24 The Fight against Social Dumping in the Subcontracting of Belgian Public Procurement

Yseult Marique – Kris Wauters[*]

24.1 Introduction

After forty years of European Union intervention in order to ensure the widest possible competition in the public procurement phase, economic actors have learned to navigate through the intricacies of this regulation. Part of the challenges of public procurement now concern the performance of these contracts, an issue that has been little regulated at European level until now. In addition, the social dimensions of European integration are becoming more and more distinct in the new public procurement directives adopted in 2014. Subcontracting in public procurement provides an excellent illustration of the challenges arising from these transformations in reconciling competition with social policy, both at European and Belgian level.

Subcontracting covers various functions. It can provide the project owner a single point of contact, the prime contractor. It can also be the means of equipping the main contractors with the technical skills needed to perform the contract. Finally, it can offer the necessary flexibility in the organization of the staff, so that the main contractors can fulfil the orders within the given deadlines.[1] Nevertheless, outsourcing can also be used opportunistically, with the aim of reducing staff costs as much as possible or transferring costs and risks to other economic actors. It can then generate situations of economic, social and human exploitation for the workers of the final subcontractors. It is then the

* Yseult Marique – Kris Wauters: Free University of Brussels (ULB), University of Essex and FÖV Speyer; Kris Wauters: Catholic University of Louvain (UC Louvain) and attorney-at-law. A more detailed version has been published in French under the title: "La lutte contre le dumping social dans la sous-traitance de marchés publics" [The fight against social dumping in the subcontracting in public procurement] in Contracts and Public Contracts, 2018, pp. 57-88. The authors wish to thank Professors Elise Dermine, Daniel Dumont, Etienne Muller and Emmanuel Slautsky for their constructive comments on the ideas presented in this contribution. Any comment is welcome and can be addressed to Yseult Marique (ymarique@essex.ac.uk).

1 M. Jaouen, 'La responsabilité solidaire en matière de soustraitance dans la nouvelle directive 'détachement': un progrès en demiteinte' (Joint liability for subcontracting in the new posting directive: a step forward), *Revue de l'Union européenne*, 2016, p. 165.

instrument of fraudulent practices, which evades taxes or violates the social obligations of employers. Thus, subcontracting may be the favourite terrain for social dumping.[2] The complicated contractual configurations and the multiplication of the actors – often located in a multitude of different countries – make the control and the questioning of the liability of the various actors extremely complex, and often unsuccessful. Thus, local contractors, for example Belgian, may use subcontractors located in another Member State of the European Union where wages and social protection are lower. These subcontractors can then post workers to come to perform the public contracts, by hypothesis, in Belgium. It will then be necessary to verify concretely the respect of the conditions of posting of workers as well as the obligations of social security. The situation can become more complex because of the multiple players and the practical difficulty of ensuring compliance with the different regulations involving administrations located abroad. There is "social dumping" insofar as firms tendering for public contracts do not compete on an equal footing and competition is distorted, especially if "subcontracting and secondment" are based on foreign subcontractors who do not respect their obligations in connection with the posting of their staff for the purpose of performing Belgian public contracts.

As a reminder, the posting of workers in the European Union is governed mainly by Directive 96/71 on 'posted workers',[3] which sought to provide minimum social protection for workers moving on the European market. It established a system whereby host countries must provide for a 'block' of minimum working and employment conditions that must apply to foreign workers, such as maximum periods of work and minimum periods of rest, minimum duration of paid annual leave, minimum wage rates, or equal treatment for men and women.[4] Given the existence of this core, the differences between the national systems are mainly at the level of wages and social security (governed separately[5]).

Since the extension, in 2004, of free movement principles to the countries of the former Eastern Europe, the opportunities offered by the socio-economic differentials have made social dumping practices particularly worrying in the European Single Market. The social and economic problems created by this situation have prompted the European and national institutions to react. The President of the European Commission, Jean-Claude Junker, announced in his 2015 State of Union that "*the same pay for the same job at the same place*" must be guaranteed. Such a promise, however, raises serious difficulties in the proper supervision of subcontracting and related techniques, such as the transnational posting of workers. It is indeed necessary to reconcile the legal principles of competition

2 The present contribution essentially intends to consider the use of illegal techniques that leads to situations of social dumping.

3 Directive 96/71/EC on the posting of workers in the context of the provision of services.

4 Art. 3.1 Directive 96/71/EC.

5 Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

and the free movement of persons and goods, which lie at the heart of the construction of the single European market, with the protection of social and solidarity gains embodied in national social rights. Various recent attempts, such as the negotiations on the Posted Workers Enforcement Directive in 2014[6] or the implementation of the parliamentary yellow card in the framework of the European Commission's proposal to reform the Posted Workers Directive in 2016,[7] have shown how inextricable these questions could be. In particular, the Posted Workers Enforcement Directive was supposed to regulate subcontracting, but the political compromise found is not entirely satisfactory, so that a further revision of the Posted Workers Directive is under way (at the time of writing).[8]

Due to this political configuration, the legal regime established by the public procurement directives to regulate subcontracting is of particular interest:[9] these directives were negotiated in parallel with the negotiations of the Posted Workers Enforcement Directive in the years 2011-2014. According to one part of the doctrine,[10] Member States would have used the national transpositions of the European Public Procurement Directives and their contracting authorities, the public procurement procedures to provide a legal framework for subcontracting practices, and thus, indirectly, for posting workers, whereas this framework should in principle have been achieved by the European Posted Workers Directives. This would have resulted in a double shift: firstly, a shift of the decision-making centre on fundamental political choices, from the European Union to the Member States

6 Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') (hereinafter abbreviated as the Posted Workers Enforcement Directive). Advancing the social protection of posted workers under subcontracts, Art. 12 of that directive provides for the joint and several liability of the subcontractor with the main employer as regards the remuneration of the posted worker and the possible extension by the Member States of this responsibility to other obligations, particularly with regard to activities in the field of construction. However, this system is not enough: it is optional and concerns only the first link in the contractual chain, while the links most vulnerable to social dumping are further down the chain.

7 D. Jancic, 'EU law's grand scheme on national parliaments: The third yellow card on posted workers and the way forward', in: D. Jancic (ed.), *National parliaments after the Lisbon Treaty and the euro crisis: Resilience or resignation?*, Oxford, Oxford University Press, 2017, pp. 299-312.

8 In particular, the European Commission's proposal to revise the Posted Workers Directive in 2016 offers the possibility for Member States to require that the remuneration paid to subcontractors be the same as that paid to the workers of the main contractor (in this respect including remuneration provided for in collective labour agreements adopted at company level) (Commission staff working document, *Impact Assessment accompanying the document – Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*, SWD (2016) 52 final, 8.3.2016, 25-26).

9 This contribution focuses on the scheme put in place by Directive 2014/24 on public procurement. Nevertheless, Directives 2014/23 on the award of concession contracts (Art. 42) and 2014/25 on the award of contracts by entities operating in the water, energy, transport and postal services (Art. 88) provide for largely similar arrangements for outsourcing.

10 A. Sanchez-Graells, 'Regulatory substitution between labour and public procurement law: The EU's shifting approach to enforcing labour standards in public contracts', *European Public Law*, 2018 (24), pp. 229-254.

and their contracting authorities; second, a shift in the logic of free movement of persons and competition towards a logic that takes into account social objectives in the management of subcontracting practices.

This contribution seeks to test this idea by explaining how Belgium has transposed the public procurement directives. This transposition leads to strengthening the administrative structure to fight social dumping in public procurement. To do this, the contribution highlights that the control mechanisms of subcontracting in Belgium have evolved into an extremely sophisticated 'administrative architecture'. This observation leads us to suggest that there is a rebalancing between freedom of movement and free competition, on the one hand; and social protection, on the other hand: thus, the principles of equality, access to the market and 'effective' competition are gradually being complemented by the principles of proportionality, a flexible market and 'fair' competition. The phenomenon thus observed underlines the room for manoeuvre that Member States have when transposing European directives and should not give rise to legal challenge in principle. On the other hand, the concrete modalities of this phenomenon can give rise to practical or political questions, to which answers must be given gradually.

To arrive at this conclusion, this paper is structured as follows. As a first step, it examines the framework for combating social dumping in subcontracting reports in public procurement at a European level (Section 24.1) and then at the Belgian level (Section 24.2). Thirdly, it examines the conformity of Belgian regulations with European law and in particular with the reasoning of the Court of Justice (CJEU) to address the interfaces between public procurement and workers' protection[11] (Section 24.3).

24.2 European Framework for Subcontracting in Public Procurement

Article 3.3 of the Treaty on European Union states that

> "the Union shall establish an internal market. It works for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, which promotes full employment and social progress, and a high level of protection and improvement of the quality of the environment."

Nevertheless, beyond these objectives in principle, the concrete realization of the choices required to establish a social market economy continues to be much in the news. How, indeed, to reconcile the necessarily contradictory interests underlying the model of devel-

11 To our knowledge, such an appeal has not yet been filed. On the other hand, a preliminary question was lodged against the Italian transposition of Art. 71 of Directive 2014/24 (C-63/18).

opment of a liberal economy? How to reconcile work and capital, state and market, local and multinational?[12]

The attention that European law gives to subcontracting has been the subject of a gradual evolution in the context of public procurement. For example, the first European public procurement directives adopted in the 1970s and 1990s focused on the creation of a single market and the abolition of barriers to free movement.[13] The principle of competition thus dominated the European public procurement system.[14] The main concern of the first directives was to regulate the relations between the public bodies and the economic actors with whom a contract would potentially be concluded. Other economic actors involved in the realization or the economic or material supply of works, goods and services were omitted, insofar as there was no legal relationship between the public authorities and the latter. Subcontracting was largely ignored by these first directives.

Subcontracting appeared in the regulation of public procurement with Directive 2004/18, which mentioned it briefly without devising detailed rules. Article 25 provided only that the specifications could ask the tenderer to indicate the share of the contract he intended to subcontract and the proposed subcontractors. On the other hand, the situation changed with the reform of the public procurement directives undertaken in 2011, which led to the adoption of Directive 2014/24. In the course of negotiations, the text of the directive eventually encompasses social considerations and includes a detailed provision on subcontracting. For example, paragraph 37 of the preamble to Directive 2014/24 states that relevant measures to ensure compliance with social obligations in the context of public procurement must be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council. A link is thus established between the systems of 'public procurement' and 'posted workers' directives. In terms of principles, this formula expresses the place of detachment in the European architecture: when the Member States take 'relevant measures' (rooted in a pro-social logic), they must respect the Posted Workers Directive; namely a set of requirements put forward to primarily favour the free provision of transnational services. Nevertheless, the practical implementation of these

12 *See* in particular, D. Schiek, *The EU economic and social model in the global crisis – Interdisciplinary perspectives*, London, Routledge, 2013; M. Freedland & J. Prassl (ed.), *Viking, Laval and beyond*, Oxford, Bloomsbury, 2016.

