

<b>SUBCONTRACTING</b>	
<b>Human Rights Related Provisions</b>	<b>Recital or Article Number</b>
Procurers must verify that subcontractors fulfill the exclusion and selection criteria.	<ul style="list-style-type: none"> <li>- Art. 63 PSD</li> <li>- Art. 88(1) UD</li> <li>- Art. 42(1) CD</li> </ul>
The overarching social clause (see above) applies to subcontractors, requiring “appropriate measures” to be taken by Member States to avoid environmental, social and labour law breaches, such as requiring joint liability between subcontractors and the main contractor (where national law allows) or replacing the subcontractor.	<ul style="list-style-type: none"> <li>- Art. 71(1) PSD</li> <li>- Art. 88(6) UD</li> <li>- Art. 42(4) CD</li> </ul>
Member States are free to establish “more stringent liability rules” around subcontracting and are able to “go further” under national law regarding direct payments to subcontractors.	<ul style="list-style-type: none"> <li>- Art. 71(7) PSD</li> <li>- Recital 110 UD</li> <li>- Recital 72 CD</li> </ul>

**Table 3: Limitations to Incorporating Human Rights Considerations into EU Public Procurement Processes**

**Key:** PSD = 2014 EU Public Sector Directive; UD = 2014 EU Utilities Directive; CD = 2014 EU Concessions Directive

<b>PRE-TENDER / MARKET ENGAGEMENT PHASE</b>	
<b>Human Rights Related Provisions</b>	<b>Limitations</b>
Not actively regulated by the Directives	N/A
<b>TECHNICAL SPECIFICATION PHASE</b>	
<b>Human Rights Related Provisions</b>	<b>Limitations</b>
<p>Criteria <i>must</i> relate to the goods, works or services directly; it is not possible to stipulate the <i>process</i> by which they are delivered.</p> <ul style="list-style-type: none"> <li>- Recital 99 PSD</li> <li>- Recital 104 UD</li> <li>- Recital 66 CD</li> </ul>	Procurers unable to specify measures relating to the way (i.e. the <i>process</i> by which) the business is managed, e.g. requiring systems to protect the health and safety of staff involved in production.
<b>EXCLUSION PHASE</b>	
<b>Human Rights Related Provisions</b>	<b>Limitations</b>
<p>Procurers <i>must</i> exclude bidders where they have been convicted of child labour or other forms of trafficking in human beings</p> <ul style="list-style-type: none"> <li>- Art. 57(1)(f) PSD</li> <li>- Art. 38(4)(f) CD</li> <li>- The UD does not contain an equivalent provision, but does allow reference to criteria under the PSD (Art. 80).</li> </ul>	<p>Child labour and human trafficking cover only a small proportion of the types of impacts companies can have across the spectrum of human rights.</p> <p>Limits to cases of formal <i>conviction</i>, which is rare in practice for most corporate-related human rights abuses.</p>
Procurers <i>may</i> exclude a bidder due to non-compliance with environmental, social or labour law obligations (the overarching social clause – see below).	Implementation is discretionary by Member States. This potentially invites inconsistency in EU-wide implementation and risks a lowest common denominator

<ul style="list-style-type: none"> <li>- The <i>UD</i> does not contain an equivalent provision, but allows reference to criteria under the <i>PSD</i> (Art. 80)</li> <li>- Art. 57(4)(a) <i>PSD</i></li> <li>- Art. 38(7)(a) <i>CD</i></li> </ul>	<p>approach.</p> <p>Member States' recourse to international law limited to the 8 ILO core Conventions only (not the International Bill of Rights or additional international human rights conventions).</p>
<p>Procurers <i>must</i> exclude "abnormally low" tenders where due to non-compliance with environmental, social or labour law obligations (the overarching social clause – see below)</p> <ul style="list-style-type: none"> <li>- The <i>CD</i> does not contain an equivalent provision.</li> <li>- Art. 69(3) <i>PSD</i></li> <li>- Art. 84(3)</li> </ul>	<p>Rejection of abnormally low tenders will only occur where procurers decide to investigate <i>why</i> the price is so low (or are compelled to do so under national law) – inviting inconsistent application across the EU.</p>
<p>Provides for the "self cleaning" of bidders to demonstrate their reliability despite valid grounds for exclusion</p> <ul style="list-style-type: none"> <li>- Art. 57(6) <i>PSD</i></li> <li>- Art. 38(9) <i>CD</i></li> <li>- Recital 107 <i>UD</i></li> </ul>	<p>What constitutes satisfactory self-cleaning is discretionary for public purchasers, who could overlook the need for human rights impacts to be remediated as part of the self-cleaning process in order for an excluded bidder to regain status as a potential bidder.</p>

