Environmental considerations in public procurement

in light of the value for money principle

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Contents

1 Introduction

1.1 Introduction

1.1.1 The topic of the thesis and its relevance

In this thesis I will look at the upper and lower limit for taking environmental considerations in public procurement. By this I mean finding out if there is any obligation to take environmental considerations, and to which extent one may take environmental considerations. I will look at these questions in light of the value for money principle to see if value for money contravenes with or in any way restricts environmental consideration in public procurement. If there is an obligation to take environmental considerations, at least to some extent, it is important that the principle of value for money and environmental considerations can be harmonized and balanced. If this is not the case, the Directive 2014/24/EU would be setting an impossible task. It is also of interest to see if the principle of value for money sets any boundaries as to which extent environmental considerations may be taken at the contracting authorities discretion.

In the European Union's primary law, the EU's emphasis on protecting the environment is reflected in TFEU Article 11, which states that the protection of the environment must be implemented into the EU's policies and activities.[1] TFEU Article 11 is referenced in the recitals to Directive 2014/24/EU, the Public Procurement Directive, and Recital 91 states that "This Directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts".[2] This quote is in many ways at the core of this thesis, because it shows an interesting balance of maintaining value for money, whilst also taking environmental considerations.

This is further illustrated in the literature, where Indén goes as far as to state that the aim of the Directive 2014/24/EU is two-fold, the first aim being ensuring efficient use of public

[1]Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012 OJ C 326, Art. 11.
[2] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, Recital 91, emphasis added.

funds and best value for money, and the second being ensuring that contracting authorities can use procurement as a means of achieving societal goals, including protection of the environment.[3]

These two objectives illustrate the relevance of the topic of the thesis. If the Directive 2014/24/EU is to balance these mechanisms, it must be clarified how they both can be fulfilled and harmonized. This is further reiterated as public procurement has developed from a purely financial procurement tool to also be an instrument for achieving other non-economic goals.[4] For example, in the European Commission's "Green Deal", the Commission sets some ambitious goals to become an environmentally conscious continent.[5] Public procurement is mentioned as one of the tools to be utilized in order to achieve this. This emphasised focus on procurement as a tool to achieve environmental goals, gives both reason and grounds to explore the topic in this thesis.

Based on these developments it is put forward that it is well established that public procurement may not be a solely financial tool anymore. However, this thesis also acknowledges that it certainly does still have a financial objective as illustrated by the quote from the Recital 91 above and as it will be demonstrated in this study. This development of using procurement as a tool for multiple aims, means that these aims sometimes need to be balanced and harmonized with each other, in order to prevent the different aims from coming under stress and into conflict with each other.

1.1.2 Research questions and delimitations

When addressing to which extent environmental considerations can be taken in public procurement, I will focus on finding the limits for taking such considerations. I will therefore look at two main questions: the lower and upper limit of taking environmental considerations. By upper limit, I mean to which extent one may take environmental considerations. When exploring this, I will pay attention to the value for money principle and assess if it may impact

[3] Michael Steinicke and Peter Vesterdorf (eds.), *EU Public Procurement Law*, Nomos Verlagsgesellschaft, Verlag C. H. Beck oHG, Hart Publishing 2018, p. 715, emphasis added.
[4] Sue Arrowsmith and Peter Kunzlik (eds.) *Social and Environmental Policies in EC Procurement Law – New Directives and New Directions,* Cambridge University Press 2009, p. xvii.
[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Sustainable Europe Investment Plan – European Green Deal Investment Plan, Brussels, 14.1.2020, COM (2020) 21 final, see for example chapter 4.2.

or limit the outcome. By lower limit, I mean to which extent, if at all, do environmental considerations have to be taken.

Two different focuses are employed when assessing these limits. Concerning the lower limit, my main focus will be identifying if there is any obligation within the procurement to take environmental considerations. My main focus in the question of the upper limit will be the awarding stage of the procurement process, and in particular the award criteria. This is not to say that environmental considerations cannot be taken in other stages of the procurement process, but merely a result of wanting to explore a more narrow scope thoroughly, rather than taking a more superficial look at a broader question. I will therefore limit the scope of this question to the award criteria.

Sustainable and environmental procurement may be linked to political questions and preferences, but this thesis will not seek to comment on the politics surrounding this topic, but rather focus on the legal implications and policies in this area.

I will also limit myself to look at what the situation is like in the EU, but where relevant I will also use Norway as an example. I will primarily use Directive 2014/24/EU, and not go into for example utilities or concessions. I will also not look into or at contracts below the thresholds stated in Directive 2014/24/EU Art. 4.[6]

In regard to what lies ahead, I will start with explaining the methodology used when addressing these questions. I will continue by defining and explaining the principle of value for money and why it is relevant, both in EU and Norwegian law. I will then look at the lower limit of taking environmental considerations, exploring if there is an obligation to take them, or a mere possibility for contracting authorities to do so. Lastly, I will look at the upper limit for taking environmental considerations, and to which extent they can be taken.

1.2 Methodology

1.2.1 EU legal methodology

In this thesis I will be focusing mainly on EU legislation, and it is therefore important to bear in mind EU legal methodology. The EU is an autonomous legal order, but it consists of many

[6] Directive 2014/24/EU on public procurement, Art. 4.

Member States. If each and every Member State applied its own interpretations, legal method and systems when applying the EU Law, the application and enforcement would vary greatly. Therefore, one must apply the EU's legal method to ensure uniform and consistent use of the EU legal sources.[7] When interpreting EU Directives, I will therefore use the EU legal method. According to case-law, this includes taking into account "wording, context and objectives" when interpreting EU legislation.[8] This has also been followed up in literature.[9] The contextual interpretation also includes a Directive's recitals/preamble.[10] In addition, I will use case-law when the Court of Justice of the European Union (henceforth referred to as the CJEU) has interpreted the legislation in a case, this is in line with ensuring a uniform and consistent application and understanding of EU Law.

Regarding the legal method when it comes to procurement law specifically, the CJEU has used the procurement principles when interpreting the Procurement Directive, which is in line with the EU interpretation method as described above.[11] The principles of public procurement are stated in Art. 18, including equal treatment, proportionality and transparency.[12]

Whether or not Art. 18 (2), which includes taking appropriate measures to protect the environment, also is a principle in EU procurement law is a question that is part of the subject of this thesis, so I will not go into depth here, but look at it more closely later. The same can be said for the principle of value for money as it is more indirectly treated in the Directive, and therefore it is something I will look into below as a part of the thesis.

The main source of law I will use in this thesis, will be Directive 2014/24/EU, henceforth just the Procurement Directive or the 2014 Directive. In the first question, Art. 18 (2) in the Directive will be of particular interest, in addition to some Articles that refer to Art. 18, including Art. 68, 57, and 71. There is not much case-law on Art. 18 (2), the only case I have

[7] Halvard Haukeland Fredriksen and Gjermund Mathisen, *EØS-rett,* 3rd edn, Fagbokforlaget 2018, p. 295. See also Opinion of the Court of 18 December 2014 [P], O*pinion 2/13 of the Court*, EU:C:2014:2454, Paragraph 174.
[8] Judgement of the Court of 15 December 2018 [C3], *Viera de Azevedo*, C-558/15, EU:C:2016:957, Paragraph 19.
[9] Fredriksen and Mathisen (2018) p. 298.
[10] Fredriksen and Mathisen (2018) p. 305.
[11] See for example the comments made in Judgment of the Court of 16 October 2003 [C5], *Commission of the European Communities v Kingdom of Spain*, C-283/00, EU:C:2003:544, Paragraph 73.
[12] Directive 2014/24/EU on public procurement, Art. 18 (1).

found is the Tim Case which will be discussed later.[13] Regarding the upper limit, the focus will be on the awarding stage and Art. 67 in the Directive. Here there is case-law of interest that will be discussed, specifically the Concordia Bus Case, the EVN Wienstrom Case and the Dutch Coffee Case.[14]

1.2.2 Norwegian legal methodology

I will primarily focus on EU law, but use Norway as an example in some cases. The situation in the EU is relevant to Norway as it is an EEA state that has implemented the Directive to its national law.[15] When looking at Norway as an example, I will look at some Norwegian sources of law, and therefore also apply Norwegian legal method. The main difference here will be the use of preparatory works and less focus on principles and context. In the EU there is less focus on preparatory works as a source of Law, than in Norway.[16] Hence, I will only analyse preparatory works when using Norway as an example, and other than that I will apply the EU methodology as described above.

[13] Judgment of the Court of 30 January 2020 [C5], *Tim SpA - Direzione e coordinamento Vivendi SA v Consip SpA and Ministero dell'Economia e delle Finanze*, C-395/18, EU:C:2020:58.
[14] Judgment of the Court of 17 September 2002 [GC], *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne*, C-513/99, EU:C:2002:495.; Judgment of the Court of 4 December 2003 [C5], *EVN AG and Wienstrom GmbH v Republik Österreich*, C448/01, EU:C:2003:651.; Judgment of the Court of 10 May 2012 [C5], *European Commission v Kingdom of the Netherlands*, Case C-368/10, EU:C:2012:284.
[15] *EØS-notat Direktiv om offentlige anskaffelser,* https://www.regjeringen.no/no/sub/eos-notatbasen/notatene/2011/nov/direktiv-om-offentlige-anskaffelser/id2434771/ (17 February 2017).
[16] Fredriksen and Mathisen (2018) p. 306.