13 Directive 71/305/EEC of 26 July 1971 coordinating the procedures for the award of public works contracts; Council Directive 77/62/EEC of 21 December 1976 coordinating the procedures for the award of supply contracts; Council Directive 90/531/EEC of 17 September 1990 on procurement procedures in the water, energy, transport and telecommunications sectors; Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts; Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts; Council Directive 93/37/EEC of 14 June 1993 coordinating procedures for the award of public works contracts; Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

14 A.L. Durviaux, *Logique de marché et marché public en droit communautaire – Analyse critique d'un système* (Market logic and public procurement in Community law – Critical analysis of a system), Brussels, Larcier, 2006.

principles remains unclear: how to articulate these requirements with the obligation to respect the principle of equal treatment and the absence of discrimination between national and non-national workers?

As regards the provisions of the Public Procurement Directive, it does not provide any details[15] on how these principles are to be articulated in the specific aspects of public procurement where the question of their articulation arises. Thus, the provision on subcontracting, Article 71, establishes no connection with the posting of workers and neither defines the concept of "subcontracting." In principle, Article 71.1 entrusts the Member States with the task of establishing the appropriate measures to ensure that subcontractors comply with the same social and environmental obligations as those that the economic operators must comply with when performing public procurement.[16] Subcontracting is conceived as a mechanism facilitating the opening of public control to SMEs which, without the subcontracting techniques, could not compete favourably with larger companies.[17] However, Article 71 is relatively limited in scope: it consolidates techniques that were accepted or were already good practices of public authorities under the previous regime.[18] Moreover, Article 71 is formulated in an extremely permissive manner. Most of its paragraphs set out possibilities for the Member States (especially the direct payment of subcontractors by the project owner, the liability rules, the sectors affected by certain measures taken under Article 71, etc.). Only one obligation is actually introduced, namely the obligation for awarding contractors to require identification by the main contractor of the subcontractors involved in works under work contracts and the services to be provided in premises placed under the direct supervision of the contracting authority. Any changes to these subcontractors must also be communicated (Article 71.5).

Thus, Article 71 provides a permissive normative framework, which opens the way for national positions that may vary from a lack of internal regulation (paragraphs 3, 5 and 6 are entirely optional) to much more detailed regulation by Member States. In a way, the Public Procurement Directive merely indicates a door, which may or may not be opened by the Member States, to develop a regime applicable to subcontracting in public procurement. From this situation, it follows that the regulation model of the fight against social dumping in the subcontracting chains in public procurement essentially depends

15 Para. 105.3 of the preamble to Directive 2014/18 makes an unclear reference to the joint and several liability of certain countries for subcontracting. This system is now provided for by Art. 12 of Directive 2014/67/EU, which has not yet been adopted when the Public Procurement Directive was adopted, which probably explains the vagueness surrounding the link established at this point.

16 C.-E. Clesse & K. Mununguu Lungungu, 'La lutte contre le dumping social au stade de l'exécution des marchés publics' (The fight against social dumping at the stage of performance of public procurement), *Marchés et Contrats publics,* 2018, pp. 43-55.

17 Concl. A.G. Sharpston, C.J., Judgment of 14 July 2016 in Case C-406/14, *Wrocław – Miasto na prawach powiatu v. Minister Infrastruktury i Rozwoju*, ECLI:EU:C:2016:562, para. 30.

18 R. Craven, 'Subcontracting matters: Articles 43 and 71 of the 2014 Directive', in: G. Olykke & A. Sanchez-Graells (eds.), *Reformation or deformation of the EU public procurement rules,* Cheltenham, Edward Elgar, 2016, pp. 295-317.

on the choices made by the Member States to activate the possibilities offered to them. It is therefore necessary to study the transposition of Article 71 of Directive 2014/24 in Belgium in order to determine the type of regulatory model that emerges from it.

24.3 The Belgian System to Fight Social Dumping in the Subcontracting of Public Procurement

This section discusses how the Belgian regulations prior to the 2016 reform had already framed subcontracting practices in public procurement in detail (Section 24.2.1). The Belgian legislation has seized the possibilities provided by Article 71 of Directive 2014/24 to specify the obligations to which contracting authorities are subject in the event of subcontracting in public procurement (Section 24.2.2). However, the effectiveness of the system requires the implementation of sophisticated administrative techniques (Section 24.2.3). As a whole, these regulatory obligations and administrative techniques suggest the porosity between social policy and public procurement as public policy instruments. There is therefore a development of regulatory techniques at the Belgian level in order to strengthen the effectiveness of the system to fight social dumping in the framework of the contracting out of public contracts. On the other hand, it is necessary to qualify the idea that social protection objectives were purely and simply substituted for the logic of competition when transposing Directive 2014/24 in Belgium (Section 24.2.4).

24.3.1 Background

In Belgium, subcontracting has always been widely practiced in public procurement.[19] Questions about the law of obligations arose to determine the legal relationship between the contracting authority, the main contractor and the subcontractors. For example, can the subcontractor require the contractor to accept the work? Can the principal contractor call the contracting authority as a guarantor? This type of questions encouraged the administration to develop techniques to control 'remote' subcontracting practices. Thus, starting from the 1950s, the administration demanded that the subcontractors be approved companies to carry out the works. The approval of the contractors made it

19 M.A. Flamme, *Les marchés de l'administration – Contrats et fournitures de travaux publics* (Administration Contracts – Public Works Contracts and Supplies), Brussels, Bruylant, 1955, No. 254-277, referring in particular to the Belgian case law of the 19th century on the topic.

possible to ensure that they had basic knowledge (especially in fields such as technology, legal, accounting, etc.) in order to carry out their business to the end[20] and thus to complete the work once it was started.

In the 1970s, subcontractors were "co-contractors", that is, contractors selected with the agreement of the administration. The practice even evolved into an imposed subcontracting system, *i.e.* a system where the administration reserved the choice of subcontractors alone or in agreement with the main contractor.[21] Since then, the economic relations linked to subcontracting and control that the contracting authorities wish to exercise in the context of public procurement have changed. Belgian legislation on public procurement implementing European directives has focused on the main contracting party. Nevertheless, specific provisions for subcontracting were included in the legislation implementing the European directives. Thus, for instance, the law of 24 December 1993 on public procurement and certain contracts for works, supplies and services contained an Article 12 which specified the deferment of a series of obligations to the contractors in their relationship with the subcontractors.[22] Similar measures were also introduced in the Public Procurement Act of 15 June 2006,[23] which required the successful tenderer, his subcontractors and any person who posted workers on the site to comply with the applicable legal, regulatory or contractual provisions concerning the well-being at work, general working conditions, taxation and social security. Cascading liability was provided for works contracts, but not for supply and service contracts.[24]

Finally, the Belgian legislation has gradually devoted specific attention to the negative consequences of using subcontracting, particularly when it leads to social dumping through illegal techniques. Social dumping practices are not only problematic for workers

20 Id., No. 82. On the history of the approval system in Belgium, *see in particular* No. 67 (Id.). The idea of developing this system sprang up in Belgium in the 1930s within professional organizations. It sought to deal with two concerns: first, "to shield the serious entrepreneurs from superficial, incorrect or incapable colleagues" and then, "to assure the administration the optimum guarantees of the good execution of the works it undertakes." It was a circular No. 506-48 of June 8, 1955, which introduced the obligation to insert a clause in the special specifications to require that the subcontractors hold the approval (*see* No. 260, Id.).

21 A. Delvaux, 'La sous-traitance imposée: attribution et recours, exécution et responsabilité' (Imposed subcontracting: attribution and recourse, enforcement and liability), *L'Entreprise et le Droit*, 2005, 107-126; X. Close & E. Bertrand, 'La sous-traitance imposée: Je t'aime, moi non plus', (Imposed subcontracting: I love you, me neither), *L'Entreprise et le Droit*, 2011, p. 61.

22 Official Journal, 22 January 1994. Thus the § 1 stated in particular that "[the] successful tenderer of a public works contract is required: (1) to respect and enforce by any person acting as subcontractor at any stage […], any legal, regulatory or conventional provisions as regards safety and health as well as general working conditions, whether these result from the law or from joint agreements, at the national, regional or local level; (2) to respect and enforce on its own subcontractors […] all legal, regulatory or contractual provisions in tax and social security matters; […]"

23 Art. 42 Law on Public Procurement and Certain Contracts for Works, Supplies and Services, Official Journal, 15 February 2007.

24 A. Mechelynck & M. Vanderstraeten, 'La lutte contre le dumping social dans la passation des marchés publics' (The fight against social dumping in public procurement), *Marchés et contrats publics,* 2018, pp. 21-42.

and unfairly competing competitors, but also for the public authorities: buildings built at low prices, or work done by unskilled staff supervised by economic actors not concerned with their reputation with the public authorities do not provide sufficient guarantees of quality and good execution and, consequently, of good use of public money. The fight against social fraud has taken on increasing political importance and was included in the federal government's agenda in 2014.[25] This political priority reflects the extent of social dumping and the threat it poses to the Belgian economy and employment.[26]

24.3.2 Current Legislative and Regulatory Framework: "Effective" Competition and "Fair" Competition

The Belgian regulation of subcontracting resulting from the transposition of Directive 2014/24 finds its legislative framework in the Belgian law of 17 June 2016. The latter gives a central place to the notion of competition, in accordance with European law. In particular, Article 5(1) of the law lays down a principle which could be called the "principle of effective competition." Thus, by transposing Article 18.1(2) of Directive 2014/24,[27] this article provides that

> "The design of the procurement shall not be made with the intention of excluding it from the scope of this law or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators. Economic operators do not take any action, conclude any agreement or arrangement likely to distort the normal conditions of competition."

This provision also reflects the direction taken in the framework of the federal policy on the fight against social fraud. In 2015, the Department for Economy adopted a plan for "effective competition", particularly in the construction sector.[28] This notion of effective competition is reflected in the Belgian regulation on public procurement by a system that

25 Government Agreement, point 3.4 (3.4.4. of which relates directly to cross-border social fraud) (http://www.premier.be/sites/default/files/articles/Accord_de_Gouvernement_-_Regeerakkoord.pdf).

