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Public Procurement, Culture and Mozzarella: 'Que dici ?'

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Directive 2014/24/EU on public procurement[1] establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is above the European thresholds. Next to purely economic goals, the Directive incorporates common societal goals and aims to contribute to environmental and social objectives and sustainable innovation as well. Directive 2014/24/EU does not refer to cultural considerations in general. It only contains a specific exclusion from the scope of application of the Directive for audiovisual or radio media services and indicates that a special regime is applicable to certain social and other specific services as it is believed that they have by their very nature a limited cross-border dimension. These 'special' services are provided within a national context that varies among the Member States due to different cultural traditions. For the procurement of works, supplies and services that do not fall within this special category, specific cultural considerations seem not to be warranted. While on the one hand, procurement procedures have to be applied in conformity with the principle of equal treatment so that all tenderers must have equality of opportunity when formulating their tenders, Article 167 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) holds that Member States are the principal actors in charge of the flowering of their cultures, that the EU should contribute to this and that it should respect the Member State's national and regional diversity. This article will investigate whether and in how far Directive 2014/24/EU allows room for national contracting authorities to explicitly and implicitly take cultural concerns into account in procurement procedures. The purchase of 'Mozzarella' by means of a procurement procedure will serve as an example to analyse whether cultural considerations can implicitly play a role to overcome the 'buy local' prohibition, even for products that enjoy a protected designation of origin.
This article adds to the academic debate as the link between procurement and cultural concerns has not yet been discussed in academic literature, neither from an explicit nor from an implicit point of view.

1. Introduction

Culture can be defined as a means of organizing and stabilizing communal life and everyday activities through specific beliefs, rituals, rites, performances, art forms, symbols, language, clothing, food, music, dance, art other human expressive, intellectual and communicative pursuits and faculties that are associated with a group of people at a particular period of time.[2] Culture has invaded juristic consciousness. It suffices to think about 'cultural rights' as laid

[1] 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, OJ 28.3.2014, L94/65.
[2] M. Danesi, *Popular Culture – Introductory Perspectives,* 4th edition, Rowman & Littlefield, Lanham, 2019, p. 15.

down in the Universal Declaration of Human Rights[3] and the International Covenant on Economic, Social and Cultural Rights[4], the protection of 'cultural heritage' as laid down in the Unesco Conventions[5] and the pleading of 'cultural defences' in the framework of internal market law as overriding reasons of public interest[6].

In its 2007 Communication on a European agenda for culture in a globalizing world[7], the European Commission held that 'culture' is indeed a broad concept and that it is generally recognised as complex to define. It can refer to the fine arts, including a variety of works of art, cultural goods and services. On the other hand the Commission holds that 'culture' can also have an anthropological meaning. It is the basis for a symbolic world of meanings, beliefs, values, traditions which are expressed in language, art, religion and myths and as such it plays a fundamental role in human development and in the complex fabric of the identities and habits of individuals and communities. While the Commission refers to Article 151 EC (now: Article 167 TFEU) as the basis for the action of the EU, it is clear that Article 167 TFEU is not the legal basis for Directive 2014/24/EU. It is nevertheless interesting to verify whether Directive 2014/24/EU contains cultural aspects that are falling within this broad notion of culture and whether and how these aspects are integrated in the system of public procurement.

To start with some examples, it can be indicated that when contracting authorities buy supplies, services or works on the market by means of a public procurement procedure, cultural considerations relating to the composition, substance or packaging of a product are often very relevant. Indeed, when buying meals for a school canteen traditional recipes or local flavours may be desired. When buying laptops for public officials it may be relevant that the keyboard is in Azerty instead of Qwerty- style. First-aid books and first-aid courses are most likely only wanted in the official language(s) of the Member State concerned and a city council may demand that a new building is to be constructed in accordance with the existing cultural style of the old city. Broadly speaking, these preferences can all be linked to culture.