**SELECTION PHASE**

<b>Human Rights Related Provisions</b>	<b>Limitations</b>
<p>Selection criteria may relate to (a) the suitability of the economic operator to pursue the activity, (b) their economic and financial standing or (c) their technical and professional ability. This could be interpreted to include e.g. robust responsible supply chain management systems or use of qualified social and human rights specialists</p> <ul style="list-style-type: none"> <li>- Art. 58(1) <i>PSD</i></li> <li>- Art. 80 <i>UD</i></li> <li>- Art. 38 <i>CD</i></li> </ul>	<p>Requires progressive interpretation by public purchasers to prioritise human rights related criteria. Procurers can be discouraged from such progressive interpretation, as it may raise legal and procedural challenge that could invalidate the entire contract.</p>

## AWARD PHASE

Human Rights Related Provisions	Limitations
<p>Procurers must base the award on the “most economically advantageous tender” (MEAT), which explicitly incorporates both (a) quality, including environmental and (for the first time) social characteristics and trading and its conditions, and (b) organisation, qualification and experience of staff assigned to performing the contract.</p> <ul style="list-style-type: none"> <li>– <i>Art. 67(1) PSD</i></li> <li>– <i>Art. 82(1) UD</i></li> <li>– The CD does not contain an equivalent provision, merely requiring that concessions are awarded “on the basis of objective criteria which comply with the principles set out in Art. 3 and which ensure that tenders are assessed in conditions of effective competition so as to identify an overall economic advantage for the contracting authority/entity”. (Art. 41)</li> </ul>	<p>While the 2014 Directives have been praised for no longer using a lowest price only approach, certain provisions contradict this, stating the MEAT “could also be carried out on the basis of either price or cost effectiveness only”</p> <ul style="list-style-type: none"> <li>– <i>Recital 90 PSD</i></li> <li>– <i>Recital 59 UD</i></li> <li>– the CD does not contain an equivalent provision</li> </ul> <p>Price-only decisions can create perverse incentives to abuse the human rights of workers and others involved in delivery in order to drive down costs and increase price competitiveness.</p> <p>The provisions make for a confusing set of boundaries within which procurers can freely prioritise quality and experience (including characteristics based on social, environmental and trading conditions) whilst ensuring sufficient quantitative rigour in obtaining the “economically best solution among those offered”.</p>
<p>Procurers <i>may</i> choose not to award a contract, due to non-compliance with environmental, social or labour law obligations (the overarching social clause, see below)</p> <ul style="list-style-type: none"> <li>– <i>Art. 56(1) PSD</i></li> <li>– <i>Art. 76(6) UD</i></li> <li>– The CD does not contain an equivalent provision.</li> </ul>	<p>Implementation is discretionary by Member States – invites inconsistency in EU-wide implementation and risks a lowest common denominator approach.</p>

## CONTRACTING PHASE

Human Rights Related Provisions	Limitations
<p>Contractual conditions can cover implementation of measures to comply with fundamental ILO Conventions.</p> <ul style="list-style-type: none"> <li>– <i>Recital 98 PSD</i></li> <li>– <i>Recital 103 UD</i></li> <li>– <i>Recital 65 CD</i></li> </ul>	<p>Limits contractual requirements concerning basic working conditions to levels set by national legislation or collective agreements (<i>Recital 98 PSD; Recital 103 UD; Recital 65 CD</i>), prohibiting the inclusion of contractual terms specifying that the delivery of public works, goods or services must be compliant with international human rights instruments.</p>