26 Philippe Pivin, MR (Ch., Response of the Minister of the Middle Classes, Self-employed, SMEs, Agriculture, and Social Integration of April 4, 2016). Professional associations – especially in the construction sector – have also mobilized and several parliamentary questions indicate the topicality of the problem (*e.g.* Vl. Parl., Written Question No. 151 by J. Vandenbroucke, dated 26 January 2017 at G. Bourgeois).

27 This provision foresees that: "The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators."

28 http://ducarme.belgium.be/sites/default/files/articles/Plan%20concurrentie%20Bouwsector.pdf.

aims to combat the "development of unfair competition by illegally minimizing the wage burden and operating costs [which] leads to violations of workers' rights and the exploitation of workers."[29] The objective of developing 'effective' competition is thus linked to the desire to fight against 'unfair' competition. The economic logic of competition must be limited by an ethic of competitive relationships. It is up to regulation to policethe behaviour of economic actors in order to give full effect to competition that is not distorted by social dumping practices.

These political objectives are reflected in the Belgian law of 17 June 2016 on public procurement, which establishes a system governing subcontracting with the stated objective of combating social dumping.[30] Article 7 of the law is enlightening in this respect. While Article 42 of the Act of 15 June 2006 merely enumerated the obligations imposed on the prime contractor, obligations envisaged under the conditions of performance of public procurement contracts,[31] Article 7 establishes among the general principles which must be governing all public procurement, the principle that: "economic operators are required to ensure that any person acting as a subcontractor at any stage [complies with] all the applicable obligations in the areas of environmental, social and labour law established by the European Union, national law, collective agreements or international provisions on environmental, social and labour law […]."

Several remarks are necessary. Firstly, the preparatory work of the law points to the fight against social dumping, particularly in subcontracting in the field of construction, as an important factor in implementing Directive 2014/24 in Belgium.[32] Secondly, the law of 17 June 2016 does not give a definition of subcontracting. It will therefore be necessary to resort to the definition usually given by the doctrine,[33] namely "the operation by which a

29 Report to the King, Royal Decree of 22 June 2017 amending Royal Decree of 14 January 2013 laying down the general rules for the execution of public contracts and public works concessions and setting the date of entry into force of the law of 16 February 2017 amending the law of 17 June 2013 on the motivation, information and remedies in respect of public procurement and certain contracts of works, supplies and services.

30 Law on Public Procurement, Official Journal, July 14, 2016.

31 *See*: C.-E. Clesse & K. Mununguu Lungungu, 'La lutte contre le dumping social au stade de l'exécution des marchés publics' (The fight against social dumping at the stage of execution of public contracts), *Marchés et Contrats publics,* 2018, pp. 43-55.

32 Ch., Doc. Parl. (2015-2016), draft law on public procurement, 4 January 2016, No. 1541/001, 139.

33 For an analysis in private law, *see*: W. Goosens, Aanneming van werk: *Het gemeenrechtelijk dienstencontract*, Bruges, La Charte, 2003; CDVA, Subcontracting, Seminar organized in Liège on April 18, 2002, Brussels, Bruylant, 2003 (*in particular*: B. Kohl & M. Vanwijck-Alexandre, 'Théorie générale des obligations et sous-traitance' (General Theory of Obligations and Subcontracting), pp. 25-104).

contractor entrusts, under his responsibility, all or part of the execution of a contract of enterprise concluded with the master of the work to a third party."[34] The law also regulates only a little directly subcontracting in public procurement. It mostly resorts to the delegation to the King.[35]

Briefly, the new Belgian regulation establishes a set of techniques aimed at combating social fraud in the subcontracting of public contracts which can be summarized as including the following techniques:[36]

1. increased transparency of subcontracting chains,
2. verification of the absence of grounds for exclusion on the part of subcontractors,
3. the prohibition on a subcontractor to subcontract to another subcontractor the entire contract awarded to him and the limitation of subcontracting chains,
4. Obligatory compliance by subcontractors with the regulation on the approval of contractors for works contracts at all stages of the subcontracting chain.[37]

The first two measures are provided for in Article 71 of Directive 2014/24, while the others are not.[38] These measures can be summarized as follows:

1) Transparency of the subcontracting chain by identifying subcontractors

The first measure implements Article 71.5 of Directive 2014/24. The contracting authority can – optionally – require the candidates to specify, in their bid, the subcontractors which they intend to rely on. In this case, the successful tenderer may not use other subcontractors without first obtaining the agreement of the contracting authority.[39] On

34 This definition is based on that provided by W. Goosens, 'Onder- en nevenaanneming', in: K. Deketelaere, M. Schoups and A. Verbeke (eds.), *Handboek Bouwrecht*, Antwerp, Intersentia, 2004, pp. 478-487, spec. 478: it is a question of a contract of subcontracting 'Indien een aannemer een deel van de uitvoering van de verbintenissen die hij in het kader van een private of publieke aannemingsovereenkomst heeft opgenomen, door een derde laat uitvoeren' and by A. Vandeburie and L. Montellier, 'The practice of subcontracting and co-contracting in public procurement', *The Company and the Law*, 2016, pp. 24-57, spec. 24. (footnotes omitted): "the operation by which a contractor entrusts, under his responsibility, all or part of the business contract concluded with the owner."

35 Art. 86 (classic sectors) and Art. 156 (excluding traditional sectors) of the law of 17 June 2016.

36 For a systematic analysis of outsourcing, *see* V. de Francquen & Y. Musschebroeck, 'Onderaanneming in overheidsopdrachten: een n analysis inzake de gunning en uitvoering', *Marchés et contrats publics*, 2017(1), pp. 11-42.

37 Art. 78/1 of Royal Decree of January 14, 2013 (amended by Royal Decree of 22 June 2017).

38 Only the measures on the fight against social dumping are discussed here, excluding other measures relating to the regulation of subcontracting. Joint and several liability between the subcontractors and the principal contractor is not discussed.

39 Art. 12 § 2 al. 2 Royal Decree of 14 January 2013 amended by Royal Decree of 22 June 2017.

the other hand, in contracts in 'fraud-sensitive' sectors,[40] the successful tenderer must, in any event, submit the following information to the contracting authority no later than the beginning of performance of the contract: name, contact details and legal representatives of all subcontractors, regardless of the extent to which they participate in the subcontracting chain and regardless of their place in this chain (participating in the work or the provision of services), to the extent that this information is known at this stage. The same is true for service contracts that must be provided on a site under the direct supervision of the contractor[41] (such as, for instance, the contracts of cleaning services for the offices of the contractor). Any change in this information must be communicated immediately to the contractor.[42] The idea underlying these information requirements is that, thanks to them, the contracting authority can verify whether the provisions relating to the limitation of the subcontracting chain (see the third measure below) and compliance with the regulations on approval (see the fourth measure below) are correctly observed.[43]

2) Verification of the reasons for exclusion

Article 12/2 of Royal Decree of 14 January 2013 laying down the general rules of performance (introduced by Royal Decree of 22 June 2017 on the basis of Article 71.6.b of Directive 2014/24) foresees the possibility for the contracting authority to verify the presence of grounds for exclusion on the part of the subcontractors,[44] according to the same rules as those applicable to the main co-contractor.[45] Here again, however, this power becomes an obligation when the public contract concerns a sector sensitive to fraud. Normally, the verification obligation exists only for the first link in the subcontracting chain, and not for subsequent links, in order not to increase the administrative burden for the contracting authorities. The latter may nevertheless still decide to carry out the verification if they wish.[46] The verification must be carried out as quickly as possible. The

40 These are the following markets: 1) works contracts; 2) service contracts awarded under the activities referred to in Art. 35/1 of the law of 12 April 1965 concerning the protection of the remuneration of workers who fall within the scope of joint and several liability for wage debts. These activities are "works or services defined by the King after unanimous opinion of the competent joint committees or sub-committees." Currently, a series of Royal Decrees have been taken particularly in the transport sector, in terms of guarding and/or surveillance; in the construction sector; in electricity; furnishing and the wood processing industry; metal, mechanical and electrical constructions; certain agricultural activities; some cleaning activities; some horticultural activities; and certain activities in the food industry and in the food trade.

41 Art. 12/1 Royal Decree of 14 January 2013 amended by Royal Decree of 22 June 2017.

42 Art. 12/1 Royal Decree of 14 January 2013 amended by Royal Decree of 22 June 2017.

43 Report to the King on Royal Decree of 22 June 2017.

44 Art. 12/2 § 1(1) Royal Decree of 14 January 2013 (as subsequently amended).

45 The grounds for exclusion on the part of the main contractor are notably examined by S. Van Garsse & S. De Mars, 'Exclusion and self-cleaning in the 2014 Public Sector Directive', in: Y. Marique & K. Wauters (ed.), *EU Directive 2014/24 on public procurement*, Brussels, Larcier, 2016, pp. 121-138. *See*: A. Mechelynck & M. Vanderstraeten, 'La lutte contre le dumping social dans la passation des marchés publics' (The fight against social dumping in public procurement), *Marchés et contrats publics*, 2018, pp. 21-42.

46 Report to the King on Royal Decree of 22 June 2017, Art. 12/2 § 2.

successful tenderer must replace, within 15 days, the subcontractor form whom he detects a ground for exclusion,[47] under penalty of sanctions.[48]

3) Exclusion of total subcontracting and limitation of the subcontracting chain

Directive 2014/24 does not explicitly provide for measures that limit subcontracting chains. Nevertheless, the King provided in Article 12/3 of the Royal Decree of 14 January 2013, as amended by the Royal Decree of 22 June 2017, two measures aimed at limiting these chains: the prohibition of total subcontracting by a subcontractor[49] and the limitation of the number of vertical links of subcontracting chains. The report to the King considers that the prohibition of total subcontracting by a subcontractor differs from a prohibition on subcontracting which would be imposed on the successful tenderer. According to the report to the King, the difference consists in the ignorance of the tenderers about the fate reserved for their bid. They can therefore bid on several markets, more than they could actually implement from their own resources. On the other hand, the subcontractor is called in the contractual chain, generally after the offer of the tenderer has been accepted. The idea is, thus, to say that to forbid the tenderer to reserve the possibility of subcontracting the contract would compel him to bid for fewer contracts and thus limit competition. On the other hand, this reasoning would not apply in the case of the subcontractor. The prohibition of total subcontracting to a subcontractor would not constitute an obstacle to market access and would contribute to the fight against social dumping.[50]

Moreover – this is the second measure –, in fraud-sensitive sectors, the subcontracting chain is limited to two, three or, exceptionally, four levels of subcontracting.[51] The explicit objective of this measure is to combat social dumping. The report to the King makes it clear that social dumping practices are, in practice, mainly present in the distant parts of the contractual chain. Prohibiting long chains of outsourcing would therefore effectively address social dumping practices.