Contracting authorities can specify such considerations in the technical specifications or they may play a role in the contract award criteria when the quality or aesthetic considerations are evaluated or the specific process of production. As such specifications and award criteria are applicable to all tenderers, the principle of equal treatment is in principle not at issue. It can be argued however that certain specifications cannot as easily be satisfied by economic operators that are not local or that are not based in the respective Member State as certain traditional production processes may only be known or can be delivered more easily by local

[3] Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948, General Assembly Resolution 217 A.

[4] International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force on 3 January 1976.

[5] Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972; Convention on the Protection of the Underwater Cultural Heritage, Paris, 2 November 2001; Convention for the Safeguarding of the Intangible Cultural Heritage, Paris, 1 October 2003.

[6] See for example Joined Cases C-60/84 and 61/84 *Cinéthique* ECLI:EU:C:1985:329*;* Case C-622/17 *Baltic Media* ECLI:EU:C:2019:566.

[7] European Commission, Communication on a European Agenda for Culture in a Globalizing World, COM (2007), 242 final, p. 3.

producers or suppliers. Likewise, certain courses can more easily be taught by national or local service providers. For this reason it is interesting to discuss whether such 'cultural' considerations in public procurement procedures should be qualified as hindering free movement and undistorted competition and whether they violate the principle of equal treatment that lies at the very heart of Directive 2014/24/EU.
This contribution is structured as follows: Part 2 discusses the explicit link between culture and procurement, either due the specific references to culture in Directive 2014/24/EU (chapter 2.2) or due to the explicit cultural nature of the product that is bought or the specific references to culture in the tender documents (chapter 2.3). Chapter 3 discusses the possibility of culture as a non-explicit consideration in procurement procedures, namely as an overriding reason of public interest, by using the purchase of Mozzarella cheese as a case study. Chapter 4 contains the conclusion.

2. Culture and Directive 2014/24/EU

2.1. Introduction

As indicated above, the legal bases of Directive 2014/24/EU are the provisions on free movement and Article 114 TFEU. Indeed, the EU's main priority in its public procurement regime is the removal of legal and administrative barriers to trade in government markets.[8] The acquisition of better value for money and resulting economic growth is an important aim as well. More competition leads to more choice for the contracting authorities to decide which tender is the most advantageous and most suitable to reach their needs, lower prices and hence bring about more value for taxpayers' money.[9] Next to purely economic goals, rules on public procurement aim to contribute to the avoidance of corruption, the creation of equal opportunities for economic operators, fair treatment and efficiency in evaluating tenders by focussing on transparency, equal treatment and non-discrimination.[10] These basic principles of public procurement are laid down in Article 18(1) of the Directive. More specifically, the Directive demands that contracts are to be awarded on the basis of objective criteria that ensure compliance with these principles with a view to ensuring an objective comparison of the tenderers as well as of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous.[11] All tender procedures, including those for cultural purchases, have to live up to these requirements.

[8] European Commission, *Statistical Performance for Keeping Watch over Public Procurement,* 1992.
[9] Case C-305/08, *CoNISMa*, para 37; Case C-147/06 and C-148/06, *SECAP*, para 29. It should be noted, however, that an increased number of participants brings about that contracting authorities will face more costs of tendering and costs relating to the evaluation of offers.
[10] S. Arrowsmith, "Public procurement: Basic concepts and the coverage of procurement rules" in S. Arrowsmith (Ed.), *Public Procurement: An Introduction* (Asia Link - EuropeAid Co-operation Office, 2010), 4; S. Schoenmaekers, 'Public Procurement', in: Kuijper, Ambtenbrink, Curtin, De Witte, McDonnell & Van den Bogaerts (eds.), *The Law of the European Union,* Wolters Kluwer, Alphen aan den Rijn, 2018, pp. 808. As held by recital 2, the Directive aims to increase the efficiency of public spending, to facilitate the participation of small and medium sized enterprise in public procurement and to enable procurers to make better use of public procurement in support of common societal goals. As held by recital 47, innovation plays an important role in this regard.
[11] Recital 90.