2 The principle of "value for money"

2.1 Introduction

2.1.1 What is the principle of value for money?

I will start by looking at what the principle of value for money is, before looking at why the principle is needed. The principle of value for money is sometimes viewed as a balancing act. On one side of the scales is the price being paid, on the other the goods being purchased.[17] When looking at what is being purchased, quality and quantity plays a central role. In the OECD journal, value for money is defined as "what a government judges to be an optimal combination of quantity, quality, features and price (i.e., cost), expected (sometimes, but not always, calculated) over the whole of the project's lifetime."[18] The object when securing good value for money, is often viewed as securing the best possible goods, at the lowest price. However, price alone may not secure the best tender, one must therefore balance both the quality and quantity with the cost of the purchase. For example, the need for good quality may outweigh the need for a low price. Or the good quality may secure a greater lifespan of the particular subject of procurement, meaning that the high initial price is offset by the long timespan of use. In an environmental context, value for money could mean buying something that is recyclable, instead of something that will need to be disposed in a more expensive and environmentally harmful way. One must therefore strive to take into consideration all costs and all benefits with a product, in order to successfully find a balance that yields the best value for money. The OECD journal further concludes that "Thus, the value-for-money concept attempts to encapsulate the interests of citizens, both as taxpayers and recipients of public services.".[19] In light of that conclusion, I will now look further into why value for money is necessary and beneficial.

2.1.2 Why is the principle necessary?

[17] Sue Arrowsmith, *Law of Public and Utilities Procurement: Regulation in the EU Volume 1,* 3rd edn, Sweet and Maxwell 2014, p. 18.
[18] Philippe Burger and Ian Hawkesworth, «How To Attain Value for Money: Comparing PPP and Traditional Infrastructure Public Procurement» *OECD Journal on Budgeting*, (2011) No. 1 pp. 91-146, p. 92.
[19] Burger and Hawkesworth (2011) p. 92.

Arrowsmith suggests that the principle arose because, unlike in private procurement, there was not a way in which to measure the success of a procurement in the public sector.[20] In private companies there is a constant need to keep costs low, because the higher a company's costs, the lower the profit. Inefficient procurement will result in a lowered profit margin, and therefore will be evident for a private procurer as there will be a correlation between high costs and lowered profit. In public procurement, the aim is rarely to make a profit. Many contracting authorities receive government funding, and do not rely on making a profit. In fact, having a "commercial or industrial character" and being "financed, for the most part" by the government are sometimes the very criteria that separate the procurers that are covered by the Procurement Directive and those who are not.[21] The principle of "value for money" is therefore meant to ensure efficient procurement, also in the instances where there is a less evident correlation between inefficient procurement and financial consequences.

Even though the correlation between cost and success is less evident in public procurement, excessive spending in the public sector should still be avoided. The basic concept of a democracy is that the people are to rule, which also means that public spending carries a responsibility. This is supported in the literature with Arrowsmith and Badcoe stating that the money that the government spends, effectively belongs to the citizens, as it is public money.[22] They suggest that the money is held in trust by the government, and that it is to be spent in a "proper manner for the purposes agreed via the democratic process".[23] They therefore concludes "Spending in a proper manner includes delivering value for money".[24] Although Arrowsmith and Badcoe are here referring to the public bodies in the UK's duties, in my opinion a similar notion must necessarily also apply in other democracies. This suggests that there is a responsibility that comes with public spending, as it is effectively the management of the citizens funds. In extension of this, it seems that it is to be considered in line with good governance to ensure efficient use of government funds. Therefore, efficient procurement is both desirable, and to a certain degree necessary, also in the public sector.

2.2 The principle of value for money in EU legislation

[20] Arrowsmith (2014) p. 17.
[21] See Directive 2014/24/EU on public procurement, Art. 2 (1) and Art. 2 (4) (a) and (c).
[22] Arrowsmith (2014) p. 21.
[23] Arrowsmith (2014) p. 21.
[24] Arrowsmith (2014) p. 21.

The principle of value for money is not found explicitly referenced in the Articles of the procurement Directive but is referenced in the Directive's Recitals.[25] In Recital 91, value for money is mentioned in conjunction with taking environmental considerations, which is why it was quoted in the introduction. [26] Other than that, the principle is mentioned in Recital 47 regarding innovation and twice in 93 regarding fixed prices.[27] This indicates that consideration to the principle has been taken, at least in some areas, when forming the Directive. Although the principle is not explicitly found in the Articles of the Directive, there are some indications of a similar notion as value for money found in the Articles of the Directive. In Art. 67, it is stated that the contracting authority should find the "most economic advantageous tender".[28] This may indicate, at least to some extent, that value for money is also of importance in regard to the Directive, as "the most economic advantageous tender" bears some similarities to value for money. If something offers good value for money, that may also be seen as economically advantageous, and vice versa. This is further supported by that leading up to the 2014 Directive, a press release on the EU parliaments webpage states that the new Directive would "ensure better quality and value for money", specifically drawing a parallel to the most advantageous tender criterion; "*Thanks to the new criterion of the* "most economically advantageous tender" (MEAT) in the award procedure, public authorities will be able to put more emphasis on quality, environmental considerations, social aspects or innovation while still taking into account the price and life-cycle-costs of what is procured."[29] I will dive deeper into "finding the most economically advantageous tender" later in the thesis.

Additionally, several member states have adopted it as a principle in their procurement policy, including the EEA member state Norway and the former EU member state the United Kingdom.[30] In the next section, I will discuss the principle in conjunction with Norwegian legislation.

[25] Directive 2014/24/EU on public procurement, see for example Recital 91.
[26] Directive 2014/24/EU on public procurement, Recital 91.
[27] Directive 2014/24/EU on public procurement, Recital 47 and Recital 93.
[28] Directive 2014/24/EU on public procurement, Art. 67.
[29] European Parliament Press Releases, *New EU-procurement rules to ensure better quality and value for money*, https://www.europarl.europa.eu/news/en/press-room/20140110IPR32386/new-eu-procurement-rules-to-ensure-better-quality-and-value-for-money (15 January 2014).
[30] For the UK, see Arrowsmith (2014) p. 17; for Norway, see below in chapter 2.3.

2.3 The principle of value for money in Norwegian legislation

Norway is part of the European Economic Area (the EEA) and Norwegian law must therefore be in line with EU law in the areas covered by the EEA agreement, including public procurement.[31] The Norwegian public procurement legislation has therefore been influenced by EU Law. Norway uses a dualistic approach to international law, meaning that the EU law must be implemented into national law.[32] EU Directives can be implemented in several ways; one can ascertain that national legislation already fulfils the Directive, one can make changes or additions to already existing legislation to ensure harmony and fulfilment of the Directive, or one can give completely new legislation.[33] The new legislation that implements the Directive does not have to mirror the exact wording, as is the case with for example EU Regulations, as long as the legislation is in line with the Directive.[34] In Norway public procurement is regulated in The Norwegian Law of public procurement (anskaffelseloven) and the Norwegian Procurement Regulation (anskaffelseforskriften), they implement the Directive 2014/24/EU into Norwegian legislation.[35] The Procurement Law has more general principles, but also has important rules relating to scope and thresholds. The Regulation bears much similarity to the Procurement Directive, with many of the paragraphs mirroring their EU counterpart with little changes other than being translated to Norwegian.

The Norwegian Law of public procurement (anskaffelseloven) § 1 states that «Loven skal fremme effektiv bruk av samfunnets ressurser», this translates to that law should ensure effective use of societal resources.[36] This law replaced the 1999 law of the same name, which had a very similar § 1 (1), but here it was also stated that the law should contribute to an increase in the creation of wealth in society by ensuring the most effective use of resources possible during public procurement based on commercial practices.[37] In the preparatory

[31] Public procurement is included in Agreement on the European Economic Area, 3 January 1994 OJ L 1, Art. 61.
[32] Fredriksen and Mathisen (2018) p. 358.
[33] Fredriksen and Mathisen (2018) p. 359.
[34] For Regulations, see: TFEU Art. 288 (2); EEA agreement Art. 7 (a); Fredriksen and Mathisen (2018) p. 363.; for Directives, see: EEA Agreement Art. 7 b); Fredriksen and Mathisen (2018) p. 367.
[35] LOV-2016-06-17-73 Lov om offentlige anskaffelser (anskaffelsesloven) § 1; FOR-2016-08-12-974 Forskrift om offentliganskaffelser (anskaffelseforskriften). The word Regulation is the legal term both for EU regulations ("forordninger") and Norwegian regulations ("forskrifter"). When referring to the former I will always state that I mean EU regulations, if not I am referring to Norwegian regulations ("forskrifter").
[36] LOV-2016-06-17-73 Lov om offentlige anskaffelser (anskaffelsesloven) § 1.
[37] LOV-1999-07-16-69 Lov om offentlige anskaffelser (anskaffelsesloven) § 1, emphasis added, unofficial trans. by Lexnet SIA from https://www.lexnet.dk/law/download/pub-proc/No-law7.pdf (read 9 May 2021).

works to the 1999 law, it is stated that the wording "forretningsmessighet" or commercial practices means that the contracting authority should at any given time be considerate of getting the most advantageous procurement, meaning the "best value for money".[38] The principle of "best value for money" is directly referenced in English.[39] In the 1999 law the principle of value was therefore very prominent, but later the wording was streamlined.