## CROSS-CUTTING ISSUES

### THE OVERARCHING "SOCIAL CLAUSE"

Human Rights Related Provisions	Limitations
<p>Member States <i>must</i> take "appropriate measures" to ensure in the performance of a contract compliance with applicable environmental, social and labour law obligations by economic operators.</p> <ul style="list-style-type: none"> <li>– <i>Art. 18(2) PSD</i></li> <li>– <i>Art. 36(2) UD,</i></li> <li>– <i>Art. 30(3) CD</i></li> </ul> <p>There are four points where non-compliance with environmental, social or labour law obligations can lead to action within the procurement process:</p> <ol style="list-style-type: none"> <li>i. Procurers <i>may</i> exclude a bidder due to non-compliance with such obligations</li> <li>ii. Procurers <i>must</i> exclude an abnormally low tender where it is due to such non-compliance</li> <li>iii. Procurers <i>may</i> choose not to award a contract, due to non-compliance</li> <li>iv. Observance by sub-contractors of such obligations is ensured through "appropriate action" by the national authority, such as joint liability with the main contractor (where national law allows).</li> </ol>	<p>What constitutes an "appropriate measure" is discretionary by Member States – invites inconsistency in EU-wide implementation and risks a lowest common denominator approach.</p> <p>Member States' recourse to international human rights instruments limited to the 8 ILO core Conventions only – not the International Bill of Rights or additional international human rights conventions.</p> <p>The UD does not explicitly allow exclusion for breaches of the overarching social clause, but does allow reference to the provisions of the PSD.</p>

### REQUIREMENTS FOR CRITERIA TO BE LINKED TO THE SUBJECT MATTER

Human Rights Related Provisions	Limitations
<p>All procurement criteria must be "linked to the subject matter" of the contract. Criteria is "linked" where it relates to the works, supplies or services in question at any stage of their life cycle, including production and trading.</p> <ul style="list-style-type: none"> <li>– <i>Art. 67(3) PSD</i></li> <li>– <i>Art. 82(3) UD</i></li> <li>– <i>Recital 66 CD</i></li> </ul> <p>Criteria that relates to general corporate policies are prohibited, such as those on corporate social responsibility, human rights or the environment.</p> <ul style="list-style-type: none"> <li>– <i>Recital 97 PSD</i></li> <li>– <i>Recital 102 UD</i></li> <li>– the <i>CD</i> does not contain an equivalent provision</li> </ul>	<p>The primary means through which companies can effectively seek to prevent, mitigate and remediate human rights impacts – through company policies and systematic and ongoing processes of human rights due diligence – is not allowed to be a criteria by which procurers can consider a company's suitability and reliability to deliver the goods, works or services being procured.</p> <p>This may actually undermine the procurer's intended objectives of seeking to work with responsible bidders, as well as force inefficiencies in focusing bidders' time and resources to lower risk issues that are "linked", rather than higher risk issues that may not be "linked" but are nonetheless reflective of the bidders' most severe human rights risks.</p>

## LABEL AND CERTIFICATION REQUIREMENTS

Human Rights Related Provisions	Limitations
<p>Social labels can be used in the technical specifications, award criteria or the contract performance conditions.</p> <ul style="list-style-type: none"> <li>– Art. 43(1) PSD</li> <li>– Art. 61(1) UD</li> <li>– the CD does not contain any provisions on the use of labels</li> </ul> <p>Criteria referring to labels must be “linked to the subject matter of the contract”, verifiable, transparent and independent.</p> <p><i>Equivalent</i> evidence must be accepted in order to ensure unrestricted competition for public contracts. As such, the <i>characteristics</i> of the label requirements should be used to describe contracting authorities’ criteria, rather than requiring the label itself.</p>	<p>As label and certification criteria must be “linked to the subject matter” of the contract, the same considerations in the section above apply.</p> <p>Currently, the existence of social and human rights related labels and certifications are extremely limited compared to the vast array covering environmental issues.</p>
<p>Certifications can only be used during the award stage; they cannot be included as part of the technical specification.</p> <ul style="list-style-type: none"> <li>– Case C-368/10 <i>Commission v Kingdom of the Netherlands</i> ('Dutch Coffee')</li> </ul>	<p>Limits procurers’ ability to integrate human rights considerations into the earliest phases of the process, where preferences for rights respecting business models can be applied to the entire pool of interested tenderers, rather than the shorter list considered for award.</p>
SUBCONTRACTING	
Human Rights Related Provisions	Limitations
N/A	N/A