2.2. Explicit references to culture in Directive 2014/24/EU

2.2.1. Procurement and the audiovisual sector

As held by recital 23 of Directive 2014/24/EU, the awarding of public contracts for certain audiovisual and radio media services by media providers should allow aspects of cultural or social significance to be taken into account, which renders the application or procurement rules inappropriate. Indeed, as held by Article 10(b), the Directive is not applicable to contracts for the acquisition, development, production or co-production of programme material intended for audiovisual media services or radio media services that are awarded by audiovisual or radio media service providers, or to contracts for broadcasting time or programme provision that are awarded to audiovisual or radio media service providers.[12] This demonstrates that cultural concerns are considered to be so essential that the application of Directive 2014/24/EU which all its procedural rules to guarantee equal treatment is set aside. While this is a very specific example of culture being considered as a mandatory reason of public interest in the field of public procurement, this contribution -which aims to focus on the less explicit and broader cultural concerns as well- will not further discuss the link between procurement and the audiovisual sector.[13]

2.2.2. Cultural service contracts as a type of public contract for social and other specific services

As held by Article 74 of the Directive, public contracts for social and other specific services listed in Annex XIV have to be awarded in accordance with Chapter I of Title III, where the value of the contracts is equal to or greater than the thresholds indicated in Article 4(d). This threshold is EUR 750 000. One of the categories of services described in Annex XIV is called 'Administrative, social, educational, healthcare and cultural services'. For cultural services, the CPV codes relates only to exhibition, fair and congress organisation services, seminar organisation services, event services, cultural event organisation services, festival organisation services, party organisation services, fashion shows organisation services and fair and exhibition organisation services.[14]

[12] For a definition of the notions 'audiovisual media services', 'media service providers', 'programme' or 'programme material', reference is made to Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive, OJ L 95, 15.4.2010, p.1.

[13] In addition, while the Court has held that also language policies can be an overriding reason of public interest, it should be noted that the Directive does not specifically refer to languages in relation to culture but does contain several provisions in which language plays a role. For this reason this contribution will not focus on language issues in relation to public procurement.

[14] It should be noted however that religious services and other specific services listed in the Annex are also 'cultural' services in the broader sense.

As held by recital 114 and as confirmed by the Court of Justice in several case such as *Commission v Ireland*[15] and *Strong Segurança*[16], certain categories of services continue by their very nature to have a limited cross-border dimension, namely such services that are known as services to the person. Those services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. For this reason a specific regime has been established for public contracts for those services, with a higher threshold than that which applies to other services. Indeed, the higher threshold of EUR 750 000 that is mentioned in Article 4(d) excludes many of them from the detailed procedural obligations from the Directive. It is considered that services to the person with values below that threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for cross-border projects. On the other hand, and as confirmed by the Court in the above mentioned case law, contracts for such services above the threshold should be subject to Union-wide transparency but according to the special regime mentioned in Chapter I of Title III. This specific regime entails that the detailed rules of the Directive are not applicable as Member States are required to put in place *national* rules for the award of such contracts in order to ensure that contracting authorities comply with the principles of transparency and equal treatment of economic operators. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The Directive takes account of that imperative, imposing only the observance of the basic principles of transparency and equal treatment. Member States are hence free to determine the procedural rules applicable as long as such rules allow contracting authorities to take into account the specificities of the services in question. In any case, Member States have to ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation.[17] Member States may provide in addition that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services.[18]

It is remarkable that in the case law of the Court of Justice there is -at least to the author's knowledge- hardly any case law to be found in relation to procurement for cultural services belonging to Annex XIV or where cultural considerations were at stake. While this is most likely due to the high threshold that is applicable to cultural services which renders the Directive in most cases inapplicable, this does of course not rule out that even for contracts below the threshold, the European principles are applicable in case of a cross border effect.[19]

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[15] Case C-507/03 *Commission v Ireland* ECLI:EU:C:2007:676, §§26-31.