The preparatory works to the new Procurement Law do not mention the principle of value for money, but state that the significant change in wording in § 1 was first and foremost a clarification.[40] My understanding is therefore that the change in wording was not meant to change the original meaning, but merely to formulate a clearer and more concise objective for the Law. The same preparatory works state that the main objective is effective use of societies resources.[41] The effective use of societies resources is a term that in itself is similar to the value for money principle, especially as it encompasses economic resources. Securing efficient use of economic resources can be viewed as a different way to phrase "best value for money", as the key component would be very similar, ensuring that there is balance between what is being purchased and how is being paid. If this is the case, the principle of "value for money" still has a prominent place in Norwegian procurement law, being one of the main aims behind the legislation.

Now that I have taken a closer look at what the principle of value for money is, both in an EU and Norwegian context, I will proceed to discuss which role it plays in the Directive when looking at the limits for environmental considerations. First, I will look at the lower limit; meaning if, and to which extent, one has to take environmental considerations in public procurement.

[38] NOU 1997:21 Offentlige anskaffelser, p. 114.
[39] NOU 1997:21 Offentlige anskaffelser, p. 114.
[40] Prop.51 L (2015–2016) Lov om offentlige anskaffelser (anskaffelsesloven), p. 80.
[41] Prop.51 L (2015–2016) Lov om offentlige anskaffelser (anskaffelsesloven), p. 80.

3 The lower limit – to which extent does environmental considerations *have* to be taken?

3.1 Art 18 (2) - Introduction

When it comes to the question of determining the lower limit of environmental considerations in public procurement, I will explore if there is a legal basis for an obligation to take environmental consideration. Are there any obligations to take environmental considerations in the Procurement Directive, and if so, what are they? Article 18 (2) in the Procurement Directive is of great interest for this topic, as it references the environment and the header for Art. 18 is "principles of procurement".[42] The Article has two paragraphs, the first containing the classic procurement principles of transparency, proportionality and equal treatment.[43] The second paragraph reads *"*Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.".[44] The wording "shall" is of particular interest, as it indicates that it is a duty under the Directive, rather than a mere possibility. According to Andhov, using the word "shall" in Art. 18 (2) suggests an obligatory character.[45] If the paragraph is to be interpreted as an obligation, it has to be established *who* it is that is obliged, and furthermore *what* exactly they are obliged to do.

3.2 Art 18 (2) – *who* is obliged?

3.2.1 "Member states"

[42] Directive 2014/24/EU on public procurement, Art. 18 the header and Paragraph 2.
[43] Directive 2014/24/EU on public procurement, Art. 18 (1).
[44] Directive 2014/24/EU on public procurement, Art. 18 (2), emphasis added.
[45] Marta Andhov, *Article 18 (2)*, draft version, p. 1, in Albert Sanchez-Graells and Roberto Caranta (eds.), *Commentary of the Public Procurement Directive (2014/24/EU),* submitted for publishing to Edward Elgar Publishing (2020).

In regard to the "who", Art. 18 (2) addresses "member states", which is interesting because the Procurement Directive refers to the parties tendering as "contracting authorities".[46] These will usually be connected to the states themselves in some way, as it is *public* procurement after all. This link is however not always very direct, a contracting authority can be the central state itself, but also includes smaller local authorities and other bodies governed by public law that fulfil the criteria stated in Art. 2 paragraph 4 a)-c).[47] This means that not all the contracting authorities that do public tendering will be directly bound by the wording "Member States". Steinicke states that Art. 18 (2) obliges the Member States to "ensure compliance", explaining that this means that the instrument for ensuring such compliance should appear in the Member States implementation of the Directive.[48] I interpret this to suggest that not all contracting authorities are directly bound by the wording "Member States". The wording is not aimed at all public procurers, although most of them are somehow connected to the state, but is rather aimed at the central governing Member States themselves. This is also supported by looking at the context, the Procurement Directive itself uses a different wording, "contracting authorities", when addressing all public procurers.[49] Steinecke's point, that the wording should be interpreted as to mean the Member States implementation of the Directive, is further illustrated by that all of the Member States implementations of the procurement Directive includes Art. 18 (2). An example of this is the EEA member state, Norway. The Norwegian Procurement Regulation does not include Art. 18 (2).[50] As mentioned above, the Regulation is otherwise heavily influenced by the Procurement Directive, with most of the paragraphs being translations or at least very similar to those of the Directive.[51] Art. 18 (2) is however not found, but the Norwegian regulations does contain a general paragraph requiring the contracting authority to take environmental considerations.[52]

Andhov suggests that the wording "Member states" may present a challenge, stating that because the Article addresses Member States rather than contracting authorities, "its obligatory character is watered down, creating a challenge of potentially limited

[46] Directive 2014/24/EU on public procurement, Art. 18 (2) for "member states" and Art. 2 for "contracting authorities".
[47] Directive 2014/24/EU on public procurement, Art. 2.
[48] Steinicke and Vesterdorf (2018), p. 331.
[49] See for example Directive 2014/24/EU on public procurement, Art. 2.
[50] FOR-2016-08-12-974, Forskrift om offentliganskaffelser (anskaffelseforskriften).
[51] FOR-2016-08-12-974, Forskrift om offentliganskaffelser (anskaffelseforskriften).
[52] FOR-2016-08-12-974, Forskrift om offentliganskaffelser (anskaffelseforskriften) § 7-9.

enforceability".[53] She therefore suggests that "Article 18(2) must be read in conjunction with Recital (37) of Directive 2014/24/EU, referring to both the Member States and contracting authorities. While the recitals are not binding, the definition of the contracting authority in Directive 2014/24/EU expressly points out that it includes the state.".[54] This could imply that, unlike Steineckes interpretation, art. 18 (2) is meant to go beyond merely influencing the implementation stage of the Procurement Directive, but also be relevant for contracting authorities' practices.

It is therefore not entirely straight forward exactly *who* is bound. The Member States are certainly bound as they are directly addressed, and in my opinion, the headline for Art. 18; "*principles* of procurement" suggest that the Member States are bound both on a general level as a legislator, facilitator and enforcer, but also when they themselves act as a contracting authority.[55] This is also in line with Andhov's statement above. The situation when it comes to contracting authorities other than the state itself, is less clear. On one hand, the Article does not mention them explicitly. If purposely left out, it may not be a loyal interpretation to includes them. On the other hand, the header suggests that the Article is a principle, which could imply all the parties should adhere to the principle. The CJEU also have stated that the header to Art. 18 is of importance, as it implies that the Article in its entirety, including Art. 18 (2), is a principle.[56] There are also the challenges of enforceability that Andhov points out, mentioned above. If the Article cannot be enforced towards *all* contracting authorities, Art. 18 (2) may be void of some of its practical meaning; an obligation that cannot be enforced will have less practical impact than enforceable obligations.

3.3 Art 18 (2) – *what* is the obligation?

3.3.1 "Appropriate measures"

If it was unclear *who* is bound, it might be even less clear what they are bound to. The wording of the obligation, to "take appropriate measures", is quite vague.[57] What kind of measures need to be taken, and how should one determine whether or not they are

[53] Andhov (2020) p. 1.
[54] Andhov (2020) p. 2.
[55] Directive 2014/24/EU on public procurement, Art. 18.
[56] *Tim SpA [C5]* C-395/18, paragraph 38.
[57] Directive 2014/24/EU on public procurement, Art. 18.

appropriate? Arrowsmith describes Art. 18 (2) to give a "general, if rather imprecise obligation on the Member states".[58] She further points out that the obligation is in Art. 18 (2) is presented as part of the "general principles" set out in Art. 18.[59] Arrowsmith operates with two categories, the first is the general obligation, stated in Art 18 (2) itself, and then there are other specific obligations that relates to it. In regard to the general obligation, she states there is discretion for the Member States to decide how to take the measures Art. 18 (2) describes.[60]

When it comes to how the obligation is to be interpreted, she states "At one extreme the CJEU could interpret the provision as requiring specific actions, such as including contract terms or exclusion conditions on such matters, at the other end of the spectrum it might consider that the obligation goes no further than giving consideration to the issue".[61]

I agree with Arrowsmith that the general principle gives a wide spectrum of interpretation. The Directive itself does not give much guidance as to where on that spectrum the obligation lies. It is therefore up to the courts to interpret exactly what this obligation entails and what kind of measures the Member States are obliged to take. If it is a merely a duty to give consideration to the issue, and it does not contain any duty to act or in some cases not to act, the general principle in Art. 18 (2) will not have much of a practical impact beyond being a symbolic principle and giving a signal effect to the Member States.

