuring respect for the national treatment principle: each GPA Signatory Party must provide 'treatment no less favourable than the treatment the Party, including its procuring entities, accords to domestic goods, services and suppliers'. Secondly, according to Article IV:1(b), GPA Parties must also accord no less favourable treatment among the GPA Signatory Parties, regardless of the country of origin of the goods and services. Both national treatment and MFN clauses will be granted immediately and unconditionally within the scope of application covered by the agreement, 'to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party'.[17]

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[14] Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47.

[15] T Cottier and M Oesch, 'Direct and Indirect Discrimination in WTO and EU Law' in SE Gaines, BE Olsen and KE Sørensen (eds), *Liberalising Trade in the EU and the WTO: A Legal Comparison* (Cambridge, Cambridge University Press 2012) 141.

[16] Only the entities listed as a Signatory Party in Appendix I to the GPA are covered by the GPA Agreement. Annexes 1–3 to that Appendix specify the central and sub-central government entities scheduled by each party, and also specify the minimum threshold values above which a procurement is covered by the Agreement. Annexes 4 and 5 to Appendix I specify each party's covered services and construction services. For an introduction to the issue of the coverage of the GPA, see P Trepte, 'The Agreement on Government Procurement' in PFJ Macrory, AE Appleton and MG Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis*, vol I (New York, Springer, 2005) 1138.

[17] For the sake of completeness, it should be reminded that Art 25 of 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 Public Procurement Directive) [2014] OJ L94/65 ensures respect for the GPA commitments to non-discrimination in the EU procurement regulation. Art 25 requires that 'contracting authorities shall accord to the works, supplies, services and economic operators

In the GPA, the obligation of non-discrimination is expressed in terms of 'treatment not less favourable'. As uniformly interpreted in other WTO agreements, 'treatment not less favourable' consists of the lack of de jure and de facto forms of discriminatory practices.[18] In the WTO regulatory framework, the principle of non-discrimination is not limited to the prohibition of formal and de jure discrimination, it also ensures that any discriminatory and protectionist effect of the measure at issue is prohibited in its application, with a prohibition of de facto discrimination.[19] De facto discrimination usually derives from neutral regulatory provisions, and usually results in the allocation of unfair advantages to national producers or suppliers. To assess the extent of de facto discrimination, the evaluation needs to cover the effects and the implications of the regulatory measure and its 'protective nature and purpose', taking into consideration the specific design and structure of the measure on the market.[20] As translated by Arrowsmith in the context of procurement, the interpretation of the principle of non-discrimination necessarily has to take into consideration the relevance of the modification of the conditions for competition resulting from the procurement regulatory measure, 'and to consider how far the condition is justified by reference to the commercial objectives that it seeks to implement'.[21] Unfortunately, the application of the principle of non-discrimination in the field of public procurement has not been fully explored or clarified in the GPA jurisprudence under the WTO dispute settlement mechanism.[22]

In WTO legal terms, the conditionalities of labour rights protection imposed alongside the procurement process – like the requirement to respect minimum wages in the *RegioPost* case – have the potential to result in de facto discrimination among the different competing suppliers, based on their country of origin.[23] More precisely,

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of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union'.

[18] The principle of non-discrimination in the WTO legal framework is at the centre of a vast academic production. For a more comprehensive overview of the analysis of the principle of non-discrimination, in both the commitments to national treatment and the MFN obligation, in the different WTO agreements, see WJ Davey, 'Non-Discrimination in the World Trade Organization: The Rules and Exceptions' (2011) 354 *Collected Courses of the Hague Academy of International Law* 317.

[19] Cottier and Oesch, above n 15, 144.

[20] See T Cottier and PC Mavroidis (eds), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (Ann Arbor, MI, University of Michigan Press, 2000).

[21] S Arrowsmith, *Government Procurement in the WTO* (London, Kluwer, 2003) 163.

[22] The only relevant case addressing the application of the principle of non-discrimination in public procurement is the panel report of the *Trondheim* case, adjudicated under the Tokyo Procurement Code. However, the panel report does not fully elaborate on the implementation of the national treatment per se, but only in the context of the use of a single tendering process. *Norway – Procurement of Toll Collection Equipment for the City of Trondheim*, Report of the Panel adopted by the Committee on Government Procurement on 13 May 1992 (GPR.DS2/R). The case is analysed in M Matsushita, 'Major WTO Dispute Cases Concerning Government Procurement' (2006) 1 *Asian Journal of WTO & International Health Law and Policy* 299.