4) Approval of subcontractors in works contracts

As indicated in the background chapter in point 2.1, Belgium has since the 1950s developed a system of approval of entrepreneurs to guarantee a minimum of skills on the part

47 Art. 12/2 § 1(2) Royal Decree of 14 January 2013 (as subsequently amended).

48 Art. 12/2 § 4 Royal Decree of 14 January 2013 (as subsequently amended).

49 Art. 12/3 § 1 Royal Decree of 14 January 2013 (as subsequently amended).

50 See below, in particular section 24.3.3.

51 Art. 12/3 § 2 Royal Decree of 14 January 2013 (as subsequently amended). The existence of a fourth level is possible in two cases: "1° when circumstances arise which were not reasonably foreseeable at the time of the introduction of the offer, which could not be avoided and the consequences of which could not have been obviated despite the economic operators having done all the necessary diligences and provided that these circumstances were brought in writing to the knowledge of the contracting authority within thirty days of their occurrence; or 2° with the prior written consent of the contracting authority".

of the latter in the conduct of their business. Currently governed by the law of 20 March 1991 organizing the approval of building contractors,[52] it is issued by the competent regional administration on the advice of the Commission for the approval of contractors, to contractors who demonstrate their technical and financial capacity.[53] It is required of all subcontractors participating at any stage of the contract chain under works contracts.[54] This obligation does not find a basis in Directive 2014/24.[55]

24.3.3 The Administrative Architecture Guaranteeing the Effectiveness of the System

The effective implementation of the new public contracting rules requires contracting authorities from across the country to participate consciously in the fight against social dumping. Three main sets of measures introduced from this perspective constitute the "administrative architecture" of the fight against social fraud in the framework of the subcontracting in public procurement. We can distinguish between an essentially educational and informative component, a technical component and a repressive component, which will be described first (Section 24.2.3.1). Then we will elaborate on the implementation issues that these components are likely to generate (Section 24.2.3.2).

24.3.3.1 The Three Components of Administrative Architecture

A. The educational and informative component

The first part concerns the "soft", informative and educational measures taken by the public authorities, namely the sensitization of contracting authorities by means of guides[56] and the elaboration of 'model' contractual documents as well as charters of

52 Official Journal, 6 April 1991.

53 https://economie.fgov.be/fr/themes/entreprises/secteurs-specifiques/qualite-dans-la-construction/agreation-des-entrepreneurs. The site presents the approval as a "quality label." Art. 78/1 of the R.D. of 14 January 2013 (amended by Royal Decree of 22 June 2017).

54 Art. 78/1 of Royal Decree of 14 January 2013 amended by Royal Decree of 22 June 2017).

55 D. Batselé, T. Mortier & A. Yerna, *Réussir ses marchés publics* (Successful public procurement), Brussels, Larcier, 2016, pp. 543-552.

56 Chancellery of the Prime Minister, *Guide – Lutte contre le dumping social dans les marchés publics et les concessions*, [Guide – Fighting Social Dumping in Public Procurement and Concessions], nd.

good conduct developed with the collaboration of economic actors.[57] The attention of all stakeholders is drawn to the phenomenon of subcontracting and the risks involved.[58] For example, the official guide to the fight against social dumping in public contracts and concessions, drawn up by the Chancellery of the Prime Minister, takes up the main lines of action against social dumping in the context of subcontracting, to know the verification of the grounds of exclusion, the limitation of the subcontracting chain and the obligation of respect of the conditions of approval by the subcontractors. This guide is accompanied by a charter, the Charter for the fight against social dumping in public procurement, which also draws attention to social dumping in the subcontracting chain.[59] Here we are at an essentially informative and preventive level, aimed both at raising the awareness of companies likely to resort to subcontracting and at effectively mobilizing the legal tools of control by the contracting authorities.

B) The technical component

The second component is the technical measures taken to ensure the effectiveness of the system to combat social dumping in subcontracting. These technical measures aim to promote the obtaining of information on the situation of the contractors of public authorities. The system of verification of information as well as the control and monitoring of public contracts are strengthened. Thus, an electronic application called "Télémarc" now allows the contracting authorities to verify the data relating to the social and tax situation of the bidders. It gives them real-time access to different official data banks such as the National Bank, VAT and taxes, the NOSS (Social Security Office) and the Central Bank of Enterprises.[60] Contracting authorities also have access to the list of approved companies.[61] As the identification of the subcontractors must also be communicated to thecontracting authorities, the latter can carry out the verifications not only as to the principal contractor but also as to the subcontractors. The Secretary of State for the

57 For example, the Walloon Region has developed with the Walloon Construction Confederation three types of tools to fight against social fraud (1) Extracts of clauses to copy/paste in the different parts of the specifications; 2) An undertaking by the contracting authority to promote fair competition and fight against social dumping to be annexed to the special specifications; 3) A declaration by the contractors for fair competition and against social dumping). On 28 April 2016, it published a practical guide to promoting fair competition and combating social dumping. (http://www.wallonie.be/fr/publications/guide-pratique-dumping-social). On 30 March 2017, it adopted a Circular on public procurement on the insertion of clauses to promote fair competition and to combat social dumping in public markets and the obligation to use Walloon tools in all public works contracts to all regional Walloon contracting authorities (Official Journal, 27 April 2017). The Flemish Region has published a *Vlaamse gids tegen social dumping bij overheidsopdrachten* (2017). The Chancellery of the Prime Minister has at the federal level issued a circular of 10 July 2017 (Fight against social dumping in public procurement and concessions).

58 Chancellery of the Prime Minister, above-cited Guide, point 9.

59 Annexe of above-cited Guide, point 10.

60 https://finances.belgium.be/fr/experts_partenaires/services_publics/Telemarc; http://www.simplification.be/content/marche-public-telemarc.

61 On the approval, *see*: point 2.2, requirement 4, above.

Fight Against Social Fraud also indicated that datamining tools would be developed in order to better identify problematic behaviour patterns.[62] Again, the process should include information on subcontractors.

Outsourcing nevertheless presents particular challenges in terms of information gathering as it may lead to foreign entities (therefore operating in languages other than the Belgian national languages). It can also include many entities in varying terms over time. Normally, Belgian regulation should facilitate practical control at this level, since vertical links are now limited in areas vulnerable to fraud. The number of horizontal links is however not limited, which leads to the potential presence of a very large number of subcontracting entities and involves management difficulties of a new type. In addition, active information obligations are imposed on the successful bidder even in the event of a change of subcontractors. It will be appropriate for the public authority to organize itself in order to systematically check the information communicated to it and to monitor it. This work will require a change in the role of the public authority and adequate equipment (staff, computer system, time, etc.). It may therefore be asked whether all the contracting authorities are equal before the administrative burden that this new type of obligation implies. A church warden with a part-time lawyer is not in the same position as an autonomous port or the *Régie des bâtiments* to monitor and manage the information to be checked. The Public Procurement Directive provided for the possibility for Member States to vary the verification requirements of the existence of grounds for exclusion depending on the type of contracting authority or the amount of the contracts in question.[63] Belgium has chosen to limit the obligations to sectors vulnerable to fraud.

C) The repressive component

The third component consists of a set of repressive measures against contractors and subcontractors engaged in social dumping practices. The regulations on public procurement firstly provide that all breaches of the contract clauses are recorded in a report drawn up by the contracting authority, a copy of which is sent to the successful tenderer.[64] The successful tenderer must repair the deficiencies without delay, but he can put forward defences within fifteen days. The time limits are reduced to a minimum of five days for the respect of the rights of the defence in two cases. The first case concerns the case where the contracting authority is informed of certain types of breaches of social obligations (*i.e.* significant breaches of duty to pay workers' remuneration[65]) by social inspectors. The second case concerns the situation where the contracting authority finds

62 State Secretary for the fight against social fraud, *2017 Action Plan – Fight against social fraud*, 11.

63 Art. 71.8 Public Procurement Directive.

64 Art. 44 § 2 Royal Decree of 14 January 2013 (as amended). These minutes can also be used as part of a procedure of exclusion of a tenderer under another procedure of public procurement. (C.E., No. 237,911, 7 Apr. 2017, BVBA Aanenmingsbedrijf Norrebehaegel; C.E., No. 226,542, 25 Feb. 2014, NV Audebo; C.E., No. 223,341, 2 Feb. 2013, NV Postelmans-Frederix).

65 In accordance with Article 49/1 Social Criminal Code.

or is informed that illegally staying third-country nationals are employed for the execution of the public contract. These failures can occur in any part of the subcontracting chain. It remains to be seen if, and how, these provisions will be implemented in practice. A priori, it seems that a close level of collaboration is needed between the inspection services and the contracting authorities so that these provisions can be implemented effectively. The express mention of a specific regime for two particular cases (significant failure to pay the remuneration and work of persons staying in the country illegally) indicates a prioritization of the fight against social dumping. The 2017 plan to combat social fraud mentions many actions to improve cooperation between public services, but it does not seem to consider the development of memorandums of understanding to establish administrative links between contracting authorities and inspection services.[66]

In addition, the means of action available to the contracting authority in the context of the performance of public procurement are also applicable in the context of subcontracting in the framework of public procurement.[67] This means that the contracting authority may take measures *ex officio* (including unilateral termination, implementation under own management or the conclusion of one or more contracts with one or more third parties for all or part of the remaining procurement) once the deadline has expired or if the successful tenderer fails to provide convincing explanations.[68] The latter may also be excluded for a period of three years from the contracting authority's contracts in the event of a serious failure in the performance of the procurement.[69] This implies that these *ex officio* measures may also be taken by the contracting authority against the tenderer in case of failing to fulfil obligations related to the subcontracting chain. No action can be taken directly against the subcontractors.