[16] Case C-95/10 *Strong Segurança* ECLI:EU:C:2011:161, §35.

[17] Article 76(2) Directive 2014/24/EU.

[18] It should be noted that Article 77 Directive 2014/24/EU is not relevant within the scope of this Article as the CPV codes that are mentioned are not related to cultural services.

[19] Above the threshold these principles are always applicable together with the rules of Chapter I of Title III of the Directive. That the EU principles are applicable to contracts below the thresholds has been ruled by the Court on many occasions. See e.g. Case C-65/17 *Oftalma Hospital* ECLI:EU:C:2018:263, §36; Case C-174/06 *SECAP* ECLI:EU:C:2008:277, §21; Case C-376/08 *Serrantoni* ECLI:EU:C:0009:808, §24; Case C-318/15 *Tecnoedi 3.3.Construzione* ECLI:EU:C/2016:747, §19; Case C-59-00 *Vestergaard* ECLI:EU:C:2001:654, §§20-21.

2.3. Explicit cultural purchases or explicit references to culture in the tender documents: some examples

The fact that there is hardly any EU case law dealing with cultural considerations in procurement procedures, does not entail that culture is irrelevant with regard to public contracts or that culture is only relevant in the light of public procurement procedures, when it concerns services listed in Annex XIV.

When thinking about public procurement contracts for cultural heritage conservation[20] or the purchase of traditional uniforms, audiovisual material or books on national history, it is rather clear that such contracts contain some cultural elements, even if this is not expressly stated in the procurement documents. In should be noted that when cultural considerations are relevant due to the nature of the purchase, is important that the technical specifications, which lay down the characteristics of the required works, service or supply afford equal access of economic operators to the procurement procedure and that they do not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.[21] In this regard it is interesting to refer to a rather dubious use of cultural considerations that has been reported in light of a tender for advisory services launched by the UK's Department for International Trade in which tech companies were expected to have the right 'cultural fit' if they wanted to be hired which meant that tenderers were assessed based on whether they were 'committed to the best possible outcome for the United Kingdom following its departure from the European Union'.[22] While it can be questioned whether this is related to culture in the first place, it should be noted that such requirement is a clear infringement of public procurement law for several reasons: firstly, such criterion does not allow for an objective assessment at the evaluation stage -it can only be monitored ex post and monitoring will be rather subjective- which is as such a violation of the principle of equal treatment; secondly, selection criteria can only relate to the technical and professional ability of economic operators, their economic and financial standing or their suitability to pursue the professional activity in conformity with Article 58(1) Directive 2014/24/EU while the 'cultural fit' criterion is not related to any of those criteria; thirdly selection criteria should be proportionate and related to the subject-matter of the contract[23] which is clearly not the case here as the 'cultural fit' criterion is a rather general requirement that aims to screen tenderers on the basis of their commitment to specific outcomes or their enthusiasm in their generation[24]; finally, even if the 'cultural fit' criterion was part of the award criteria it should be linked to the subject-matter of the contract, not confer an unrestricted freedom of choice on the

[20] The particular characteristics of such procurement contracts are discussed in: C. Guccio, G. Pignataro & I. Rizzo, 'Evaluating the efficiency of public procurement contracts for cultural heritage conservation works in Italy', *Journal of Cultural Economics*, Springer, New York, vol. 38(1), pages 43-70, 2014.

[21] Article 42(2) Directive 2014/24/EU.

[22] See A. Sanchez Graells, *"Buy Brexit"? Using "cultural fit" as evaluation criteria breaches EU and UK public procurement law,* blog available at https://policybristol.blogs.bris.ac.uk/2017/03/02/buy-brexit-using-cultural-fit-as-evaluation-criteria-breaches-eu-and-uk-public-procurement-law/ referring to an article in *The Guardian* of 1 March 2017.