[23] C McCrudden, 'International Economic Law and Human Rights: A Framework for Discussion of the Legality of "Selective Purchasing" Law Under the WTO Government Procurement Agreement' (1999) 2 *Journal of International Economic Law* 30.

this is a de facto violation of the national treatment commitment that could represent the most likely scenario resulting from the enforcement of minimum labour standards in the award of procurement contracts.[24] The conditionality regarding respect for labour rights may entail de facto discriminatory effects if the requirements for participation in the public tendering process are drafted in a way that is more accessible for national suppliers.[25] The potential de facto discrimination associated with the protection of human rights and labour rights in the WTO legal framework of public procurement was the central legal issue in the *US Massachusetts State Law* dispute, but unfortunately never resulted in an official interpretation of a panel report.[26]

However, it is relevant to note that the compliance with labour legal requirements set in national regulations and enforcing the protection of international minimum standards of labour rights protection, applicable in an undifferentiated way to national and foreign suppliers, could be interpreted as mitigating the potential risk of violation of the national treatment principle.[27] In light of the WTO approach to non-discrimination in public procurement, there is a considerable difference between procurement policies that require compliance with national legal requirements and policies that impose criteria that go further than the enforcement of the domestic legal norms, thus implying even further effects to the conditions of competition in the procurement markets.[28] Moreover, the reference to international legal standards in procurement documentation, as, for example, in the International Labour Organisation (ILO) Core Labour Conventions, guarantees respect for the principle of non-discrimination on the basis of the nationality of the suppliers, ultimately avoiding the risk of violation of the national treatment principle.[29] In balancing the protection of minimum working conditions and the principle of non-discrimination, as highlighted in the *RegioPost* case, the role that could be played by ILO Convention No 94 –

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[24] HK Nielsen, 'Public Procurement and International Labour Standards' (1995) 2 *Public Procurement Law Review* 94.

[25] A Davies, 'The National Treatment and Exception Provisions of the Agreement on Government Procurement and the Pursuit of Horizontal Policies' in Arrowsmith and Anderson (eds), above n 2, 433.

[26] The dispute arose from the Commonwealth of Massachusetts State Law prohibiting state procuring authorities from awarding public contracts to suppliers doing business with Myanmar, based on serious human rights violations in that country. The EU and Japan claimed a violation of the non-discrimination principle, as it explicitly did not provide 'to the suppliers of other Parties offering products or services of the Parties immediate and unconditional treatment no less favourable than that accorded to domestic services and suppliers and that accorded to services and suppliers or any other Party'. See EU Request for Establishment of a Panel, *WTO United States – Measure Affecting Government Procurement*, WTDS88/3, 9 September 1998. A panel report was never released as the dispute was settled at domestic level by a decision of the US Supreme Court, which declared the Massachusetts procurement law to be unconstitutional. C Kaufmann, *Globalisation and Labour Rights: The Conflict Between Core Labour Rights and International Economic Law* (Oxford, Hart Publishing, 2007) 121.

[27] J Pauwelyn, 'Human Rights in WTO Dispute Settlement' in T Cottier, J Pauwelyn and El Burgi, *Human Rights and International Trade* (Oxford, Oxford University Press, 2005).

[28] S Arrowsmith, 'Horizontal Policies in Public Procurement: A Taxonomy' (2010) 10 *Journal of Public Procurement* 149.

[29] G Marceau, 'Trade and Labour' in D Bethlehem et al (eds), *The Oxford Handbook of International Trade Law* (Oxford, Oxford University Press, 2009) 555.

aimed at ensuring that workers enjoy wages and working conditions as satisfactory as the conditions normally established in national law – becomes particularly important.[30]

III. The Regulation of Production Methods and Processes and the Principle of Non-Discrimination

In light of the space that minimum labour rights may or not occupy in the regulation of public procurement practices, another important dimension of the interpretation of the principle of non-discrimination has to be taken into consideration in both the WTO and EU legal frameworks. Attention to working conditions, together with environmental concerns, can also be described and framed as fundamental characteristics of production processes and supply methods, which are frequently addressed in public procurement practices. For this reason, it becomes essential to understand to what extent production methods and processes are regulatory features included (or not) in the determination of any discrimination between the goods and the services procured. This is a particularly controversial aspect of the concept of non-discrimination, as respect for labour rights and for minimum working conditions represents an aspect of the production process that has no impact on the final characteristics of the goods and services procured, and which does not necessarily have a strict link with the subject matter of the procrement contract.