Finally, there is an obligation to report situations of social fraud identified in subcontracting situations to the competent services so that they can investigate the situation. Thus, the contracting authority with a suspicion of social fraud must notify the social inspection services.[70] Article 29 of the Code of Criminal Procedure provides for this obligation when an official or a public officer becomes aware of the existence of a crime or offense while exercising his duties. These provisions must be linked to the labour

66 For example, to ensure the concrete follow-up of the obligation provided for in Art. 36 § 5 Royal Decree 18 April 2017 on public procurement in the traditional sectors, which provides that "[w]hen the offer is in the context of a public works, supply or service contract rejected following the finding that it is abnormally low because it does not fulfil the obligations referred to in article 7 (1) of the law, in the field of federal social law or federal labour law, the contracting authority shall immediately communicate it to the Information and Social Research Service indicating the following information: the identification data of the tenderers concerned, the subject of the contract and the abnormally low or high price or cost]."

67 Art. 44 and following Royal Decree of 14 January 2013 (as amended).

68 Art. 47 Royal Decree of 14 January 2013 (as amended).

69 Art. 48 Royal Decree of 14 January 2013 (as amended).

70 C.-E. Clesse & K. Munungu Lungungu, 'La lutte contre le dumping social au stade de l'exécution des marchés publics' (The fight against social dumping at the performance stage of public contracts), *Marchés et Contrats publics,* 2018, pp. 43-55.

inspection reforms carried out in Belgium to transpose Directive 2014/67.[71] In addition, the 2017 action plan to combat social fraud indicates the increase the social inspection staff with fifty units,[72] which is likely to strengthen the activity of labour inspectorates, and probably the effectiveness of the fight against social dumping.

24.3.3.2 Possible Difficulties

The concrete effectiveness of these measures over the medium and long terms is difficult to assess since the implementing decrees relating to them were adopted during the course of 2017. However, the following considerations may be made to lay a few milestones for a future evaluation.

Firstly, social fraud remains a poorly documented phenomenon by its very nature. In 2017, the Belgian Court of Auditors published a critical report on the transparency of measures taken to combat social fraud and social dumping.[73] They noted that despite positive developments in the collection of relevant information to develop an effective policy, this information remains fragmented across different services.[74] This situation limits the real ability to conduct an overall analysis of the information collected. For the moment, it seems that the sources of information remain unclear, coming from the economic sectors concerned most often,[75] without independent evaluations being produced or made accessible to the public. The absence of this type of information makes the task of inspection services complicated, since they do not know what they need to do in the field. Nevertheless, it is quite possible to gradually objectify, quantify and map the phenomenon and its evolution, to adapt the administrative responses.

Subcontracting is not static. There may be changes in the subcontracting chain. It will therefore be necessary to ensure that these changes are controlled and controllable, which in practice can be complicated if the companies concerned are located abroad, despite the increased information obligations now imposed on the contractors.

71 M. Morsa, 'Le détachement des travailleurs ou le difficile équilibre entre les libertés du marché et les droits sociaux fondamentaux' (The posting of workers or the difficult balance between market freedoms and fundamental social rights), *Journal des tribunaux du travail*, 2014, pp. 177-193, especially pp. 190-192.

72 Secretary of State, above-cited 2017 Action plan, 2.

73 Court of Auditors, *Plan de lutte contre la fraude sociale et le dumping social*, 2017 (Plan to Combat Social Fraud and Social Dumping, 2017).

74 On the fragmentation of social inspection services, *see*: K. Salomez & J.-P. Bogaert, 'Vers un service d'inspection sociale unifié: aspects juridiques' (Towards a unified social inspection service: legal aspects), *Revue belge de sécurité sociale*, 2017 (59: 2), pp. 283-316.

75 *E.g.*: from the field of constructions.

Finally, the need to develop European cooperation is underlined by the action plan against social fraud.[76] Similarly, cooperation within Belgium and with the Benelux countries appears important.[77]

24.3.4 Provisional Evaluation of the Belgian Regulations

At the end of this analysis of the Belgian transposition of Directive 2014/24 regarding subcontracting in public procurement, and in particular the fight against social fraud, two observations seem to emerge.

On the one side, Belgium has slipped through the door left ajar by Article 71 of the Public Procurement Directive: it has thus limited the subcontracting chains and imposed obligations to make them more transparent. There is a real development of the regulation of subcontracting, at both preventive and repressive levels; we can also observe an attempt to better coordinate the services involved in the fight against social dumping in the framework of subcontracting public procurement.

On the other side, the novelty of this Belgian approach to social fraud needs to be qualified when one examines how the Belgian legislation uses public procurement as a lever for a broader industrial or social policy. Thus, the social purpose of public markets is anchored in the economic constitution of the country,[78] as a means recognized as legitimate by the economic, social and political actors to ensure the (economic and social) efficiency of the use of public money. Thus, in the 1970s and 1980s, the choice of the subcontractor was largely defined by the owner himself. This reminder qualifies the idea that the Belgian state would, suddenly in 2017, become particularly interventionist in terms of subcontracting in public procurement. The management autonomy of the main contractor seems, on the contrary, to have increased in the long term. Thus, the system introduced in 2017 is a continuation of the existing legislation.[79]

Belgium therefore uses the public procurement rules as a supplement to the rules on the posting of workers. In a way, it is a matter for Belgium to develop a coherent framework applicable to the protection of workers, whether employed in the context of public

76 Secretary of State, Action plan 2017, p. 16. On the institutional governance that should be developed under Title IV of the Directive 2014/24 to ensure the effective implementation of the regulation on public procurement in the Member States, *see*: Y. Marique & K. Munungu Lungungu, 'Le droit des marchés publics: un levier efficace dans la mise en œuvre des obligations sociales et environnementales?' (The law of public procurement: an effective lever in the implementation of social and environmental obligations?), in: A. Vandeburie (ed.), *Government Procurement*, UB3, Brussels, Larcier, 2018, pp. 53-137.

77 Secretary of State, Action plan 2017, 6.

78 T. Prosser, *The Economic Constitution*, Oxford, Oxford University Press, 2014 – defines the notion of economic constitution (in its descriptive acceptance) as: "the key conceptual principle and institutional arrangements which may be relevant to management of the economy."

79 *See supra,* for instance Art. 12 L. 24 December 1993 or the use of the approval technique.

contracts or outside them. It remains to be seen whether the CJEU is likely to accept the approach taken by Belgium in implementing Directive 2014/24.

24.4 Conformity Assessment of the Belgian System under European Law

Belgium has developed a sophisticated system of fighting against social dumping in the subcontracting in public procurement, both in terms of the obligations that must be respected related to regulation of public procurement and of preventive, technical and repressive measures developed to ensure effective compliance with these obligations. It has seized the possibilities provided by Directive 2014/24 to regulate subcontracting in public procurement.

As a reminder, paragraph 105 of the preamble to the Directive states that national measures must be "appropriate" and "in accordance with European Union law." However, recent national measures on the subcontracting in public procurement has been the subject of recent case law of the CJEU, decisions in line with the sensitive political context outlined in the introduction to this paper. It is therefore necessary to examine this case law in order to try to assess whether the Belgian system does not go beyond what is allowed by the Directive and whether it respects the European principles.

This section briefly summarizes the recent decisions of the CJEU relating to subcontracting in public procurement to illustrate the type of litigation that the national restrictive measures of subcontracting are currently generating (Section 24.3.1). We will then summarise the case law of the CJEU as regards the equal treatment and proportionality of restrictions on freedom of movement, taking the previously discussed decisions as illustrations (Section 24.3.2). We will then confront the Belgian system with this case law and make a careful assessment of its possible compliance (Section 24.3.3). This analysis leads to the suggestion of a justification of Belgian policy with regard to European requirements (Section 24.3.4).

24.4.1 Recent European Case-Law on Subcontracting in Public Procurement

Among the recent decisions of the CJEU at the interface between public procurement and social protection, two types of national measures are mainly challenged: first, the require-

ment to pay workers a minimum wage and the vertical limitation of subcontracting chains. The first measures constitute an economic obstacle to free movement: if the same wage is to be paid to all workers, the wage gap disappears, as well as the competitive advantages of companies located in low-wage countries. The second measures are likely to legally restrict access to public procurement by certain economic actors and, thus, to restrict competition.

On two occasions, in the *Bundesdruckerei* judgment of 18 September 2014[80] and *RegioPost* judgment of 17 November 2015,[81] the CJEU pronounced itself on the requirement of a minimum wage imposed in a public contract.[82] In the first judgment (*Bundesdruckerei*), the Court held that the German regional legislation which prescribed, in the context of public procurement, the payment of a minimum wage to workers of a subcontractor established in another Member State was incompatible with Union law, in cases where those workers performed the relevant market exclusively in that State. The city of Dortmund contracted a public procurement for document digitalization with a company, *Bundesdruckerei*, established in Germany. Nevertheless, this company was having its contract carried out by a Polish subcontractor in Poland by Polish workers who were not going to move to Germany. The subcontractor refused to pay the German minimum wage to his Polish staff. According to the CJEU, the protection of workers may constitute a legitimate ground for obstacles to free movement, but it must be shown that the measures taken are such as to achieve this objective and that they are proportionate to the objective pursued. This was not the case here because the minimum wage did not necessarily apply to both private markets and government procurement. Moreover, all the services were to be provided in the territory of the State of the service provider and therefore outside the territory of the State from which the public procurement originated. In that case, the Court therefore made free movement a priority in the fight against social

80 Judgment of 18 September 2014 in Case C-549/13, *Bundesdruckerei GmbH v. Stadt Dortmund*, ECLI:EU:C:2014:2235; A. Defossez, 'Chronique de marché intérieur – La jurisprudence de la C.J.U.E est-elle le principal moteur de la concurrence sociale au sein de l'Union?' (Internal Market Chronicle – Is the jurisprudence of the CJEU the main driver of social competition within the Union?), *Revue trimestrielle de droit européen*, 2015, p. 258; A.L. Durviaux, 'Chronique droit européen des marchés et autres contrats publics – Les marchés publics et le 'dumping social'' (European Law Chronicle of Procurement and Other Public Contracts – Public Procurement and 'Social Dumping'), *Revue trimestrielle de droit européen,* 2015, p. 394; M. Rocca, 'Arrêt 'Bundesdruckerei': salaire minimal et prestation de services entièrement exécutée dans un autre Etat member' ('Bundesdruckerei' judgment: minimum wage and provision of services fully performed in another Member State), *Journal de droit européen*, 2015, pp. 16-17.