[23] Article 58(1) Directive 201/24/EU.

[24] A. Sanchez Graells, *"Buy Brexit"? Using "cultural fit" as evaluation criteria breaches EU and UK public procurement law,* blog available at https://policybristol.blogs.bris.ac.uk/2017/03/02/buy-brexit-using-cultural-fit-as-evaluation-criteria-breaches-eu-and-uk-public-procurement-law/.

contracting authority and allow for effective competition by specifications that allow the information provided by the tenderers to be effectively verified as required by Article 67(3) and (4) of Directive 2014/24/EU.

3. (Implicit) cultural considerations as an overriding reason of public interest

When assessing a European tender procedure for works, services or supplies, one is always inclined to only focus the discussion on Directive 2014/24/EU and the interpretation of the Directive by the Court. In the scope of this contribution, it is however relevant to see whether culture can also play a role in procurement procedures from a broader EU perspective, namely whether it can be a overriding reason of public interest. This contribution will now discuss case law of the court of justice in which culture was invoked as such mandatory requirement and will then continue with analysing whether culture can also be a public interest objective in public procurement procedures.

3.1. Culture as an overriding reason of public interest in (general) EU internal market law

While it is held that culture allows for the widening of the mind and of the spirit[25] and while it can be seen as an expression of freedom, the case law of the Court of Justice demonstrates that cultural concerns can also be invoked to justify limitations to free movement. This is particularly relevant in the context of this contribution, as the legal basis of Directive 2014/24/EU can be found in Articles 53(1) TFEU which contains the freedom of establishment, 62 TFEU on the freedom to provide services and 114(1) TFEU on the approximation of laws which allows for harmonization in order to establish and ensure the functioning of the internal market as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.[26]

When paying closer attention to the treaty Articles, reference should be made to Article 36 TFEU which holds that prohibitions or restrictions on imports, exports or goods in transit can be justified on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing *artistic, historic or archaeological value* or the protection of industrial and commercial property. It follows that Article 36 TFEU contains a cultural component. Article 52 TFEU on the freedom of establishment on the other hand -which is also applicable to the freedom to provide services- contains less justification grounds and only refers to public policy, public security or public health. Notwithstanding the absence of an explicit reference to culture in the Treaty articles on free movement, the Court of Justice of the European Union has ruled on several occasions that culture is indeed an overriding reason of public interest which can justify limitations to free movement. As held in *Cinéthique*[27], the protection of the cinema as

[25] Quote of J. Nehru, first Prime Minister of India who drafted the core aims of the "Fundamental Rights and Economic Policy" resolution in 1929 and declared that one of the aims of the congress should be the protection of regional languages and cultures. The resolution was ratified in 1931 by the Congress party session.

[26] Article 26(2) TFEU.

[27] Joined Cases C-60/84 and 61/84 *Cinéthique* ECLI:EU:C:1985:329, §§20-23.

a means of cultural expression, can justify restrictions to the free circulation of video tapes. In *Collectieve Antennevoorziening Gouda*[28] the Court stated that national laws which aim to preserve a pluralist and non commercial public service television system are a form of cultural policy. Furthermore in *Commission v Greece*[29] the Court clarified that the general interest of the proper appreciation of places and things of historical interest and the widest possible dissemination of knowledge of the artistic and cultural heritage of a country can constitute an overriding reason justifying the freedom to provide services.[30] The most famous case is undoubtedly *Groener*[31] in which the requirement of linguistic knowledge (Irish) was considered to be part of a policy for the promotion of the national language that justified a restriction to free movement. The Court held that the policy followed by the Irish governments did not only aim to maintain but also to promote the use of Irish as a means of national identity and culture. Linguistic policies can thus also fall within the ambit of cultural policy.