In Norway, a similar discussion outside public procurement has arisen, with some parallels to this debate. In the Norwegian constitution, there is a general Article, § 112, that protects the environment.[62] In an effort to stop the government's plans to extract oil in the Barents Sea, the environmental organisations Greenpeace and Natur og Ungdom sued the Norwegian Government, claiming this was a breach of § 112.[63] Many of the same discussions were brought up; can a general clause be enforced in this manner, in each individual case? Or, is it a general principle, that allows the Government discretion to decide in which areas to take environmental considerations? If the clause can be enforced in each and every case, the government loses its ability to see the big picture and to prioritize within the scope of their power. If the courts start enforcing the general clause in individual cases, it could easily start

[58] Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK Volume 2,* 3rd edn, Sweet and Maxwell 2018, p. 722.
[59] Arrowsmith (2018), p.722.
[60] Arrowsmith (2018), pp. 722-723.
[61] Arrowsmith (2018), pp. 722-723.
[62] LOV-1814-05-17, Kongeriket Norges Grunnlov §112.
[63] HR-2020-2472-P.

to infringe upon the separation of powers and the executive branch's room to maneuverer and management discretion.[64] However, on the other hand, if the clause cannot be enforced in individual cases, it loses most of its enforceability as a whole, and a right that cannot be enforced might have some symbolic meaning on paper, but in practice will not have much of an impact. Both these aspects were much debated leading up to the supreme court ruling. In the end, Supreme Court of Norway ruled in favour of the government with 11 votes to 4 in a plenary session.[65]

All though this case is not directly relevant for the EU legislation, it illustrates some of the same issues, a principle cannot be so general it ends up not have any meaning, at the same time if an obligation is very particularized and exhaustive it leaves the Member States with little discretion or room to manoeuvre. This issue may be even more prominent in the EU than in the Norwegian environmental lawsuit, as the EU consists of Member States that have their own sovereignty and the CJEU cannot go further than legislation allows, without infringing upon their discretion. In a public procurement context, a strict interpretation of Art. 18 (2) as a principle and clear obligation, may leave the contracting authorities with little room to manoeuvre and prioritize when and where to take environmental considerations, on the other hand, a very loose interpretation of Art. 18 (2) might render it a mere formality without much practical purpose.

It is hard to determine what kind of measures must be taken in order to fulfil the obligation in Art. 18, and how to deem them appropriate. Thus, in regard to the general obligation in Art. 18 (2) itself, it is hard to fully stake out what exactly the obligation entails, and how far in binding the member states it goes.

3.3.2 Which legislation the "appropriate measures" aims to protect

Although the wording "appropriate measures" is vague, what is clear, is what these vague measures are meant to be aimed at; they are to "ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective

[64] HR-2020-2472-P. See for example the Norwegian Governments arguments in Paragraph 39, the Court's presentation of the question in Paragraph 78-83, and the Court's conclusion in Paragraphs 141-144.
[65] HR-2020-2472-P.

agreements or by the international environmental, social and labour law provisions listed in Annex X."[66]

Here, the Article directly references what sort of environmental legislations the measures are aimed at protecting. In regard to EU primary law, the aforementioned TFEU Art. 11 is relevant, as it states that protection of the environment must be implemented into the EU's policies and activities.[67] There are also some secondary laws of interest, for example Directive 2019/1161/EU on clean vehicles.[68] National law will vary of course. As an example, Norway has, as mentioned in the example above, a general constitutional clause protecting the environment.[69] Furthermore, all of the Members States that utilize a dualistic system, will also have to implement the EU Directives in their own national law.[70] This will likely not make much difference regarding Art. 18 (2), as both national and EU legislation are covered by the Article.

Additionally, there are some conventions covered by Annex X to the Procurement Directive. Without commenting too much on the social legislation, Annex X includes several ILO conventions aimed at for example child labour, the right to organize and forced labour.[71] It also contains some relevant legislation regarding the environment, namely the Vienna Convention for the protection of the Ozone Layer and the Montreal Protocol on substances that deplete the Ozone Layer, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), the Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention) and the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10 September 1998, and its 3 regional Protocols.[72] These conventions cover environmental topics such as harmful chemicals and how to dispose them and protecting the ozone layer.

Although it is clear what legislation the Member States are meant to comply with, the problem of how far they have to go in order to ensure compliance still causes some issue. As

[66] Directive 2014/24/EU on public procurement, Art. 18 (2).
[67] TFEU, art. 11.
[68] Directive (EU) 2019/1161 of the European Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles (Text with EEA relevance.).
[69] LOV-1814-05-17, Kongeriket Norges Grunnlov § 112.
[70] See for example Norway, mentioned above in 2.3.
[71] Directive 2014/24/EU on public procurement, Annex X.
[72] Directive 2014/24/EU on public procurement, Annex X.

long as the measures that need to be taken are vague, enforcement is also an issue here. To be clear, if a Member State directly breaches the legislation listed in Annex X, for example their own national law or an EU Directive, it is a different matter and can be enforced through the normal mechanisms. Meaning that a direct breach by a Member State can be taken to the courts responsible for enforcing the legislation, for example CJEU for EU legislation or national courts for national legislation. Some of the legislation in Annex 10 is rather specific, such as the regulations on how to discard certain waste. Breaches of this would be discovered rather easily. Other legislation, such as TFEU Art. 11 and the example of the Norwegian constitutional clause, are in their self rather general.[73] Enforcement and compliance are therefore not always straight forward, as illustrated by the example of the Norwegian environmental lawsuit explained above in 3.3.1. In other words, even though it is clear which legislation the measures are aimed to protect, this does not mitigate the vagueness of the general principle in Art. 18 (2). This is because the issue, in relation to the procurement Directive and specially Art. 18 (2), is how it can be ensured that the Member States take appropriate measures to ensure that procurement happens in compliance with the aforementioned legislation. It is here that the vague criteria cause an issue of enforceability.

To sum it up, the general principle in Art. 18 (2), does contain some sort of obligation, hence the wording "shall".[74] However, this obligation is not very precise, as it is not clear what kind of measures that must be taken, and how one is meant to evaluate whether or not they are appropriate. Therefore, although there is an obligation, it is hard to know what the obligation actually entails as its own general principle. As mentioned above, in addition to the general obligation in Art. 18 itself, there are more specific obligations as well. Article 18 (2) can be used in conjunction with other specific Articles that reference it. In the following, I will take a closer look at these Articles.

3.4 Specific obligations linked to the general obligation in Art. 18 (2)

3.4.1 Art. 69 abnormally low tenders and Art. 18 (2)

[73] TFEU, art. 11; LOV-1814-05-17, Kongeriket Norges Grunnlov § 112.
[74] Directive 2014/24/EU on public procurement, Art. 18 (2).

Art. 69 states that where a tender seems to be abnormally low, the contracting authority shall require an explanation.[75] The fourth paragraph in Article 69 is of particular interest in regard to Art. 18 (2), as it states that: "Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 18(2)".[76]

The word "shall" indicates that there is an obligation to reject the tender.[77] In the context of this thesis, this is relevant because Art. 18 (2) includes environmental considerations, and the obligation to reject a tender if there is non-compliance with 18 (2) could set a lower limit of taking environmental consideration in the procurement process. This may seem rather straight forward, however, the wording "established" indicates that a suspected or probable breach of Art. 18 (2) might not be enough.[78] Furthermore, the wording "because" suggest that not only must one establish non-compliance with Art. 18 (2), that non-compliance has to be the *cause* of the abnormally low price.[79] So, the obligation in Art. 69 (4) may seem rather wide at first glance, but the fact that one has to establish non-compliance with Art. 18 (2) and in addition to that establish a causal-link between the non-compliance and the low price means that the scope of Art. 69 (4) is narrower than it may seem.

Managing to fully establish non-compliance might be a challenge in itself, but manging to establish a casual-link between the non-compliance and the low price is in my opinion also very, if not more, challenging. Although art 69 (4) certainly contains a specific obligation to reject tenders that are abnormally low because they do not comply with Art. 18 (2), in practice, this obligation might have a rather narrow scope. Contracting authorities may still reject the offer in accordance with art. 69 paragraph 3, in cases "where the evidence supplied does not satisfactorily account for the low level of price or costs proposed".[80] This is however not an obligation to reject, the word "may" in Art. 69 (3) suggests an opportunity, not an obligation.[81] The obligation in Art. 69 (1) and (3) is to require an explanation and to assess it, not to reject it or check compliance with the principle in Art. 18 (2).[82] This means that

[75] Directive 2014/24/EU on public procurement, Art. 69 (1).
[76] Directive 2014/24/EU on public procurement, Art. 69 (4), emphasis added.
[77] Directive 2014/24/EU on public procurement, Art. 69.
[78] Directive 2014/24/EU on public procurement, Art. 69 (4).
[79] Directive 2014/24/EU on public procurement, Art. 69 (4).
[80] Directive 2014/24/EU on public procurement, Art. 69 (3).
[81] Directive 2014/24/EU on public procurement, Art. 69 (3).
[82] Directive 2014/24/EU on public procurement, Art. 69 (1) and (3).

contracting authorities have some opportunity to go beyond the scope in Art. 69 (4), but they are not required to thus not mitigating the narrow scope of the obligation in Art. 69 (4).

3.4.2 Art. 57 (4) exclusion grounds and Art. 18 (2)

There is also a possibility to exclude economic operators in Art. 57 (4) a), if the *"*contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2)".[83] This would include violations of environmental obligations that are mentioned in Art. 18 (2).[84] The wording "may" in Art. 57 (4) indicates that this is not an obligation, but a possibility, however the Member States can decide to make it an obligation, hence the wording "or may be required by Member States to exclude".[85] My understanding is that such a requirement from the Member States, may be an example of an "appropriate measure" in Art. 18 (2). [86] For example, a Member State could oblige their contracting authorities to reject tenders in cases where the contracting authority can demonstrate a violation of the environmental legislation mentioned in Art. 18 (2), making it a potentially relevant tool for the Member States to ensure compliance with Art. 18 (2).