The issue of process and production methods (PPMs) has been widely addressed in EU law, and the Court of Justice has often recognised the possibility of imposing restrictions on free movement in the single market on the basis of PPM-based differentiations.[31] However, it is in the context of the EU regulation of public procurement that the PPM issue plays a very prominent role, framed in terms of a 'link with the subject matter of the contract'.[32] If the 2014 Procurement Directive considerably increases the possibility of including labour considerations in the award of public contracts, the enforcement of minimum working conditions in public procurement finds in the link with the subject matter of the contract its most stringent limit under the EU procurement regime.[33] Having a link to the subject matter of the contract represents an essential requirement for the lawfulness of the inclusion of

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[30] C McCrudden, *Buying Social Justice: Equality, Government Procurement and Legal Change* (Oxford, Oxford University Press, 2007) 554.

[31] G Davies, '"Process and Production Method"-Based Trade Restrictions in the EU' (2008) 10 *Cambridge Yearbook of European Legal Studies* 69.

[32] Cottier and Oesch, above n 15, 169.

[33] A Semple, 'The Link to the Subject-Matter : A Glass Ceiling for Sustainable Public Contracts? ' in B Sjåfjell and A Wiesbrock (eds), *Sustainable Public Procurement under EU Law. New Perspectives on the State as Stakeholder* (Cambridge, Cambridge University Press, 2015) 50, 66–70.

any non-economic criteria in the procurement process, as initially introduced by the Court of Justice judgments in *Concordia Bus*[34] and in *EVN and Wienstrom*[35] in the context of the use of environmental conditionalities in public procurement.[36] The requirement for a link with the subject matter of the contract essentially aims at balancing the legitimate use of public procurement for the enforcement of labour rights with the priority of ensuring efficiency in the conduct of the procurement process itself, thus excluding considerations that fall outside the scope of the contract and which may diverge from the needs of the governmental authorities.

The 2014 reform of the Procurement Directives shed light on a few interpretative issues concerning the requirement for a link with the subject matter, in particularly regarding its definition and its application throughout the procurement process. Recital 97 of the 2014 Public Procurement Directive clarifies that the 'link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterizing the specific process of production or provision of the purchased works, supplies or services'. Article 67(3) of the 2014 Public Procurement Directive also sets out an attempt to define this fundamental requirement.[37] Moreover, one of the most evident regulatory changes effected in the 2014 Public Procurement Package[38] consists in the extension of the requirement regarding the link to the subject matter to all specifications and criteria throughout the entire procurement process, and it is not imposed exclusively at the award stage, as was the case in the 2004 Public Procurement Directive. In the 2014 Public Procurement Directive, the linkage to the subject matter is required not only in the development of award criteria, but also in relation to the technical specifications, selection criteria and contract performance clauses, as well as being imposed on variants and labels.[39]

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[34] Judgment of 17 September 2002, *Concordia Bus*, Case C-513/99, EU:C:2002:495.

[35] Judgment of 4 December 2003, *EVN and Wienstrom*, Case C-448/01, EU:C:2003:651.

[36] A further interpretation of the requirement of the link with a subject matter of the contract under Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (2004 Public Procurement Directive) [2004] OJ L134/114, was at the centre of the interpretation by the Court of Justice in the *Dutch Coffee* case. Judgment of 10 May 2012, *Commission v Netherlands*, Case C-368/10, EU:C:2012:284.

[37] Art 67 of the 2014 Public Procurement Directive specifies that conditions linked to the subject matter in conformity with the new Directive can be identified 'where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in: (a) the specific process of production, provision or trading of those works, supplies or services; or (b) a specific process for another stage of their life cycle, even where such factors do not form part of their material substance'.

[38] The 2014 Public Procurement Directive, together with Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L94/1, and 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 L94/243.

[39] Semple, above n 33, 61.

The interpretation of the link with the subject matter of the contract was not addressed in the *RegioPost* judgment, as adjudicated against the framework set by the 2004 Public Procurement Directive, which imposed this linkage only at the award stage of the procurement process. However, it is interesting to note that the conditionality regarding respect for minimum wages in special conditions for the performance of the contract at the centre of the *RegioPost* dispute, if regulated under Article 70 of the 2014 Public Procurement Directive (instead of the 2004 version), would necessarily have involved scrutiny of this requirement in light of the new regulatory approach to the issue of the subject matter of the contract. It would be interesting to see, in the development of the future case law of the Court of Justice on the issue, whether production characteristics concerning respect for human rights or the labour conditions of the workforce could be considered as criteria able to be linked to the subject matter of the contract. Requirements relating to the general ethical sourcing policy followed by the tenderers or the overall management of the suppliers cannot be included in the procurement process, and broad ethical considerations and the possible corporate responsibility policies pursued by the different suppliers remain outside of the evaluation process in the procurement cycle.[40]