81 Judgment of 17 November 2015 in Case C-115/14, *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz*, ECLI:EU:C:2015:760; P. Pecinovsky, 'Evolutions in the social case law of the Court of Justice: the follow-up cases of the Laval quartet: ESA and RegioPost', *European Labour Law Journal*, 2016, 7(2), pp. 294-309; A. Brown, 'The lawfulness of a regional law requiring tenderers for a public contract to undertake to pay workers performing that contract the minimum wage laid down in that law: Case C-115/14, *RegioPost*', *Public Procurement Law Review*, 2016, p. 2.

82 Pour des commentaires de ces deux décisions, voy. F. Costamagna, 'Minimum wage between public procurement and posted workers: anything new after the *RegioPost* case?', *European Law Review*, 2017, 42(1), pp. 101-111.

dumping (by accepting the idea that companies should be able to claim the wage differential as a "competitive advantage"). It has thus facilitated competition between workers.

In the second judgment (*RegioPost*), the CJEU took a different position by admitting that participation in a public procurement could be conditional on the commitment to pay a minimum wage, especially when a subcontractor is used. The imposition of a minimum wage is compatible with Directive 2004/18 (and even more so with Directive 2014/24), as long as such imposition is a specific, transparent and non-discriminatory market condition for social considerations. In the event that a tenderer does not undertake to pay this minimum wage, he may be excluded by the contracting authority. Nevertheless, this decision surprises the scholarship for more than one reason.[83] Comments on the decision include the following aspects.[84] First of all, the Court's reversal of case law in relation to its previous decisions, especially in the *Bundesdruckerei* case, is unexplained and mysterious, even though the European Commission considers that the *RegioPost* judgment contributes to clarifying the situation.[85] Thus, the Court dismisses the argument that a different system applies for public and private procurement.[86] Secondly, the solution adopted in the judgment could lead to possible violations of state aid rules.[87]

In the *Wroclaw* judgment of 14 July 2016,[88] and the *Borta* judgment of 5 April 2017,[89] both delivered on the findings of Advocate General Sharpston, the CJEU reiterated the eligibility of subcontracting framework measures. In the *Wroclaw* case, the tender specifications for the construction of a ring road in Wroclaw, Poland, provided that

83 See the report of a conference on the decision held in Bristol in May 2016 available on: http://www.howtocrackanut.com/blog/2016/5/10/regiopost-and-its-implications-full-extended-discussion-at-bristol-conference. *Add.* M. Rocca, 'RegioPost judgment: Public procurement and minimum wage', *Journal de droit européen*, 2016, pp. 57-58.

84 E. Willemart, 'Le respect du salaire minimum dans les marchés publics: Des arrêts *Rüffert, Bundesdruckerei* et *RegioPost* de la Cour de justice de l'Union européenne à la transposition des directives de 2014' (Compliance with minimum wage in public procurement: From the *Rüffert, Bundesdruckerei* and *RegioPost* judgements of the CJEU to the implementation of the 2014), in: P.-O. de Broux et P. Nihoul (ed.), *Actualités en droit public économique*, Limal, Anthemis, 2017, pp. 29-62 ; P. Pecinovsky, 'Evolutions in the social case law of the Court of Justice: the follow-up cases of the Laval quartet: ESA and RegioPost', *European Labour Law Journal*, 2016, 7(2), pp. 294-309; A. Brown, 'The lawfulness of a regional law requiring tenderers for a public contract to undertake to pay workers performing that contract the minimum wage laid down in that law: Case C-115/14 *RegioPost*', *Public Procurement Law Review*, 2016; F. Costamagna, 'Minimum wage between public procurement and posted workers: anything new after the *RegioPost* case?', *European Law Review*, 2017, 42(1), pp. 101-111.

85 Commission staff working document, *Impact Assessment – Accompanying the document – Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*, SWD(2016) 52 final, 8.3.2016, 19.

86 Case C-115/14, *RegioPost,* paras. 63-66.

87 A. Sanchez-Graells, 'Competition and state aid implications of 'public' minimum wage clauses in EU public procurement after the *RegioPost* judgement', in: A. Sanchez-Graells (ed.), *Smart public procurement and labour standards – Pushing the discussion after RegioPost,* Oxford, Bloomsbury, 2018, pp. 93-114.

88 Case C-406/14, *Wroclaw*.

89 Case C-298/15, *Borta UAB. S. de La Rosa*, 'L'influence grandissante des principes fondamentaux de la commande publique – A propos de l'arrêt *Borta UAB*' (The growing influence of the fundamental principles of public order – About the Borta UAB decision), *Revue des affaires européennes,* 2017, pp. 343-351.

the tenderer would be under an obligation to carry out at least 25% of the work by their own means. In the *Borta* case, the terms of reference for a public procurement for the construction of a port in Lithuania did not require a predetermined proportion in the performance of the contract by each partner, but linked it to the contribution of the professional experience that each partner claimed to have in the tender documents.

In both cases, the CJEU considered that these clauses were contrary to European law. It has each time checked whether a concrete and real link of necessity between the national measure (or the contract clause) limiting subcontracting and the invoked legitimate objective existed. It rejected the abstract limitations to the possibilities of subcontracting or the limitations that are not likely to achieve their purpose. The Court checked whether alternative, less restrictive measures were possible.[90] In *Borta*, the Court also emphasized that

> "As regards public contracts, it is the concern of the European Union to ensure the widest possible participation by tenderers in a call for tenders. […] The use of subcontractors, which is likely to facilitate access of small and medium-sized undertakings to public contracts, contributes to the pursuit of that objective."[91]

However, clauses such as those discussed in the case in question could impede the achievement of this objective.

These four decisions highlight the solutions provided by the Member States to relatively similar issues. It seems that the location of benefits on the territory of the State where the public contract was passed and a regime applicable to both public and private contracts are relevant elements in the reasoning of the CJEU. In addition, the latter recognizes the importance of concretely matching the specific requirements imposed by a contracting authority with regard to the specificities of the public contract in question. States' hesitations and evolving case law of the CJEU indicate the need for political clarification of the link between the logic of competition and social protection in public procurement. The following lines provide a cautious interpretation of the general trends that emerge from this case law.

90 Case C-298/15, *Borta*, para. 57.
91 Case C-298/15, *Borta*, p. 48.

24.4.2 Beyond the Proportionality Test, the Concrete Reality of Effective Competition?

The principle of equal treatment is the very essence of the public procurement directives. The purpose of those directives is to promote the development of effective competition and, to that end, lay down award criteria designed to ensure such competition.[92] At its side, however, the principle of proportionality is gaining more and more importance in the case law of the CJEU on public procurement[93] and is now expressly included in Article 18.1 of the Public Procurement Directive as a principle to be respected when awarding contracts. The application of this principle of proportionality is likely to slightly modify the application of the principle of equality in the framework of free movement and competition that structure the regulation on public contracts. Indeed, the principle of proportionality allows the Member States to restrict free movement to a certain extent. Thus, restrictions on the principle of freedom of movement must be allowed when they pursue a legitimate objective of general interest, when they are appropriate to guarantee the realization of the latter, when they are necessary to achieve the objective and when they are proportionate to the objective pursued.[94] Althoughwe consider the whole reasoning that allows the Court to assess whether the national measures are well justified, it is rare, as we know, for the Court to systematically examine each of these elements. It usually focuses on the most relevant aspects in each case.

The different decisions discussed under Section 24.3.1 show that the framework for assessing the compatibility of national measures with primary European law (in this case Article 56 TFEU) and secondary European law (the Posted Workers and Public Procurement Directives) is nothing less than fluctuating. Thus, *Borta* expressly invokes the principle of proportionality and applies it.[95] *Bundesdruckerei* applies the type of reasoning induced by the proportionality test but without explicitly invoking the principle. *Wroclaw* uses the notion of proportionality but on another issue raised by the case that is discussed here.[96] And finally, the *RegioPost* judgment does not use the principle even though it is

92 A.G.P. Mengozzi in Case C-115/14, *RegioPost*, referring to cases *Concordia Bus Finland* (C-513/99, para. 81) and *Fabricom* (C-21/03 and C-34/03, para. 26).

93 Judgment of 16 December 2008 in Case C-213/07, *Michaniki AE v. Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias*, [2008] ECR 9999 (commentary by K. Wauters & E. Loncke, 'Hof van Justitie, nr C-213/07', *Chroniques de droit public,* 2009, pp. 747-763); *C.J.,* Judgment of 19 May 2009 in Case C-538/07, *Assitur Srl v. Camera di Commercio, Industria, Artigianato e Agricoltura di Milano*, [2009] ECR 4219; *C.J.*, Case C-376/08, *Serrantoni and Consorzio stabile edili*, ECLI:EU:C:2009:808. K. Wauters & J. Ghysels, 'Le principe de proportionnalité et l'attribution des contrats publics' (The principle of proportionality and the award of public contracts), in: C.-H. Born & F. Jongen (ed.), *D'urbanisme et d'environnement – Liber Amicorum Francis Haumont*, Bruxelles, Bruylant, 2015, pp. 1107-1120; P. Bogdanowicz, 'The application of the principle of proportionality to modifications of public contracts', *European Procurement and Public Private Partnership Law Review,* 2016 (3), pp. 194-204.

94 Case C-376/08, *Serratoni*, paras. 43-44.

95 Case C-298/15, *Borta*, para. 51.

96 Case C-406/14, *Wroclaw,* para. 49.

part of a line of judgments (*Bundesdruckerei*) that had previously resorted to it.[97] On the other hand, and paradoxically, it is the only one that validates the national protective measure in question. Despite these fluctuations, the following reasoning can be reconstructed.

In principle, there is a restriction or an impediment to the freedom of movement and competition in public procurement where there is "an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State."[98] In *Borta*, the Advocate General clarified this principle as follows:

> "[…] the European Union is concerned to ensure the widest possible participation by tenderers in a call for tenders, even where directives on public procurement are not applicable. That is in the interest of the contracting authority itself, which will thus have greater choice as to the most advantageous tender which is most suitable for its needs. One of the principal functions of the principle of the equal treatment of tenderers and the corollary obligation of transparency is thus to ensure the free movement of services and the opening-up of undistorted competition in all the Member States.
> Subcontracting contributes to those objectives as it is likely to encourage small and medium-sized undertakings to get involved in the public contracts procurement market and therefore to increase the number of potential candidates for the award of public contracts."[99]

Restrictions on freedom of movement may nevertheless be legal if they pass the proportionality test.