In the Member States where such an obligation has been given, that obligation will in my opinion go further than the EU wide obligation in Art. 69. This is a result of the wording in Art. 57 (4) a), as it does not require any causal-link between the violation and for example low price. [87] Meaning one of the two main hindrances found in art. 69 is mitigated. The other main hindrance in Art. 69 is having to establish non-compliance. [88] This seems similar to having to demonstrate a "violation" of applicable obligations in Art. 18 (2). [89] In some cases, being able to demonstrate this might, as is the case with Art. 69, present a challenge. It is not always straight forward to document or secure concrete proof of such violations, in order to offer a satisfactory demonstration. Though, if this can be demonstrated, the fact that one does not need to illustrate any causal-link, means that the scope is not quite as narrow as with Art. 69. It is, however, up to the Member States discretion if exclusion in those cases is a duty or a mere right.

[83] Directive 2014/24/EU on public procurement, Art. 57 (4) a).
[84] Directive 2014/24/EU on public procurement, Art. 18 (2).
[85] Directive 2014/24/EU on public procurement, Art. 57 (4).
[86] Directive 2014/24/EU on public procurement, Art. 18 (2).
[87] Directive 2014/24/EU on public procurement, Art. 57 (4) a).
[88] Directive 2014/24/EU on public procurement, Art. 69 (4).
[89] Directive 2014/24/EU on public procurement, Art. 57 (4) a).

3.4.3 Art. 71 subcontractors and Art. 18 (2)

Art. 71 regulates the use of subcontractors, and is relevant to the thesis because it ensures that contracting authorities cannot circumvent the environmental obligations in Art. 18 (2) by using subcontractors.

The first paragraph of Article 71 states that "[o]bservance of the obligations referred to in Article 18(2) by subcontractors is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit".[90]

The first paragraph faces some of the same issues as the general obligation in Art. 18 (2). It is not addressed to the contracting authorities themselves, narrowing the scope (see above in 3.2.1). Secondly the wording "appropriate action", is like the wording *"*appropriate measures*",* rather vague (see above in 3.3.1).[91]

Paragraph 6, however, exemplifies what measures may be taken to ensure compliance with Art. 18 (2), at least in regard to subcontractors. It gives two suggested measures; a) being that the Member State "provides for a mechanism of joint liability between subcontractors and the main contractor, the Member State concerned shall ensure that the relevant rules are applied in compliance with the conditions set out in Article 18(2)." and b) which includes requiring verification on whether there are grounds for exclusion.[92] These specific examples can mitigate some of the vagueness in the general principle and in Art. 71 (1). The suggestions in Art. 71 (6) themselves, a) and b), will not always be obligations, as the wording "may" and "such as" indicate that they are suggestions on how to fulfil the obligation in Art. 18 (2) in the area of subcontracts, but are not in themselves concrete obligations. [93]

When it comes to Art. 71 (1) it is a bit more uncertain if this is in itself an obligation, or if it is a clarification of who or how to fulfil the obligation in Art. 18 (2) in the area of subcontracting. This distinction will likely not have a big impact in actuality, because either way, Art. 71 does not seem to go further than Art. 18 (2). By this I mean that it does exemplify the obligation in Art. 18, but other than that it may seem that its main function is to specify that one cannot get around Art. 18 (2) by using subcontractors. The obligation in Art.

[90] Directive 2014/24/EU on public procurement, Art. 71 (1).
[91] Directive 2014/24/EU on public procurement, Art. 71 (1) and Art. 18 (2).
[92] Directive 2014/24/EU on public procurement, Art. 71 (6).
[93] Directive 2014/24/EU on public procurement, Art. 71 (6).

71 is in its essence it is very similar to the obligation in Art. 18 (2). This is supported in the literature, with Arrowsmith stating that "… the provisions eventually included are quite limited: they in part merely repeat possibilities that already existed for Member States and include very little by the way of concrete obligations".[94] She sees Art. 71 as an acknowledgment of the obligation in the context of subcontracting.[95] In light of this, the same must be said for Art. 71 as Art. 18 (2); the obligation also applies when subcontracting, however, what exactly the obligation is and how far it goes is unclear.

3.4.4 The Tim Case

In recent CJEU case-law the Tim Case might offer some clarification in the area of subcontracting, as this was the situation in the case, but it may also shed some light on the general obligations as well.[96] A tenderer had been rejected due to one of their subcontractors breaching Art. 18 (2). The breach was related to accessibility, which is one of the social considerations in Art. 18 (2), so although not directly relevant to the environment and subject to this thesis, I do not find there are grounds to treat breaches of the legislation mentioned in Art. 18 (2) differently. There was some discussion about what the subcontractors breach meant; should the tender be rejected, or could the tender still participate, needing only to replace the subcontractor. The case also touches on whether Art. 18 (2) is a principle and the proportionality aspect of applying Art. 57 (4).

Paragraph 38 in the case is of great interest regarding the status of Art. 18 (2) as a principle. The court states:

"it should be noted that Article 18 of Directive 2014/24, entitled 'Principles of procurement', is the first article of Chapter II of that directive devoted to 'general rules' on public procurement procedures. Accordingly, by providing in paragraph 2 of that article that economic operators must comply, in the performance of the contract, with obligations relating to environmental, social and labour law, the Union legislature sought to establish that requirement as a principle, like the other principles referred to in paragraph 1 of that article, namely the principles of equal treatment, non-discrimination, transparency, proportionality […]. It follows that such a requirement constitutes, in the general scheme of that directive, a

[94] Arrowsmith (2018), p. 723.
[95] Arrowsmith (2018), p. 724.
[96] *Tim SpA [C5]* C-395/18.

cardinal value with which the Member States must ensure compliance pursuant to the wording of Article 18(2) of that directive*"*.[97]

This indicates that Article 18 (2) certainly should be seen as an obligation, as it is described as a principle and a cardinal value. There are no grounds for interpreting the case to mean that only parts of Art. 18 (2) are principles, the environmental aspect of Art. 18 (2) is specifically mentioned and must be included. The scope of the obligation is also clarified somewhat, rather than the more vague "take appropriate measures to ensure" in Art. 18 (2) it states that the that the Members "must ensure" compliance.[98] This could indicate, that on the spectrum of interpretation (mentioned above in 3.3.1); the obligation in Art. 18 (2) should be interpreted rather widely. The Court's' interpretation seems to extend beyond an obligation simply to make considerations; the Member States actually have to take action to ensure compliance.

Regarding the proportionality, the Court found that an automatic rejection of the tender (which was according to national law, this does not follow directly from the wording in Art. 57 (4) itself), was not compatible with Art. 57 (4).[99] Had it been a non-automatic obligation to reject was however, it would had been in line with the Directive.[100] This illustrates that the Member States can go rather far in order to ensure compliance with Art. 18 (2), as long as the principle of proportionality is maintained, the Member States can oblige the contracting authorities to reject tenders in accordance with Art. 57 (4). This would not be the case if there was an obligation for an automatic rejection that deprived the contracting authority of taking any discretion and also deprived the economic operator the opportunity to give any closer information regarding the situation.[101] It must, however, be the case in the area of environment because, as with the considerations taken in the Tim Case, it is mentioned in Art. 18 (2). When the Court states that Art. 18 (2) is a principle, it must be interpreted to include the environment as it is explicitly mentioned.

3.5 Conclusion – Opportunity or obligation?

[97] *Tim SpA [C5]* C-395/18, Paragraph 38, emphasis added.
[98] Directive 2014/24/EU on public procurement, Art. 18; *Tim SpA [C5]* C-395/18, Paragraph 38.
[99] *Tim SpA [C5]* C-395/18.
[100] *Tim SpA [C5]* C-395/18, Paragraphs 54 and 55.
[101] *Tim SpA [C5]* C-395/18.

In light of the discussion above, it is hard to give a clear-cut conclusion to the question of whether or not there is an obligation to take environmental considerations. In light of the Tim Case that goes so far in establishing Art. 18 (2) as a principle, the answer seems to be yes.

However, although Art. 18 (2) entails some sort of obligation, it is not easy to conclude exactly what the obligation entails. The Tim Case does shed some light on the matter, because regarding Art. 18 (2) as a principle and value in procurement, indicates it could be a quite exhaustive obligation, especially if it is to be given the same rank as for example transparency and proportionality. There is also the problem of enforcement because the principle is so general and vague. If it is hard to enforce, it might not have much impact in actuality. In regard to specific situations, the most clear-cut obligation is in Art. 69.[102] This lays a rather clear obligation to reject the tender in certain cases, however the need to establish non-compliance with, and a casual-link to, Art. 18 (2), might result in the actual scope of Art. 69 to be somewhat narrow.[103]

All in all, there are obligations to take environmental consideration, but what those obligations specifically are, remains to be fully discovered.

[102] Directive 2014/24/EU on public procurement, Art. 59.
[103] Directive 2014/24/EU on public procurement, Art. 69.