In the WTO legal system, the admissibility PPMs and 'non-product related' (non-PPMs) have gradually assumed a crucial importance in the determination of the standard of non-discrimination.[41] The WTO jurisprudence has vastly elaborated on the crucial importance that the concept of 'likeness' has in defining the terms of comparison between goods and services in order to prove discrimination in WTO law.[42] In the WTO regulatory framework, the prohibition of non-discrimination applies only as far as the concept of 'likeness' applies. If the discrimination between 'like' products, services and service providers represents a violation under WTO law, it is possible to treat differently products that are not 'like'. The PPMs debate directly impacts on the concept of 'likeness'. On the one hand, it seems to be commonly accepted that it is possible to consider non-'like' – and subsequently discriminate against – products on the basis of production methods resulting in a difference in their final characteristics. On the other hand, the possibility of differentiating and discriminating between 'like' goods and services based on process-based measures that do not impact on the final characteristics of the products (non-PPMs) is still highly contested.[43] Production characteristics, like social and environmental concerns, may have a

[40] R Caranta, 'The Changes to the Public Contract Directives and the Story They Tell About How EU Law Works' (2015) 52 *CML Rev* 418.

[41] For a comprehensive overview see CR Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (Cambridge, Cambridge University Press 2011).

[42] RE Hudec, 'The Product-Process Doctrine in GATT/WTO Jurisprudence' in M Bronckers and R Quick (eds), *New Directions in International Economic Law, Essays in Honor of JH Jackson* (London, Kluwer, 2000) 187.

[43] R Howse and D Regan, 'The Product/Process Dinstinction – An Illusory Basis for Disciplinating "Unilateralism" in Trade Policy' (2000) 11 *European Journal of International Law* 249.

direct or indirect impact on the extent of the discrimination between procured 'like' national and imported products.[44]

The legitimacy of non-PPM considerations is particularly controversial in the interpretation of the standard of non-discrimination in the GPA framework. In defining the standard of non-discrimination in procurement, the wording of Article IV GPA does not refer to the issue of 'likeness' of the procured goods, services and suppliers as established in Articles I and III of the General Agreement on Tariffs and Trade (GATT) and, similarly, Article II GATS. Article IV GPA simply prohibits discrimination of 'goods, services and suppliers' and not of 'like' products and services. It has been argued that the notion of likeness is implicit in and self-evident from the GPA provision.[45] However, the lack of a 'likeness' reference in the wording of Article IV clearly shapes the interpretation of 'not less favourable' treatment in public procurement, following a different approach on likeness compared to GATT and GATS. A greater margin of flexibility for the comparative evaluation of discrimination in public procurement practices, focused on the competitive conditions in the market and including other characteristics of the production methods, seems to be granted in the GPA text.[46] The lack of a 'likeness' standard in Article IV GPA significantly undermines the importance of the non-PPM debate, welcoming a more extensive interpretation of non-discrimination compared to other WTO agreements. For all these reasons, the identification of discriminatory effects in the design of the procurement measures – including the possibility to differentiate on the basis of non-PPM concerns like the protection of labour rights – becomes more evident and more interconnected with the provisions regulating the procedural aspects of the procurement process and the transparency of different phases of the award procedure, in both the GPA and the EU Directives.

IV. Permitted Exceptions and Derogations from the Principle of Non-Discrimination

As explored so far, the principle of non-discrimination represents the main limitation on the instrumental use of procurement practices for the implementation of labour rights under international trade instruments of procurement regulation. The requirement to respect minimum working conditions, set out in domestic or local regulations, may constitute a violation of the principle of non-discrimination, leading to distortions of the

[44] S Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality' (2002) 27 *Yale Journal of International Law* 59.

[45] S Lester, B Mercurio and A Davies, *World Trade Law. Text, Materials & Commentary*, 2nd edn (Oxford, Hart Publishing, 2012) 714.

[46] MA Corvaglia, 'Public Procurement and Private Standards: Ensuring Sustainability under the WTO Agreement on Government Procurement' (2016) 19 *Journal of International Economic Law* 607.

conditions of competition in the public market. However, even if in violation of the WTO principle of non-discrimination or the EU fundamental economic freedoms, it is still possible to justify these discriminatory procurement practices under both these trade regimes.