After the Lisbon treaty entered into force, culture was not only mentioned in Article 167 TFEU -this Article was included since the 1992 Treaty of Maastricht- but also in Article 3(3) sub 4 of the Treaty on the European Union (TEU). This Article stipulates that the Union shall respect its rich cultural and linguistic diversity and shall ensure that Europe's cultural heritage is safeguarded and enhanced. In addition, with the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights which stipulates in Article 22 that the Union shall respect cultural, religious and linguistic diversity, received the status of primary EU law. Cases in which cultural policies were identified as a mandatory reason of public interest seem to be more numerous post Lisbon, specifically with regard to languages and the audiosvisual sector. In *Uteca*[32] the Court held that since language and culture are intrinsically inked, the objective pursued by a Member State of defending and promoting one or several of its official languages must not of necessity be accompanied by other cultural criteria in order for it to justify a restriction to one of the fundamental freedoms guaranteed by the Treaty. Hence, a measure adopted by a Member State which requires television operators to reserve a certain amount of pre-funding of works of which the original language is one of the official languages of that Member State is not precluded by EU law. *Baltic Media*[33] is another example of cultural concerns and the audiovisual sector. The Court indicated that while Directive 2010/13 of the Audiovisual Media Services Directive[34] gives expression to the freedom to provide services in the field of audiovisual media services by introducing an area without internal frontiers for those services, it should be taken into account that the Directive holds at the same time that the cultural and economic nature of these services make them important for democracy,

[28] Case C-288/89 *Collectieve Antennevoorziening Gouda* ECLI:EU:C:1991:323, §23.
[29] Case C-154/89 *Commission v France* ECLI:EU:C:1991:76, §17; Case C-180/89 *Commission v Italy* ECLI:EU:C:1991:78, §20; Case C-198/89 *Commission v Hellenic Republic* ECLI:EU:C:1991:79, §21.
[30] In this case Greece made the provision of services by tourist guides travelling with a group of tourists from another Member State subject to possession of a licence which required the acquisition of specific. While the Court believed that this is a valid objective to pursue, it held that the measures was not proportional as tour operators can be selective in employing tourist guides and exercise control over their services in less far reaching manners.
[31] Case C-379/87 *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee* ECLI:EU:C:1989:599, §§14-20.
[32] Case C-222/07 *UTECA* ECLI:EU:C:2009:124, §33.
[33] Case C-622/17 *Baltic Media* ECLI:EU:C:2019:566, §65.
[34] Directive 2010/13 of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ 2010 L 95, p. 1.

education and culture which justifies the application of specific rules. This was also confirmed in *Vivendi*[35] and by the exclusion of these services from the scope of application of Directive 2014/24/EU. Outside the audiosvisual sector a similar approach to culture as an overriding reason of public interest has been taken by the Court.[36] The fact that cultural considerations can indeed be invoked as a mandatory reason of public interest is also specifically codified by Article 4 of Directive 2006/123/EC on services in the internal market[37] which stipulates that overriding reasons relating to the public interest are reasons recognised as such in the case law of the Court of Justice including (amongst others) cultural policy objectives.

3.2. Culture as an overriding reason of public interest in public procurement law

As indicated above, Articles 53(1) TFEU , 62 TFEU and 114(1) TFEU constitute the legal bases of Directive 2014/24/EU. While the justification grounds relating to the freedom of establishment as enumerated in the treaty are related to public policy, public security or public health, recital 41 of the Directive stipulates that nothing in the Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life, the preservation of plant life or other environmental measures, in particular with a view to sustainable development, provided that those measures are in conformity with the TFEU.