4 The upper limit – to which extent *may* environmental considerations be taken?

4.1 Introduction to Art. 67 - Taking environmental considerations in the awarding phase

4.1.1 Finding the most "economically advantageous tender" and the two main ways to procure

Now that we have established that there is obligation to take the environment into account, at least to some degree for the Member States, I will look at the possibility to take environmental considerations, and where the upper limit for taking them lies. I will be paying specific attention to the value for money principle and the how the monetary aspect is mentioned in the Directive.

Although there is a possibility to take environmental considerations at different stages throughout the procurement process, I will, for the sake of limiting the scope of the thesis, focus on the awarding stage. [104] In the awarding phase, it is Art. 67 that is of particular interest as it regulates which award criteria may be set to the tenders.[105]

Article 67 sets out the objective for awarding contracts; the contracting authority are to "base the award of public contracts on the most economically advantageous tender".[106] The second paragraph of the Article goes more in-depth on what finding the most "economically advantageous tender" is.[107] My understanding of the wording in Art. 67, is that it seems to give two methods for finding the most "economically advantageous tender".[108] The first method is to evaluate tenders is "identified on the basis of the price or cost". [109] This solely looks at price or cost. The lowest price or cost wins the tender, as is seen as the most economically advantageous under this model. The second method is to "include the best price-quality ratio which shall be assessed on the basis of criteria, including qualitative,

[104] See for example Directive 2014/24/EU on public procurement, Recital 40.
[105] Directive 2014/24/EU on public procurement, Art. 67.
[106] Directive 2014/24/EU on public procurement, Art. 67 (1).
[107] Directive 2014/24/EU on public procurement, Art. 67 (2).
[108] Directive 2014/24/EU on public procurement, Art. 67 (2).
[109] Directive 2014/24/EU on public procurement, Art. 67 (2).

environmental and/or social aspects, linked to the subject-matter of the public contract in question". [110] This method takes into account the price, but also other criteria that the contracting authority may set. The best balance of these two components is seen as the most economic advantageous tender.

The two method approach is supported by Sanchez-Graells, who states that under the Directive, contracting authorities can choose between two rules to determine the most economically advantageous tender.[111] He calls the two methods best price-quality ratio (BPQR) and most cost-effective offer (MCE).[112] In regard to the topic of the thesis, this is particularly relevant, as the best price-quality ratio bears much resemblance to the value for money principle.

Because there are two methods to award the contract there is therefore also two ways of including environmental factors when selecting the tender. They present different limits and challenges. The best price-quality ratio (BPQR) model has the clearest resemblance to the value for money principle, in that it aims to balance the financial aspect with what the contract is to deliver; The price is balanced against how well the quality meets certain criteria. I will look more closely at both these methods later, to see how one can include environmental considerations, and if and how the principle of "value for money" may be upheld in both.

4.1.2 There must be an economic aspect when awarding contracts

Before looking more closely at the different methods, I would like to emphasise that one cannot *only* take environmental considerations. My interpretation is that Art. 67 suggests there must always be some sort of economic or monetary aspect. If this were not the case, it would likely be difficult to harmonize with the value for money principle.

As previously mentioned, Article 67 states that the contracting authorities should award contracts based on "the most economically advantageous tender".[113] My interpretation of the wording "economically" certainly suggests that there's at least some element of monetary

[110] Directive 2014/24/EU on public procurement, Art. 67 (2).
[111] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules*, 2nd edn, Hart Publishing (2015) p. 379.
[112] Sanchez-Graells (2018), p. 379.
[113] Directive 2014/24/EU on public procurement, Art. 67 (1).

value, and removing any monetary or financial element from the contract seems to be outside the scope of Article, and may therefore not be in line with the Procurement Directive. This is also supported by Recital 92; it states that "To identify the most economically advantageous tender, the contract award decision should not be based on non-cost criteria only".[114] In Recital 90 it is stated that "It should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the best price-quality ratio, which should always include a price or cost element.".[115] This quote is referencing the price-quality ratio that will be commented on further below, but it also clearly illustrates that one cannot completely leave price out of the equation. If connected to the value for money principle, this means that there is a limit as how far it can be stretched, one cannot go so far in pursuit of for example an environmentally beneficial contract, that one negates to factor in money at all. Seen in light of the discussion above in 2.1.2, about why the principle of value for money is necessary, this makes sense; public procurement is spending public money and with that public spending comes responsibilities. If one could procure without taking any consideration to price or cost; freely spending the public funds without reservations, it would in my opinion be hard, if not impossible, to uphold that responsibility.

4.2 Art. 67 – The best price-quality ratio method

4.2.1 Introduction

Article 67 (2) states that finding the most economically advantageous tender "may include the best price-quality ratio which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question". The mentioning of a "price-quality ratio" or BPQR is, as mentioned above, interesting as it seems to me to describe the "value for money" principle in its simplest form, containing both elements of the balancing act. The Article further elaborates that the BPQR method must be based on the criteria set forth.[116] The Article itself clearly states that environmental aspects can be included in these criteria. The Article also gives a limitation, the criteria need to me "linked to the subject-matter of the contract in question", meaning that

[114] Directive 2014/24/EU on public procurement, Recital 90, emphasis added.
[115] Directive 2014/24/EU on public procurement, Recital 90.
[116] Directive 2014/24/EU on public procurement, Art. 67 (2).

broader considerations, on a societal level may be outside the scope, as they may be harder to link to the contract at hand, and its subject-matter. [117]

I will now look further into what it means that that award criteria have to be "linked to the subject-matter", in particular in will in regard to environmental award criteria[118]

4.2.2 Linked to the subject-matter of the contract

Before the 2014 Directive and Art. 67 as we now know it, taking environmental considerations and the link to the subject-matter was developed by the CJEU. I will start by going through some of the more central cases regarding this. The previous procurement Directives had a similar condition to award criteria and several cases discussed what should be viewed as relating to the subject-matter.

In the Concordia bus Case one of the questions discussed was whether taking environmental considerations, specifically gas emissions and noise considerations, was to be considered linked to the subject-matter. The court stated that:

"where the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender […]it may take criteria relating to the preservation of the environment into consideration, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

65 With respect to the main proceedings, it must be stated, first, that criteria relating to the level of nitrogen oxide emissions and the noise level of the buses […"] must be regarded as linked to the subject-matter of a contract for the provision of urban bus transport services" [119]

This illustrates a few important points. Firstly, it explicitly states that one may take consideration to the preservation to the environment. Furthermore, these environmental considerations still have to be linked to the subject-matter, in extension of this, it must mean that there are environmental considerations that could be viewed as not linked to the subject-

[117] Directive 2014/24/EU on public procurement, Art. 67 (2).
[118] Directive 2014/24/EU on public procurement, Art. 67 (2).
[119] *Concordia Bus [GC]* C-513/99, Paragraphs 64 and 65, emphasis added.

matter. The quote also stresses that this does not mean that the contraction authority has unrestricted freedom or is exempt from fundamental principles of the EU law.

Lastly, it is important to note that the court do not state that emissions and noise levels would always be relevant considerations for any procurements. The court states that emissions and noise levels must be considered linked to the subject-matter "of a contract for the provision of urban bus transport services". Note how specific the court is here, my interpretation of this is that this indicates that general environmental considerations may fall outside the scope because they have to be linked to the subject-matter to the specific contract.

The Concordia Bus Case was later followed up in the EVN Wienstrom Case.[120] The case concerned the procurement of electricity, and the impact on the environment was one of the criteria being used to identify the most economically advantageous tender. The court referenced the Concordia case, and confirmed that award criteria does not have to be purely economic stating that "where a contracting authority decides to award a contract to the tenderer who submits the most economically advantageous tender it may take into consideration ecological criteria".[121] Furthermore the court accepted that an award criteria based on renewable energy in an contract about electricity did not violate the Directive, stating that "the Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, an award criterion with a weighting of 45% which requires that the electricity supplied be produced from renewable energy sources."[122].

They did, however, find that for the contract at hand, it had not been connected to the subject-matter due to the sole focus on the environmental aspect, stating that "An award criterion that relates solely to the amount of electricity produced from renewable energy sources in excess of the expected annual consumption, as laid down in the invitation to tender, cannot be regarded as linked to the subject-matter of the contract."[123]

The EVN Wienstrom Case further reiterates that the link to the subject-matter must be evaluated individually on a case-by-case basis. A criterion that generally was linked to the

[120] *EVN Wienstrom [C5]* C-448/01.
[121] *EVN Wienstrom [C5]* C-448/01, Paragraph 33.
[122] *EVN Wienstrom [C5]* C-448/01, paragraph 72.
[123] *EVN Wienstrom [C5]* C-448/01, paragraph 68.

subject-matter of the contract, in this case renewable energy and electricity, was not considered linked to the subject-matter in that specific case.[124]

In the Dutch Coffee Case one of questions of whether criteria that coffee must have a certain fairtrade label was connected to the subject-matter.[125] In particular, if because the label was linked to the origin of the product, the link to the subject-matter was insufficient. The Court however found that the link was sufficient, stating "there is no requirement that an award criterion relates to an intrinsic characteristic of a product, that is to say something which forms part of the material substance thereof." and further concluded "There is therefore nothing, in principle, to preclude such a criterion from referring to the fact that the product concerned was of fair trade origin.".[126]

Much of this case-law has now been codified in Directive 2014/24/EU Art. 67 (2), which states that one can take environmental considerations as long as they are linked to the subject-matter. What is to be considered linked to the subject-matter of the contracts, is further defined in the Article's third paragraph, which states that "Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle".[127]

This sheds some light some light on what the condition that criteria must be linked to the subject-matter of the contract means, as it states that they have to relate to the work, supply or service. My understanding of the wording "relate" is that very broad or societal considerations will fall outside the scope as they don't relate to the subject-matter of the contract itself.[128] It is however interesting that the criteria can relate to any stage of the life cycle of the product/work/supply. I will go further into what life-cycle costing entails when discussing the MCE method, but for now comment that as the life cycle of the contract will broaden the scope of what the consideration may relate to. For example, the time aspect will be broadened, as the consideration can relate to the any stage of the subject's life cycle, including for example the productions stage or the end of the life stage. For example, one can take environmental considerations by having an award criterion based on whether the product can

[124] *EVN Wienstrom [C5]* C-448/01.
[125] *Commision v Netherlands [C5]* C-368/10.
[126] *Commision v Netherlands [C5]* C-368/10, Paragraph 91.
[127] Directive 2014/24/EU on public procurement, Art. 67 (2), emphasis added.
[128] Directive 2014/24/EU on public procurement, Art. 67 (2).

be recycled or not, even though this relates to the stage after the product has served its purpose of fulfilling the subject-matter of the contract.