In the EU framework, the protection of workers' rights has been consistently included in the interpretation of the justifications for restrictions to the internal market fundamental freedoms. The Court of Justice has on various occasions recognised the potential admissibility of discriminatory practices on the basis of considerations of public interest and subject to compliance with the principle of proportionality.[47] According to an established jurisprudence of the Court of Justice,[48] and confirmed in the *RegioPost* judgment,[49] the protection of workers and the improvement of working conditions have been recognised as overriding reasons relating to the public interest, and as mandatory requirements capable of justifying discriminatory procurement measures.[50]

Similarly to the EU framework, procurement measures imposing respect for minimum working criteria may still be in compliance with the GPA regulatory framework even if shown to be discriminatory. [51] The WTO plurilateral regulation allows for the use of procurement practices for the enforcement of labour rights in violation of the principle of non-discrimination in two specific circumstances: (i) if these procurement practices are included in the derogations to the GPA coverage in the Parties' schedules of commitments; and (ii) where included in the scope of application of the agreement, if these discriminatory practices can be still justified under the exceptions of Article III of the revised GPA.[52]

Only a limited list of non-trade objectives are admissible as legitimate justifications for a violation of the non-discriminatory principle under WTO law. Regulatory space for legitimate policy goals is recognised in Article

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[47] E Reid, 'Regulatory Autonomy in the EU and WTO: Defining and Defending its Limits' (2010) 44 *Journal of World Trade* 877.

[48] The policy objectives of the protection of workers and protection from unfair competition, in the form of a request for respect for minimum wages, have been recognised as legitimate grounds for derogation from the non-discrimination provisions of the TFEU, in the established jurisprudence that began with Judgment of 18 December 2007, *Laval un Partneri*, Case C-341/05, EU:C:2007:809 and which was more recently developed in *Rüffert* and *Bundesdruckerei* prior to *RegioPost*.

[49] *RegioPost*, above n 7, paras 70 and 71.

[50] R Nielsen, 'Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective' (2007) 44 *CML Rev* 531.

[51] Corvaglia, above n 4, 128.

[52] Art III:2 GPA states that 'Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: a. necessary to protect public morals, order or safety; b. necessary to protect human, animal or plant life or health; c. necessary to protect intellectual property; or d. relating to goods or services of persons with disabilities, philanthropic institutions or prison labour.'

XXIV GATT – as well as Article V GATS for services – to the extent that the necessity of the unequal treatment is proved and the conditions of the introductory clause (the *chapeau*) are met.[53] On a parallel basis, a number of exceptions to discriminatory procurement practices pursuing legitimate policy goals are also offered in the revised GPA.[54] Compared to the EU procurement framework – where the protection of workers' rights has been clearly recognised as a legitimate justification – within the context of the general exceptions of Article III GPA, the justification of discriminatory practices on the basis of consideration of labour rights is still fairly problematic. However, even without an explicit mention of labour standards, three aspects of Article III:2 GPA can be invoked as grounds for the inclusion of labour considerations in the interpretation of the GPA exceptions.

First, the most straightforward reference to labour rights is offered by paragraph (d) of Article III:2 GPA, which allows for discriminatory procurement practices relating to 'goods or services of persons with disabilities, philanthropic institutions or prison labour'. The wording of the provision opens up the possibility of an extensive interpretation of procurement practices, with references to ILO Convention No 159 concerning Vocational Rehabilitation of Employment of Disabled Persons (1983) and to ILO Convention No 29 on Forced Labour (1930). However, it appears to be rather difficult to argue that an extensive interpretation of other ILO core conventions or labour standards, like the reference to minimum working conditions, can be included in the detailed scope of this provision. Secondly, it might be possible to imagine an extensive interpretation of paragraph (b) of Article III:2 GPA, including labour considerations restricting the procurement market as 'necessary to protect human health'. However, the interpretative efforts to assimilate the protection of the physical health with the protection of workers' labour conditions find a major limitation in the unresolved question of the extraterritorial application of WTO general exceptions.[55] Lastly, paragraph (a) of Article III:2 GPA includes protection of 'public morals, order or safety' in the scope of the GPA general exceptions, allowing for the possibility of granting exceptions based on human and labour rights justifications rooted in public morals. Parallel to the moral exceptions included in the GATT and GATS,[56] it has been argued that inclusion of social considerations, particularly the

[53] B Mcgrady, 'Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures' (2009) 12 *Journal of International Economic Law* 153; L Bartels, 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction' (2015) 109 *American Journal of International Law* 95; T Voon, 'Exploring the Meaning of Trade-Restrictiveness in the WTO' (2015) 14(3) *World Trade Review* 451; H Andersen, 'Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions' (2015) 18 *Journal of International Economic Law* 383.

[54] Together with the case of defence procurement practices explicitly excluded by Art III:1, derogations from national treatment and MFN rules in the conduct of public award procedures expressly apply to measures necessary to protect public morals or human, animal or plant life or health, or products manufactured by handicapped persons, prison labour or philanthropic institutions, according to Art III:2 GPA. Lester, Mercurio and Davies, above n 45, 710.