In this perspective, the restriction on the freedom of movement of persons, goods or services must first of all pursue a legitimate objective. The CJEU recognized, as the pursuit of a legitimate objective, measures aimed at the correct execution of works[100] or the promotion of SMEs.[101] With respect to restrictive measures aimed at the protection of workers, the CJEU has been harsh in the past. Thus, it had adopted a narrow view on the protection of workers by refusing that the obligation to respect a minimum wage as provided for in a collective labour agreement could be accepted in the name of pursuing the objective of protecting workers.[102] Later on, the CJEU has been cautious. Thus, in the *Bundesdruckerei* case, it stated that the measures taken in the framework of public procurement could only achieve the objective of protecting workers provided that workers in

97 Case C-115/14, *RegioPost,* paras. 70-77.
98 Case C-549/13, *Bundesdruckerei,* para. 30.
99 A.G. Sharpston, in Case C-298/15, *Borta,* paras. 44-45 (notes omitted).
100 Case C-298/15, *Borta*, paras. 53-55.
101 Case C-298/15, *Borta,* para. 59.
102 Judgment of 3 April 2008 in Case C-346/06, *Dirk Rüffert v. Land Niedersachsen*, [2008] ECR 1989.

the private market enjoyed the same protection. The scholarship has questioned whether the CJEU doubted the reality of the objective of protecting workers (namely "[the objectives] ensuring that employees are paid a reasonable wage in order to avoid both 'social dumping' and the penalisation of competing undertakings which grant a reasonable wage to their employees"[103]) and whether it did not suspect that behind this apparent objective was, in fact, a hidden objective of protecting public procurement.[104] In the *Bundesdruckerei* judgement, the CJEU gives yet another indication of the type of legitimate objective that could be invoked, namely the stability of social security systems. In this case, however, the Court considered that the national measure was not necessary to achieve that objective which had been considered legitimate.[105] It could therefore be concluded that measures to protect the stability of the social security system are recognized as having a legitimate aim. Nevertheless, they will have to pass the test of 'necessity'.

The measure must then be 'necessary' to achieve the legitimate objective pursued. This means, in principle, that there should be no alternative and less restrictive measures which would achieve the same objective.[106] There must be evidence of the need for the measures taken, as stated in *Borta*:[107] the burden of proof lies with the Member State. It may in particular be reported by scientific data or other reports. In this regard, the findings of Advocate General Sharpston in *Borta* are illuminating. They take on a restrictive attitude to the limitations allowed for subcontracting, "considering the essential role subcontracting plays in promoting the objectives of the [Public Procurement] Directive."[108]

Once the 'legitimate objective' and 'necessity' tests have been passed, the measure concerned must finally satisfy the 'proportionality' test in the narrower sense. The findings of Advocate General Sharpston in the *Borta* case clarify how to approach the question of whether a limitation of subcontracting is in conformity with European law. Indeed, they indicate that the absence of a limitation of subcontracting "might have resulted in different offers (in terms of, for example, the price or the timeframe for completing the works)."[109] They also mention possible alternative measures. The Advocate General points out that the restrictions imposed by the national legislation at issue in this case are:

103 Case C-549/13, *Bundesdruckerei*, para. 31.

104 A. Defossez, 'Chronique de marché intérieur – La jurisprudence de la Cour de justice est-elle le principal moteur de la concurrence sociale au sein de l'Union?' (Internal Market Chronicle – Is the case-law of the Court of Justice the main driver of social competition within the Union?), *Revue trimestrielle de droit européen,* 2015, p. 258.

105 Case C-549/13, *Bundesdruckerei,* para. 35.

106 See in general on the free movement of goods: Judgment of 20 February 1979 in Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649; Judgment of 16 November 2000 in Case C-217/99, *Commission of the European Communities v. Kingdom of Belgium*, [2000] ECR 10251 (protection of public health).

107 Case C-298/15, *Borta,* para. 60.

108 A.G. Sharpston, in Case C-298/15, *Borta,* para. 34.

109 A.G. Sharpston, in Case C-298/15, *Borta,* para. 50.

> "both too rigid and too vague to satisfy the proportionality test. Although contracting authorities appear to enjoy flexibility when defining, for each contract, what 'the main work' is, the restriction on subcontracting resulting from that provision is defined in particularly broad terms. It applies regardless of the subject matter of the public works contract and is binding upon contracting authorities when they conclude any type of public works contract, even when they may consider that there is no obvious reason for imposing such a restriction at all."[110]

Overall, the compliance framework of domestic law in European law leaves the door open to numerous questions of interpretation. Nevertheless, certain elements seem particularly important in the analyses carried out by the CJEU, (apart from a reasoning that strictly follows the proportionality test): the Court and its Advocates General are particularly interested in the economic reality, whether it is the reality created by national regulations (or specific procurement documents) or the (socio-)economic situations to which the national entities must find concrete solutions. The general prism of this approach is to ensure that the free movement of persons is not affected more than necessary by the pursuit of another real objective which must also be accepted as something the national authorities could validly pursue. Therefore, the national authorities are asked to be flexible in the tools used or, in any case, seriously consider alternatives. Finally, there must be a balance between the means used (the clauses and conditions developed) and the objective pursued (for example the proper execution of the works).

Through this pragmatic approach, the CJEU seeks to verify that the measures taken are specific and adapted to the particularities of the sectors and markets concerned. Instead of systematically applying the same test of proportionality, it is the economic reality of preserving (effective[111]) competition that seems to have primacy. Other socio-economic conditions (such as social dumping or workers' protection) seem to enter the Court's reasoning only peripherally.[112] However, European primary law has evolved to include not only competition and market logic, but also social aspects (social market economy, which must nevertheless be "highly competitive").[113] Social protection is sandwiched between economic considerations and thus seems to receive less consideration. One exception to this pattern can be identified, namely the mysterious *RegioPost* decision. The elements of this decision which might be of a nature that explains its exceptional status are the following: the fact that the special scheme was provided for in the law, thus ensuring transparency adapted to the benefit of economic actors and the fact that all the

110 A.G. Sharpston, in Case C-298/15, *Borta,* para. 52.

111 Emphasized in particular in the conclusions of A.G. Sharpston, Case C-298/15, *Borta,* para. 32.

112 The fact that the lack of methodology of the Court induces suspicion of preference for neo-liberal theories are discussed for example by A. McCann, 'The CJEU on trial: Economic mobility and social justice', *European Review of Private Law*, 2014 (5), pp. 729-768.

113 Art. 3.3 TEU.

services concerned by the public procurement are located in the Member State from which the public procurement emerges. The conjunction of these indices seems likely to convince the CJEU that the measures in such a context comply with European law.

24.4.3 *'Fair' Competition for the Subcontracting of Belgian Public Procurement: A New Path in Line with European Law?*[114]

In Section 24.2.2, we presented the panoply of measures taken in the context of the Belgian implementation of Directive 2014/24 to combat social dumping in the context of the subcontracting public procurement. Of these measures, three are designed in absolute, systematic and general terms: firstly, the prohibition of total subcontracting by the subcontractor; secondly, limiting the subcontracting chain to two or three (or even exceptionally four) levels; lastly, the obligation for all links in the subcontracting chain to comply with the legislation on the approval of works contracts.[115] As we have seen, these measures have been justified by the consideration that certain sectors are particularly sensitive to fraud, so that contracts awarded in these sectors can often be tainted by fraud. Are these Belgian measures in line with the main trends in European case law? There are a number of considerations that can feed into the reflections on trying to evaluate how the CJEU could exercise its proportionality check in its assessment of the conformity of the Belgian system with European law.

The conformity of the Belgian regulation on subcontracting in public procurement could be analysed by the CJEU either directly under Directive 2014/24 or under primary law (Article 56 TFEU). It seems hardly disputable that the introduced system restricts freedom of movement. Can the adopted measures be accepted because they meet the proportionality test? The assessment of this question varies according to the extent of the system which will, if necessary, be subject to the control of the CJEU. Indeed, according to the Belgian legislator, the various measures to regulate subcontracting in public markets constitute a sort of 'system', as we explained in Section 24.2: a range of obligations that fit into each other, with preventive, informative and repressive aspects, and close national and international collaboration. Is the whole of this system to be evaluated in terms of its impact on the free movement of persons? Or does this only concern some

114 The principle of fair competition is mentioned in the case law of the CJ in relation to public procurement (*e.g.*: Judgment of 14 February 2008 in Case C-450/06, *Varec SA v. Belgian State*, [2008] ECR 581, paras. 50-54). as well as in European directives (*e.g.*: Directive 2014/24, Arts. 50, 55 and 79 all in the context of the information to be communicated by the contracting authorities to candidates and tenderers) or in European Parliament documents (*e.g.*: European Parliament resolution of 14 September 2016 on social dumping in the European Union (2015/2255 (INI)). Nevertheless, these are relatively disparate indications from which it is difficult to draw precise and systematic conclusions.

115 Nevertheless, proportionality is gaining ground in Belgian regulation. Thus, the report to the King (Royal Decree of 22 June 2017) specifies that certain measures must be taken in compliance with this principle (for example in the use of optional grounds for exclusion from a market).

of the measures that will be tested for compliance with European law? So far, the CJEU seems to have been called upon only to decide on isolated measures taken by the Member States. It is therefore difficult to assess whether the CJEU would use the proportionality test differently if it had to decide on a system as a whole, such as the one introduced by the Belgian regulation. This paper focuses on the restrictive measures of the subcontracting chain. As this aspect of the regulation on subcontracting in public procurement does not find a direct basis in Directive 2014/24, it is most likely to be assessed against the principle of proportionality by the CJEU.

At the level of the assessment of the legitimate objective pursued by the Belgian regulation, the latter pursues a public policy priority for the Belgian government, namely to ensure 'fair' competition and to fight against social fraud, in accordance with the Government Agreement of 2014 and the Action Plan against Social Fraud of 2015. For the Government delegate, the limitation of the subcontracting chain pursues a legitimate aim as it aims to avoid "findings made on the ground that social dumping often arises in the context of the subcontracting chain"[116] and to implement the obligations arising from Article 18.2 of Directive 2014/24 (*i.e.* compliance by subcontractors with social and environmental obligations). Failure to comply with this provision is further likely to distort competition. In addition, the Government delegate considered that Member States should be granted wide freedom to take appropriate measures to achieve these objectives.

For now, the CJEU refused in its *Bundesdruckerei* judgment to consider the national measure with the objective to avoid social dumping as the pursuit of a legitimate reason. The Court did not soften its control in view of this reason of public interest. Even more, it seemed to doubt its reality. However, the doubts in *Bundesdruckerei* were aroused by the difference in treatment of workers employed in public and private procurement.