In the actual provisions, the Directive is silent in terms of justification grounds. Only Article 57(3) that deals with mandatory exclusion grounds, holds that Member States may provide for a derogation from certain mandatory exclusion grounds on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment. Several other provisions allow for justification grounds to be invoked for objective reasons to deviate from the general norms of the Directive. In the framework of this contribution, most interesting is Article 42(2) which states that technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating *unjustified obstacles* to the opening up of public procurement to competition. Article 42(4) further holds that unless *justified* by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process which characterises the products or services by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. While Article 42(4) does not include any specific grounds for justification, it does hold that a reference as meant above is only permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract is not possible. In addition, such reference should always be accompanied by the words 'or equivalent'. In any case it is clear that the Directive does not contain any specific reference to culture as an overriding reason of public interest.

[35] Case C-719/18 *Vivendi* ECLI:EU:C:2020:627. See specifically §§72-74 of the Opinion of Advocate General Campos Sánchez-Bordona who refers to media pluralism as an overriding reason in the public interest.
[36] See e.g. Case C-202/11 *Anton Las v PSA Antwerp NV* ECLI:EU:C:201:239, §§25-27 and Case C-391/09 *Runevič-Vardyn* ECLI:EU:C:2011:291, §§87-88.
[37] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376 of 27.12.2006, pp. 36-68.

Case law of the Court of Justice of the European Union in which culture is linked to public procurement outside the context of Annex XIV and the specific CPV codes relating to culture is equally hard to be found. Cultural considerations were referred to in *Sporting Exchange*[38], a case that is not directly relating to Directive 2014/24/EU. It concerned national law that conferred an exclusive right to organise and promote games of chance on a single operator and which prohibited any other operator, including operators established in other Member States, from offering via the internet services within the scope of that regime in the territory of the first Member State. The case dates from 2010 and was hence ruled before Directive 2014/23/EU[39] on service concessions saw the light. The national court asked whether the case law developed by the Court of Justice in relation to article 49 EC (now: Article 56 TFEU on the freedom to provide services) and to the principle of equal treatment and the consequent obligation of transparency in the field of services concessions is applicable to the procedure for the grant of such licence. The Luxembourg Court responded that the obligation of transparency is indeed applicable where the service concession in question may be of interest to an undertaking located in another Member State and that such obligation requires a degree of advertising sufficient to enable the service concession to be opened up to competition an the impartiality of the procurement procedures to be reviewed.[40] The Court added however that the issue of a single licence is not the same as a service concession as it constitutes an intervention by the public authorities to regulate the pursuit of an economic activity which is the organisation of games of chance which is in principle prohibited by law unless an administrative licence has been issued for that purpose.[41] Nevertheless, the Court held that the fact that the issue of a single licence is not the same as a service concession contract does not, in itself, justify any failure to have regard to the requirements arising from Article 49 EC, in particular the principle of equal treatment and the obligation of transparency, when granting an administrative licence. These principles are indeed applicable as the effects of such a licence on undertakings established in other Member States and potentially interested in that activity are the same as those of a service concession contract.[42] The Court then added that when exclusive rights are conferred on a single operator, the freedom to provide services is restricted. This can be justified however on grounds of pubic policy, public security, public health or other overriding reason in the public interest such as consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order. In that context the Court held that moral, religious or *cultural* factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order.[43] It is clear that culture is in this case not considered as an independent overriding reason of public interest, but is

[38] Case C-203/08 *Sporting Exchange* ECLI:EU:C:2010:307.
[39] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, pp. 1-64.
[40] Case C-203/08 *Sporting Exchange* ECLI:EU:C:2010:307, §41.
[41] *Ibid.,* §§43-44.
[42] *Ibid.*, §47.
[43] *Ibid.* §§26-27.

rather considered as part of public order in general and as a factor to take into account when assessing the protection of consumers.[44]

Even though neither the Directive, nor the Court has specifically referred to culture as an overriding reason of public interest in relation to a public procurement case, this does not entail that culture cannot constitute such overriding reason. First of all, culture can be considered to be part of public policy, which is referred to in recital 41 and Article 52 TFEU. Secondly, the Court of Justice already has taken other overriding reasons of public interest that are not specifically enumerated in the legislation into account in public procurement cases, such as the protection of workers.[45]

To concretize the analysis above and to demonstrate with a concrete example that (implicit) cultural considerations can have far reaching consequences for the outcome of a procurement procedure, I will now turn to the question whether the purchase of Mozzarella cheese on the basis of a procurement procedure can violate free movement rules and if so, whether this can be justified on the basis of cultural considerations.