[55] L Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction. The Case of Trade Measures for the Protection of Human Rights' (2002) 36 *Journal of World Trade* 353.

[56] The interpretation of the notion of 'public morals' inside the WTO regulatory framework has been articulated in the context of Art XX GATT and Art XIV GATS, and in light of the adjudication of the *US – Gambling* case and the more recent *EC –*

protection of some basic human rights and labour standards, in the conduct of award procedures could be interpreted as grounded in public morality concerns.[57] Significant uncertainties still remain regarding the interpretation of the notion of 'public morals' inside the WTO regulatory framework, as the idea of public morals entails substantial differences between the WTO member states on the basis of the dominant religious or ethical beliefs to be taken into consideration.[58] Further uncertainties are also linked to the specific interpretation of the idea of public morals in the context of public procurement, as it is necessarily linked to the position of the government as the principal buyer in the market, responsible and accountable for its moral conduct in its choices when spending taxpayers' public money.[59]

However, even if it were possible to include minimum labour rights in the interpretation of the different grounds for exceptions listed in Article III GPA, the legitimacy of the use of general exceptions under the GPA could be called into question. The most difficult aspect to prove is probably the so-called 'necessity test', showing clear similarities with the analysis of the EU proportionality principle.[60] In order to be in conformity with the WTO framework, the regulatory measures have to be shown to be necessary for the realisation of the policy objectives listed as a ground for exception. Parallel to the exceptions provisions in other WTO agreements, Article III GPA requires that the adoption of discriminatory procurement practices be necessary for the achievement of the relevant social and labour policies, and should demonstrate a well-defined link between the policy objective and the regulatory measure adopted for that purpose.[61] Compared with the clear inclusion of the protection of workers' rights under the justifications for violation of the EU internal market fundamental freedoms, the interpretation of the protection of minimum labour rights under the general exceptions in the GPA appears to be particularly problematic. The difficulties in defining the grounds for exception and applying the standard of necessity in Article III GPA translated into a widespread preference of the GPA Signatory Parties for excluding from the GPA's coverage their instrumental procurement practices for social and labour policies, rather than justifying them under the GPA general exceptions.

The GPA coverage has a more complex architecture compared to the coverage of the EU Directives, which extend to all procurement contracts above certain financial thresholds.[62] The GPA discipline only extends

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Seal Products case. R Howse, J Langille and K Sykes, 'Pluralism in Practice: Moral Legislation and the Law of the WTO After Seal Products' (2015) 48 *George Washington International Law Review* 81.

[57] For a closer study of the relation between general exceptions and human rights, see G Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 *European Journal of International Law* 753.

[58] S Charnovitz, 'The Moral Exception in Trade Policy' (1997) 38 *Virginia Journal of International Law* 689.

[59] McCrudden, above n 30, 498.

[60] SE Gaines and BE Olsen, 'Trade and Social Objectives' in Gaines, Olsen and Sørensen (eds), above n 15, 211.

[61] Andersen, above n 53, 383.

[62] C Maria Cantore and S Togan, 'Public Procurement in the EU' in A Geogopoulos, B Hoekman and PC Mavroidis (eds), *The Internationalization of Government Procurement Regulation* (Oxford, Oxford University Press, 2017) 145.

to the covered procurement activities between GPA Signatory Parties, as stated in Article II:1 GPA. Moreover, as clarified by Article II:4 GPA, coverage is defined by the commitments listed in the seven annexes of Appendix I to the GPA for each GPA Signatory Party.[63] These annexes set out the specification of the threshold values, the lists of each Party's procurement agencies required to comply at central, sub-central and local level, together with the lists of sectorial coverage of goods, services and construction services specified by the GPA Parties. In relation to the use of public procurement for social purposes, the GPA negotiating history shows a clear preference for making use of the flexibilities offered by the GPA, rather than jusfitying discriminatory practices under the GPA general exceptions.[64] The GPA Signatory Parties have traditionally excluded broad procurement programmes targeting objectives of social integration from the scope of application of the GPA committments. To mention just a few examples, Canada excluded from its GPA commitments procurement schemes in favour of small and minority-owned businesses, together with 'any measure adopted or maintained with respect to Aboriginal peoples',[65] and on a similar basis the US established an extensive system of domestic and small-business preferences, as well as broad socio-environmental requirements, exempted from its GPA national treatment commitments.[66]

V. Procedural Requirements under the WTO and the EU and the Case of Special Conditions for the Performance of Public Contracts

In the analysis of the strategic use of procurement to enforce labour rights, it is worth remembering that the inclusion of labour clauses is theoretically and technically possible in all phases of the procurement process, from procurement planning to the final stage of public contract management, even if with different economic and legal implications.[67] What requires close analysis is the legality of the inclusion of the requirement for labour rights' protection in the regulation of each stage of the procurement process, under the different international instruments

[63] PC Mavroidis, *Trade in Goods*, 2nd edn (Oxford, Oxford University Press, 2012) 803.