Furthermore, these new Belgian measures are likely to

> "significantly increase the administrative burden of the contracting authority. If no further restriction of the subcontracting chain is made, long chains of subcontracting will remain perfectly possible, which risks making the administrative burdens unmanageable and ultimately compromising the effectiveness of the measure. In the case of too long a chain of subcontracting, the contracting authority can only intervene de facto when irregularities are already noted."[117]

116 Report to the King, Royal Decree of 22 June 2017 amending the Royal Decree of 14 January 2013 laying down the general rules for the execution of public contracts and public works concessions and setting the date of entry into force of the law of 16 February 2017 amending the law of 17 June 2013 on the motivation, information and remedies in respect of public procurement and certain works contracts, supplies and services.

117 Id.

Next, the report to the King indicates that the measures satisfy the requirement of proportionality, since it is sufficient for the subcontractor to undertake "the execution of a small part of the contract entrusted to him for subcontract the rest to another subcontractor." Nevertheless, this measure makes it possible to limit the creation of long cascades of contracts.

Finally, the report to the King considers that the limitation of subcontracting introduced in the Belgian regulation differs from the situation in the *Wroclaw* judgment. In fact, the successful tenderer and the subcontractor are not in a comparable situation. The bidder (potential future successful tenderer) who does not know, by definition, whether his bid will be successful, may be inclined to submit bids to more procurement than he can do himself. On the other hand, the subcontractor usually intervenes at a time when the contract has already been awarded, so that he can make an informed commitment. The difference between the two situations is particularly significant for SMEs with more limited means. According to the report to the King,

> "the fact that SME-tenderers know that they can designate one or more subcontractors in case they are awarded the contract, encourages them to submit a request for participation or an offer, even if the procurement is quite important. Since the prohibition [on a subcontractor to subcontract the entire contract] is not applicable to the successful tenderer and therefore cannot discourage the participation of candidates or tenderers in the procurement procedure, it is not a problem."[118]

Thus, the report to the King considers the competitive situation at the level of supply (companies likely to answer a large number of calls from thecontracting authorities). Now, the CJEU and its Advocate General consider the level of competition that contracting authorities see expressed towards a particular offer. In this way, they are situated on the other side of the transaction, at the level of demand, to assess the choice available to the contracting authorities. If the two perspectives are not inconsistent, the position that the CJEU will adopt on the reasoning of Belgium is uncertain.

The report to the King concludes that the prohibition of total subcontracting does not unduly disturb the possibility of subcontracting procurement to SMEs. Moreover, an authorization for derogation could always be requested from the contracting authority if necessary.

In view of the case law of the CJEU, the argument in the report to the King may be surprising. Indeed, at the very least, two considerations must be mentioned here. First, the proportionality test is interpreted creatively in the report to the King. How can one both argue in favour of the total prohibition of subcontracting because of the risks of

118 Id., commentary on Art. 12/3.

fraud and of techniques that are in a legal grey area, and advocate to circumvene this prohibition limitation by resorting to keeping a "small" part of the main procurement? How can one credibly advocate respect of legality and at the same time propose techniques that allow it to be easily avoided?

Moreover, the report to the King does not consider the possibility of creative alternative measures. In the *Borta* case conclusions, however, Advocate General Sharpston scrutinizes the existence of alternative measures that are less restrictive of competition. In this regard, one could for example ask whether using ISO labels relating to the quality of social responsibility of entrepreneurs and their subcontractors would not be an option that could be considered and less restrictive of competition.[119] The report to the King could have explained why other alternative measures, potentially less restrictive of the freedom of the economic actors, would be unsatisfactory in achieving the objectives of combating social dumping in the subcontracting chains established in public procurement.

In short, it seems that the Belgian regulation has adopted a general approach to the implementation of European directives, based on presumptions of fraud in certain sectors. If certain possibilities to be exempted from the prohibitions exist (such as an authorization by the contracting authorities), the discretion of the contracting authorities, as well as the possibilities for the economic operators to show that they are not fraudulent actors, seem far from the principles of flexibility that the CJEU seems to expect of the contracting authorities in order to ensure effective competition.

24.4.4 Towards Another Justification of the Belgian Regulation on the Fight against Social Dumping in Public Procurement?

While the proportionality test makes it possible to soften the consequences of the principle of equal treatment, the fact remains that the CJEU handles the principle of proportionality with caution. While the Court has been sympathetic to wage protection measures in *RegioPost*, it does not seem to be softening its case law on restrictive measures of subcontracting. These are always assessed in terms of effective competition. Belgium faces a real risk to see its system of combatting social dumping in public procurement rejected, because it leaves no room for the flexibility that the CJEU expects and the incentive offered in the report to the King could be open to discussion unless economic, statistical or empirical studies came to support the argument offered in this report. It is possible that the administrative structure ensuring the effective application of the Belgian regula-

119 An option chosen by the Netherlands. (*see* the report of the round table held during the conference leading to the publication of the French version of this text: https://blogdroiteuropeen.files.wordpress.com/2017/12/confecc81rence-dumping-social-v2.pdf).

tion will be perceived with suspicion, along the lines of the approach taken in the *Bundesdruckerei* case.

As it seems clear that the system of combating social dumping in the subcontracting chain addresses a real need,[120] it would be interesting to think creatively about possible arguments that the Belgian Government could eventually put forward in a possible procedure to the CJEU. Thus, the CJEU could have a chance to be less suspicious about the reality of the legitimate objectives invoked by the Member States to justify restrictive measures of competition. Will the CJEU accept a substitution of effective competition by fair competition,[121] or will it recognize the possibility for Member States to develop a sophisticated policy for combating fraud, unfair competition and social dumping? Belgium could put forward qualitative and not purely quantitative arguments about the seriousness of social fraud and its consequences in Belgium. For example, it could say that its Constitution includes an Article 23, which states that:

> "Everyone has the right to lead a life in keeping with human dignity.
> To this end, the laws [and] subnational laws […] guarantee economic, social and cultural rights, taking into account corresponding obligations, and determine the conditions for exercising them.
> These rights include among others:
> 1. the right to employment and to the free choice of an occupation within the context of a general employment policy, aimed among others at ensuring a level of employment that is as stable and high as possible, the right to fair terms of employment and to fair remuneration, as well as the right to information, consultation and collective negotiation;
> 2. the right to social security, to health care and to social, medical and legal aid;
> 3. the right to decent accommodation […]."

The social dumping practices that Belgium seeks to eradicate are likely to seriously undermine the constitutional guarantee of the "right to lead a life in keeping with human dignity." Therefore, Belgium could try to bypass the usual reasoning of the CJEU by asking it to accept that, in the name of these principles, based on the country's national identity, they may take measures restricting freedom of movement. This approach would

120 See especially the exchanges during the round table held at the conference which gives rise to the publication of this special issue (http://droit-public.ulb.ac.be/apres-midi-detudes-marches-publics-et-dumping-social/).

121 The *Varec* judgment (Case C-450/06, *Varec SA v. Belgium*, para. 50.) recognizes the principle of "fair competition" in the sense that this principle recognizes certain procedural rights as part of the implementation of remedies in the context of public procurement. It is not certain that this principle extends beyond this type of situation.

be part of the European policy of a progressive social convergence.[122] If this type of reasoning were followed,[123] one could talk about reversing the order of priorities between competition and social protection. However, the CJEU does not seem to be moving in this direction so far.

24.5 Conclusions

The interactions between social policy and public procurement, which were at the centre of this paper, open up a wide reflection on the actual interactions between different public policies and the instruments mobilized to implement them. It seems that there is a rebalancing between freedoms of movement and free competition, on the one hand; and social protection on the other: thus, the principles of equality, market access and 'effective' competition are progressively complemented by the principles of proportionality, flexibility and 'fair' competition. Directive 2014/24 has indeed left Member States a wide leeway to implement Article 71 on subcontracting in their national legal order. Belgium has made extensive use of this margin of manoeuvre. It remains to be seen whether the modalities of this implementation, particularly as regards social dumping and social fraud practices, will withstand scrutiny from the CJEU for their compliance with EU law.

This regulation of the fight against social fraud in subcontracting relations lies at the junction of crucial political choices: either the recognition of the need to develop greater European integration (including social and fiscal systems or control techniques); or a dismantling of the European area so that national political priorities can avoid the obligations related to the free movement of persons. This eminently political choice cannot be the result of a decision or a series of decisions taken by the CJEU following more or less random disputes, neither of strategies of parliamentary blockade in the name of subsidiarity. Neither of these two options respond to the need for a long-term vision of the living together.

The Belgian route seeking to juxtapose effective competition and fair competition, to develop substantive obligations to regulate subcontracting in public procurement while developing an elaborate administrative control structure for tenderers, offers an interesting line of consideration: it is a compromise which could lead to wider reflections, both at European and national levels.

122 Report of the European Parliament on social dumping, 18 August 2016 (2015/2255 (INI)), especially para. 51.

123 Such an approach could be part of the reflections on the need to introduce a degree of justice or morality into the operations of the market. Certain types of exchange should not be admitted at all, since they are fundamentally immoral. L. Tjon Soei Len, 'Equal respect, capabilities and the moral limits of market exchange: denigration in the EU integral market', *Transnational Legal Theory,* 2017, pp. 103-118. What could be more immoral than the exploitation of a human being in order to get rich?

Nevertheless, if we take a step back from these developments, we cannot fail to question the concrete implications of the proliferation of methods developed to fight against social fraud: confidence in the power of collecting a large number information and the almost limitless possibilities of data mining and other methods of analysing a large amount of information raise questions about the scientific basis of this belief and about the epistemological and reflective understanding of those who are involved in these processes. Is it fundamentally important to try to maximize the supply of information potentially subject to verification? With all the costs, logistical problems or risks of violating the privacy of citizens that this implies?

Clearly, the articulation of social policies and public procurement is at a particularly stimulating moment when the legal and political modalities of integrating the two sides of 'effective competition' and 'fair competition' are more than ever on the agenda. What are the next steps to be taken in the development of the system: are we moving towards the development of a European social inspection or towards a form of repressive social state? Can we hope that the system will develop processes of adaptation, selection and targeting of tools facing real, objectively demonstrated risks that allow to reach a always evanescent balance between equality and proportionality? In any case, it seems that a system where competition is both effective and fair does not appear out of thin air. More than ever, sophisticated administrative structures are required in order to work towards the progressive realization of this ambitious goal.