Although the 2014 Directive now allows the whole life cycle to be relevant when linking the criteria to the subject-matter, this is not without limits. Indén suggests that criteria that are only remotely linked to the production process, would not have an adequate link to the subject-matter of the contract.[129] This illustrates that there still is a limit to how far one can stretch the considerations, and that although there is some connection to a stage of the process this connection has to be adequate, and not just remotely connected.

This does however not mean that the award criteria do not have to be related to the technical specification in order to be seen as related to the subject-matter, this is clearer under the 2014 Directive than before.[130] Indén writes that "This broader interpretation of the link to the subject-matter of the contract favours the use of, social, environmental and innovation considerations as award criteria".[131]

The notion that the subject-matter has been broadened in the 2014 Directive is supported by EU case-law discussed above, and Kunzlik comments on some of that case-law, stating that "It is important that the ECJ's language in Concordia Bus Finland and in EVN-Wienstrom requires only that the requirement merely be 'linked' to the subject matter of the contract, a reasonably wide formula, and not that it be 'directly' linked."[132] This suggest that although very remote connections are not adequate, there is not a requirement that of an direct link.

Lastly, the principles of EU law and in particular EU procurement law may set a limit for which environmental considerations can be taken. This is illustrated in the three cases above. In the Dutch Coffee Case the Court stated that contracting authorities must ensure compliance "with both the principle of the equal treatment of potential tenderers and the principle of transparency of the award criteria" when awarding contracts.[133] In the Concordia bus case it is stated that the criteria must "comply with all the fundamental principles of Community law, in particular the principle of non-discrimination".[134] In the EVN Wienstrom Case, proportionality seems to have played a role, as it is generally stated that the EU procurement

[129] Steinicke and Vesterdorf (2018) p. 728.
[130] Steinicke and Vesterdorf (2018) p.727.
[131] Steinicke and Vesterdorf (2018) p.727.
[132] Arrowsmith and Kunzlik (2009) p. 403.
[133] *Commision v Netherlands [C5]* C-368/10, Paragraph 88, emphasis added.
[134] *Concordia Bus [GC]* C-513/99, Paragraph 64.

law does not hinder taking into consideration renewable energy when procuring electricity, but in the case at hand it was given as a sole factor, thus the court did not view the criteria as linked to the subject-matter.[135]

When it comes to procurement law specifically, Art. 18 (1) list some relevant principles, including equal treatment, transparency and proportionality. This means that using an award criterion that in practice will result in unequal treatment, may be unsuitable. For example, if a contracting authority sets specific criteria to the amount of distance the products can travel, although transport is technically a part of the life cycle of the product and transport emissions are undoubtfully harmful to the environment, this approach will favour suppliers in the contracting authorities' state or surrounding states, and not secure equal treatment to all the Member States. Therefore, I would consider the principle of equal treatment to present a challenge if taking that approach.

4.3 Art. 67 – The most cost-effective offer method

Art. 67 states that the most economically advantageous tender can be "identified on the basis of the price or cost".[136] "Price" indicates the quantitative payment for the goods or service. It is, however, more challenging to clearly define what should be included in the cost of a given tender, and there are numerous methods of deciding what should and should not be included in the calculations. Furthermore, the price often has a far less complicated timeline; it is usually what must be paid at the moment of the purchase.

Article 67 provides an example of a method for calculating the cost, namely the life-cycle cost method.[137] By using life-cycle costing it is possible to take environmental considerations using the MCE approach. This can be achieved by factoring in all the relevant costs, including environmental and other externalities, during the entire lifespan of the subject of procurement.[138] Life-cycle costing internalizes some of the external costs of the contracting authorities into the cost evaluation of procurement itself. For example, if a good is recyclable

[135] *EVN Wienstrom [C5]* C-448/01, Paragraph 68 seen in light of Paragraph 72.
[136] Directive 2014/24/EU on public procurement, Art. 67 (2).
[137] Directive 2014/24/EU on public procurement, Art. 67 (2).
[138] See for example Directive 2014/24/EU on public procurement, Recital 96 and Art. 68 (1) b.

rather than having to be disposed of in a specific and expensive way, the external price of disposing the item after use, will now be factored into the cost of the good itself.

MCE will also not present much challenge to the value for money principle, as one is still choosing the most cost-effective option. This however does stress the importance of using the same costing method for all the tenderers, including the same factors. At the core of the value for money principle, is the balancing of the value and the cost of what is being purchased. Different tenders might offer different value at different costs. If one were to consider only the cost of the tenders, the tender with the lowest cost would have to be chosen over the alternative, even if the alternative provided a substantially higher value with only a marginally higher cost.

In order to secure value for money, it is therefore important that the same or similar criteria is included in the costing. This is also in line principle of equal treatment, ensuring that the costs being compared includes the same factors. Using Art. 68 and comparing costs based on the same criteria for what is included in the cost, is therefore also important from a procurement standpoint, ensuring equal treatments and equal grounds for competition.

I will not go further into the technicalities of life-cycle costing, but will briefly comment that there will be an outer limit to how and which externalities can be included. This is of interest, as it can affect to which extent environmental considerations can be taken using this method. This is shown by the wording in Art. 68 specifies that life-cycle costing "shall to the extent relevant cover parts or all of the following costs […]" this includes "environmental externalities linked to the product".[139] Furthermore, there is a condition for including environmental externalities, that "their monetary value can be determined and verified".[140]

The condition that it must be possible to determine a monetary value to the environmental externalities, hinders very vague and non-monetary environmental considerations be taken as a part of the costing. This is, in my opinion, crucial to the value for money principle, as it hinders non-monetary, broad and vague considerations to be masked as something concrete and defined, blurring the comparison and choice between different tenders. Furthermore, allowing costing to happen based on non-monetary value, could risk undermining the requirement that there must be an economic aspect when awarding contracts, as discussed in

[139] Directive 2014/24/EU on public procurement, Art. 68 (1), emphasis added.
[140] Directive 2014/24/EU on public procurement, Art. 68 (1) (b), emphasis added.

chapter 4.1.2. It also prevents circumvention of the condition that environmental considerations must be linked to the subject-matter when using the BPQR method.

It is more unclear if the requirement that conditions are linked to the subject-matter also applies to the price and cost portion of Article 67, but if one could bypass the condition that environmental considerations should be connected to subject-matter by costing them instead this could render that condition ineffective. Indén does however state that "*The objective of ensuring contracting authorities better opportunities to use procurement as a tool to achieve a common goal is realised, inter alia, through the consideration of the environment in the awarding of public contracts. The most obvious example of this is found in the option o contracting [authorities] to use life-cycle costing as award criterion. For this reason, the new directive implies that link between award criterion and the subject matter of the contract, has been relaxed*"[141] In light of this, Art. 68 is important, as it requires the environmental externalities to be valued in money. This means that contracting authorities cannot easily bypass the criteria that environmental considerations have to be linked to the subject-matter by costing the considerations instead. Costing can only be used for environmental aspects that can be valued in money; if one wants to take considerations that cannot be valued in money, one has to use the Best price-quality ratio method. Furthermore, Art. 68 requires that the costs included are "relevant" and that environmental externalities are "linked to the product", also setting a limit of taking very broad or vague considerations. With these mechanisms in mind, this form of costing does not seem to interfere with the value for money principle.

4.4 Conclusion – taking environmental considerations in the awarding stage

In light of the limitations found in Art. 67 itself, it begs the question of if the value for money principle can further limit to which extent one can take environment considerations. My conclusion is that this is not the case. As concluded above, there still has to be some sort of monetary or economic element in the procurement. Furthermore, the value for money principle does not seem to limit what one can or can't buy, but rather provide guidelines of how to buy. By this I mean it is up to the contracting authority to decide what to buy and

[141] Steinicke and Vesterdorf (2018) p.715, emphasis added.

define the subject-matter, and then when procuring that subject-matter, they can use the value for money principle.