[64] McCrudden, above n 30, 205.

[65] PM Lalonde, 'The Internationalization of Canada's Public Procurement' in Georgopoulos, Hoekman and Mavroidis (eds), above n 62, 300.

[66] CR Yukins, 'US Government Contracting in the Context of Global Public Procurement' in Georgopoulos, Hoekman and Mavroidis (eds), above n 62, 264.

[67] S Arrowsmith, J Linarelli and D Wallace, *Regulating Public Procurement: National and International Perspectives* (London, Kluwer, 2000) 251.

of procurement regulation.[68] In the context of the international trade regulation of public procurement, the principle of non-discrimination is translated into detailed procedural requirements of fairness and transparency alongside each step of the procurement process. For this reason, the interpretation of the principle of non-discrimination cannot be seen in isolation from the analysis of the regulation of the procedural aspects of the conduct of the procurement process, in both the WTO and the EU regulatory systems.

On the one hand, in the regulatory framework of the TFEU provisions on the fundamental freedoms in the single market, the EU Directives integrate the Treaty provisions applicable to procurement with very detailed regulation of the entire award process of public contracts.[69] The 2014 Public Procurement Package provides considerable clarification and improvement in ensuring more possibilities for the inclusion of social and labour policies in the award of public contracts, offering more flexible award criteria, horizontal performance clauses and more detailed rules on subcontracting.[70] On the other hand, in the GPA, the non-discrimination principle is enforced by a detailed procedural regulation concerning the award process, which is intended to increase transparency and openness in the concrete conduct of the procurement cycle. The transparency provisions and positive commitments set out in the GPA for each stage of the procurement process have been described as a 'proxy for identifying discrimination' in the conduct of the procurement process.[71] However, the relationship between an alleged violation of Article V:1 GPA and respect for the specific transparency and procedural rules has not been fully explored at all in the academic literature, nor in the limited GPA jurisprudence. For example, it is unclear if a violation of Article V:1 GPA necessarily has to be claimed in association with the violation of one of the GPA provisions regarding non-discriminatory and transparency, award criteria or technical specifications.

In its analysis of the inclusion of labour rights throughout the procurement process, the *RegioPost* judgment focused attention on the possibility of including labour rights requirements in the special conditions relating to the performance of the contract, in the context of Article 26 of the 2004 Public Procurement Directive. As suggested by the European Commission, special conditions and performance clauses have been generally described as 'the most appropriate stage of the procedure to include social considerations relating to employment and labour conditions of the workers involved in performance of the contract'.[72] The clear preference for the inclusion of labour considerations at this stage of the procurement process found its original legal ground in recital 33 and Article 26 of the 2004 Public Procurement Directive, and it has been reaffirmed in Article 70 of the 2014 Public Procurement Directive, which adds a specific reference to the possibility of 'employment-related' special conditions. Contrary to the previous case law of the Court of Justice, the *RegioPost* judgment recognised the

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[68] For a more extensive comparaison between the GPA, the EU Procurement Directives, the UNCITRAL Model Law and the World Bank's Procurement Framework, see Corvaglia, above n 4.

[69] P Trepte, *Public Procurement in the EU. A Practitioner's Guide*, 2nd edn (Oxford, Oxford University Press, 2007) 1.07.

[70] Caranta, above n 40, 391.

[71] Lester, Mercurio and Davies, above n 45, 714.

[72] European Commission, *Buying Social. A Guide to Taking Account of Social Considerations in Public Procurement*, (2010) 44.

possibility of including minimum wage requirements – as set in a legislative measure and not in a collective agreement – as fully compatible with EU law, in light of the TFEU free movement of services, the Posted Workers Directive and the 2004 Public Procurement Directive.[73]

Compared to the EU Directives, the GPA offers minimal and less detailed regulation of the performance stage of public procurement contracts. Under the GPA regulatory framework, contracting authorities seem to have substantial freedom to decide the contract conditions to be imposed on the winning tenderers.[74] However, performance conditions cannot derogate from the principle of non-discrimination and transparency. Apart from this fundamental restriction, nothing in the GPA seems to prohibit the use of contract conditions focusing on the production processes and supply methods of the goods and services procured.[75]

Lastly, it is important to point out that, within the discussion of the labour use of procurement in the GPA regulatory framework, the prohibition of offsets in Article IV(6) may also play a considerable role in the analysis of this stage of the procurement process.[76] Contract performance conditions imposing local content requirements may fall within the definition of offsets included in Article I(l) GPA as 'measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements'. For this reason, it should be important to assess to what extent the requirement for respect of minimum labour rights embedded in contract performance may result in de facto offsets, which are always prohibited in the GPA framework.