As Art. 67 requires a link to the subject-matter, it therefore does not contravene with the value for money principle. This is also in line with the quote from Recital 91 mentioned in the introduction; the Directive is meant to give ways to do environmental procurement and keep in line with the value for money principle. I see both the requirement to an economic element and the requirement for a link to the subject-matter as fulfilments of that description in the Recital. This finds further support in the literature, for example Trybus writes that "Moreover, they emphasise that environmental considerations must be relevant to the subject matter of the contract, must be consistent with the government's procurement policy based on value for money, and must be approached from a whole life cycle cost perspective. Hence for the Government there is no conflict between environmental considerations and value for money, the earlier "can be consistent with achieving" the latter."[142] The quote is in relation to the UK government, but as the UK is one of the states that strongly emphasizes the value for money principle, it must be seen as relevant also for other states.

[142] Roberto Caranta and Martin Trybus (eds.), *The Law of Green and Social Procurement in Europe*, 1st edn, DJØF Publishing 2010, p. 281.

5 Striking a balance – my final thoughts and conclusions

5.1 The question of the lower limit

The first question I examined, was the lower limit for taking environmental considerations. My approach was to explore if the Procurement Directive gives any obligation to do so. The clearest find was that through the use of the word "shall", Art. 18 seems to give some obligation to, and therefore also a lower limit of, taking environmental considerations.[143] There are, however, some challenges in interpreting where exactly the lower limit in Art. 18 lies, both regarding who is obliged and what the obligation entails. The Article addresses the Member States rather than contracting authorities, giving grounds to uncertainty regarding who is obliged. Furthermore, the wording in Art 18 (2) to "take appropriate measures" is also relatively vague, and it is therefore difficult to identify exactly what the obligation entails.[144]

The clearest find of a lower limit is Art. 18 (2) in conjunction with Art. 69, where there is an obligation to reject tenders that are abnormally low due to breaching the legislation mentioned in Art. 18 (2).[145] The criteria for doing so are that the breach has to be established, and it has to be the cause of the low tender.[146] These criteria make the scope rather narrow. Despite this, it is the least vague lower limit I found; contracting authorities *have to* reject those low tenders, and taking less consideration to the environment than that, is below the limit.

Furthermore, the Member States may according to Art. 57, oblige its contracting authorities to reject tenders that breaches that legislation, also where this does not cause the tender to be abnormally low.[147] There is not an obligation to do so, as per the wording "may" in Art. 57.[148] The paragraph is however still interesting, because it can serve as an exemplification of a way to fulfil the rather vague obligation in Art. 18 (2).

[143] Directive 2014/24/EU on public procurement, Art. 18 (2).
[144] Directive 2014/24/EU on public procurement, Art. 18 (2).
[145] Directive 2014/24/EU on public procurement, Art. 69 and 18 (2).
[146] Directive 2014/24/EU on public procurement, Art. 69.
[147] Directive 2014/24/EU on public procurement, Art. 57 (4).
[148] Directive 2014/24/EU on public procurement, Art. 57 (4).

5.2 The question of the upper limit

When it comes to the second question, the upper limit of taking environmental considerations, I found that there were two ways of taking environmental considerations in the awarding stage. Both have limitations, and those limitations also serve as the upper limit of taking environmental considerations in the awarding stage. Through the best price-quality (BPQR) method one can take environmental consideration through including them in award criteria. The BPQR method's limit for taking environmental considerations is that award criteria have to be linked to the subject-matter.[149] This link has to be evaluated on a case-by-case basis and the principle of equal treatment has to be upheld.[150] The Most cost efficient offer (MCE) method can include environmental considerations though mechanisms such as life-cycle costing.[151] The limit here is that one can only include life-cycle costs that can be valued in money, otherwise they have to be included as award criteria and linked to the subject-matter.[152]

When it comes to the question of how far one can go in considering environmental issues, the clearest find in the Directive is that the monetary aspect cannot be negated completely. There has to be some element of price or cost regardless – a tender that is completely *non-economic*, cannot be the most *economically* advantageous.

5.3 Striking a balance with value for money

When it comes to balancing the environmental considerations with the value for money principle, an important find is that there must be a monetary or economic aspect when awarding contracts. This is in accordance both with the wording in Art. 67 and the Recitals of the Procurement Directive.[153] This clear requirement to include a monetary or economic aspect ties into the harmonisation between taking environmental consideration and value for money; one cannot completely negate the economical aspect. However, through the obligation in Art. 18 (2), the environmental considerations cannot be completely negated either. The clearest example of this is the lower limit set by Art. 69 in conjunction with Art.

[149] Directive 2014/24/EU on public procurement, Art. 67 (2).
[150] *EVN Wienstrom [C5]* C-448/01.
[151] Directive 2014/24/EU on public procurement, Art. 67 (2) and Art. 68 (1).
[152] Directive 2014/24/EU on public procurement, Art. 68 (1) (b).
[153] See the discussion above in 4.1.2.

18 (2).[154] For example, if a high-quality tender is priced very low and has the best value for money, but it is discovered that the reason for the low price is that the toxic waste from the production is discarded into the ocean rather than being disposed of properly, this tender has to be rejected. In other words, in the same way that the environmental considerations cannot completely negate cost (there has to at least be some sort of monetary element, see above), value for money cannot completely negate environmental considerations.

If this is true, that neither value for money nor environmental considerations may be completely negated in light of the other, how then should they be balanced? This is something this thesis has tried to answer, based both on the existing legislation, case-law and literature. Again, the Tim Case can shed some light on this question.[155] The case illustrates two important points that this thesis highlights.

The first is that Art. 18 (2) is given status as a principle.[156] The second is that the court weigh the principle in Art. 18 (2) with the proportionality principle in Art. 18 (1). The outcome was that the automatic nature of the rejection was not proportionate, and the proportionality principle outweighed the principle in Art. 18 (2) in that specific case.[157] Therefore, although it has a status as a principle, Art. 18 (2) does not always prevail, not when other principles outweigh it. The court balances the two principles against each over. This is very interesting, and suggests that if the principles do collide, they need to be balanced and harmonized in each specific case. At the same time, the principle of value for money's status is not as clear as for example the principle of proportionality, as it is not mentioned as explicitly in the Directive's Articles.

With this in mind, the main conclusion drawn in this thesis is perhaps not very surprising; neither value for money, nor environmental considerations, can fully outweigh the other.

Should there arise conflict between the two, the procurement Directive does offer some harmonization mechanisms. The first mechanism is life-cycle costing, where cost and environmental considerations do not compete with each other. The second, is the inclusion of environmental considerations only related to the subject-matter of the contract.

[154] Directive 2014/24/EU on public procurement, Art. 67 (2) and Art. 68 (1).
[155] *Tim SpA [C5]* C-395/18.
[156] *Tim SpA [C5]* C-395/18, Paragraph 38.
[157] *Tim SpA [C5]* C-395/18.

For instance, regarding life-cycle costing I submit that this tool allows environmental considerations to be costed as environmental externalities, and they do therefore not directly compete with the price or cost. In the extension of this, if one sees the value for money principle as balancing the scales, the environmental considerations do not add any weight because they have become part of the cost element. They do not contravene with price, as they might have done if they had to be balanced as a counterpart to the price. Here it is important to bear in mind that according Art. 68 the environmental considerations have to be able to be valued in money in order to be costed as a part of the life-cycle costing mechanism.[158] If this was not the case, they would not truly be a part of the cost element, but a non-economic consideration that is being exempt from the balancing act. The criteria that environmental externalities have to be able to be valued economically is therefore important for the harmonization with the value for money principle.

Another harmonizing mechanism is that Art. 67 requires environmental considerations to be linked to the subject-matter of the contract. [159] This means that very broad considerations that are not connected to the contract, cannot be achieved through the award criteria public procurement. Thus, not allowing public funds to be spent through procurement on very broad environmental policies that have not gone the normal democratic route through legislation. It therefore, in line with the value for money principle, ensures the efficient spending of public funds.

Outside of those instances, should a conflict between the two principles arise, a possible solution could be to balance them according to the specific case in hand, as illustrated by the Tim Case.[160] In the Tim Case the environmental considerations where balanced with the principle of proportionality.[161] Although proportionality is a more established principle in the EU than perhaps value for money is in public procurement, there seems to be little grounds to not use such a method. Particularly because at the very heart of the value for money principle lies a balancing act, which bears much similarity to proportionality. By this I mean that the one way to look at value for money principle, is that value and the price have to be balanced in such a way that they are proportionate on a case-by-case basis.

[158] Directive 2014/24/EU on public procurement, Art. 68 (1) (b).
[159] Directive 2014/24/EU on public procurement, Art. 67 (2).
[160] *Tim SpA [C5]* C-395/18.
[161] *Tim SpA [C5]* C-395/18.

This could suggest that if there should arise a situation where the Procurement Directive's harmonization mechanisms fail, and a conflict between environmental considerations and value for money does arise, they might have to be balanced with each other in line with the EU principle of proportionality, on a case-by-case basis. This was the solution in the Tim Case, and therefore seems be a sufficient way to resolve such a conflict.[162] This issue does however remain uncertain territory, and as the interest for green solutions is gaining traction, it remains to be seen if any instances of conflict between environmental considerations and the principle of value for money arise. If a conflict should arise, it also remains to be seen how and if the CJEU will harmonize them.

[162] *Tim SpA [C5]* C-395/18.

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