VI. Conclusions

The inclusion of minimum working conditions, like respect for minimum wages as highlighted in the *RegioPost* judgment, has been framed in this chapter in terms of a regulatory tension between the principle of non-discrimination, common to WTO and EU procurement regulatory systems, and the priority to ensure respect for minimum labour conditions. Focused on the interpretation of the principle of non-discrimination, the comparative analysis between the EU and the WTO systems of procurement regulation has shown patterns of convergence and considerable divergences regarding the possibilities for the inclusion of minimum labour rights in the award

[73] McCrudden, above n 30, 490.

[74] L Tosoni, 'The Impact of the Revised WTO Government Procurement Agreement on the EU Procurement Rules from a Sustainability Perspective' (2013) 8 *European Procurement & Public Private Partnership Law Review* 47 .

[75] RH Weber, 'Development Promotion as a Secondary Policy in Public Procurement' (2009) 4 *Public Procurement Law Review* 184.

[76] McCrudden, above n 30, 490.

of public contracts. From the comparison of these two international trade instruments of procurement regulation, in light of the discussion fuelled by the *RegioPost* case, the following relevant conclusions can be drawn.

First, the principle of non-discrimination represents the backbone of both the GPA agreement and the EU regulation of public procurement. The concept of non-discrimination, interpreted as fair opportunities and equal conditions of competition, offers a common approach to regulatory coherence between the WTO and the EU systems of procurement governance. Moreover, it is the principle of non-discrimination that has the most substantial impact on the achievement of labour policies in public procurement. The inclusion of labour rights conditionality in the public procurement process is extremely difficult to isolate from the allocation of preference and economic benefits to domestic suppliers, often resulting in a de facto violation of the principle of non-discrimination under both the WTO and the EU legal systems.

Secondly, in the context of the interpretation of the principle of non-discrimination, the WTO and the EU provide two divergent approaches to the issue of process and production methods (PPMs). If the consideration of non-PPMs has been more openly accepted in the EU context, the WTO allows differentiations of goods and services only based on production methods that result in a change in the final characteristics of the products. In particular, the PPMs debate plays a crucial role in the EU procurement regulation. Considerations regarding PPMs can be framed in the requirement for a 'link to the subject matter of the contract', which represents the main limitation on the inclusion of social and labour considerations in the procurement cycle in the 2014 Public Procurement Package. In the GPA framework, however, the discussion of non-PPM considerations is undermined by the lack of a likeness requirement in the wording of the GPA prohibition on discrimination, thus allowing a more inclusive interpretation of the prohibition.

Thirdly, even if there are fundamental similarities in its interpretation, explicit exceptions and derogations from the principle of non-discrimination are used differently under WTO and EU law, in order to guarantee the lawfulness of procurement practices enforcing minimum working conditions. On the one hand, the application of the principle of non-discrimination in the GPA categorically excludes the allocation of preferences to domestic producers deriving from the conditionality of labour rights, unless justified under its general exceptions or excluded from its coverage. Due to the difficulties in justifying them under the GPA general exceptions, the Signatory Parties made use of the extensive flexibilities for the exclusion from GPA coverage of procurement practices enforcing labour policies, thus resulting in discriminatory barriers to trade. On the other hand, the EU has not allowed extensive derogations from its the coverage of the 2014 Public Procurement Package, but has granted exceptions to the fundamental freedoms of the internal market on the basis of the protection of workers' rights, under the strict application of the principle of proportionality.

Lastly, the execution phase of public contracts provides considerable opportunities for the enforcement of minimum labour rights without explicitly violating the principle of non-discrimination under both the WTO and the EU regulation of public procurement. Contract performance conditions based on minimum labour standards do not represent discriminatory procurement measures per se, particularly if they are aimed at enforcing labour rights already embedded in national and local measures and applicable to foreign and national suppliers. In

the EU procurement regulatory framework, contract performance conditions have been traditionally approached as the preferred stage of the procurement process at which to enforce minimum labour rights, in respect of the requirement for a link to the subject matter of the contract as required under the 2014 Public Procurement Directive. Under the GPA, the contracting authorities have substantial freedom to decide the contract conditions to be imposed on the winning tenderers, without derogating from the principles of non-discrimination and transparency and the prohibition of offsets.