3.3. Case study: The procurement of Mozzarella cheese as a cultural need in the public interest?

To grasp in how far cultural considerations can be relevant in procurement procedures, a hypothetical case study will be provided that deals with the procurement of supplies that do not seem to be 'cultural in nature'[46] but that may contain some implicit cultural connections. The purchase of Mozzarella cheese to incorporate in sandwiches for school canteens will be taken.[47] So more concretely, would a preference for Mozzarella as opposed to Gouda, which may find its basis in national or local culinary traditions, be at odds with the principles of equal treatment, undistorted competition and free movement as incorporated in Directive 2014/24/EU, specifically if there is no explicit reference to cultural considerations? This question is particularly interesting to answer as contrary to many other procurement systems in the world, the EU system forbids 'buy local' policies[48] as Article 18 stipulates that the design of the procurement cannot be made with the intention of artificially narrowing competition. To know whether certain culinary preferences can be justified in procurement purchases, it is relevant to look outside procurement law.[49]

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[44] See in this regard also Case C-243/01 *Gambelli* ECLI:EU:C:2003:597, §63; Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica* ECLI:EU:C:2007:133, §47; Case C-275/92 *Schindler* ECLI:EU:C:1994:119, §61; Case C-124/97 *Läärä* ECLI:EU:C:1999:435, §12; Case C-67/98 *Zenatti* ECLI:EU:C:1999:514, §15.

[45] See e.g. Case C-115/14 *RegioPost* ECLI:EU:C:2015:760, §69-70.

[46] Think for example about contracts for cultural heritage conservation. In this part we do not discuss the specific cultural services that are covered by Chapter I of Title III of the Directive.

[47] When discussing this example, it is assumed that the relevant thresholds of Directive 2014/24/EU have been reached.

[48] This contribution does not discuss the International Procurement Instrument that was proposed by the Commission in 2012 (COM(2012) 0124 final) and revised in 2016 (COM(2016) 34 final) as this concerns the openness of EU procurement markets to third country competitors which is not the main scope of this contribution.

[49] It should be noted that this Article does not discuss organisational culture or issues that relate to how understanding culture can be effective and useful when negotiating as part of a procurement process. For more information on this topic, see: S. Rowlinson, D.H.T. Walker and F. Y. K. Cheung, 'Culture and its impact

Relevant secondary legislation on agricultural products and foodstuffs

When it comes to the composition or production of a product, the Court has consistently held that in case of absence of common or harmonised rules Member States may, for the purpose of protecting consumers, require those concerned to alter the description of a foodstuff where a product offered for sale under a particular name is so different from the products generally understood as falling within the description within the EU that it cannot be regarded as falling within the same category.[50] Where the difference is of only of minor importance however, labelling should be sufficient to provide the purchaser or consumer with the necessary information.[51]

For a broad range of products, the EU legislator has created secondary legislation to approximate the provisions relating to these products and to lay down definitions and common rules in respects of the composition, manufacturing specifications, packaging and labelling in order to ensure the free movement of those products in the EU.[52] When it comes to Mozzarella, Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs is specifically relevant. [53] This Regulation, which was created to satisfy the increasing demand for quality and traditional products for consumers and to reward producers for their efforts to produce a diverse range of quality products[54], is applicable to agricultural products which include dairy products.[55] The Regulation contains a Title on protected designations of origin and protected geographical indications (Title II, articles 4-16) and a Title on Traditional Specialities Guaranteed (Title III, articles 17-26) which are not related to the geographical origin of the product.

To start with the discussion of Mozzarella on the basis of Title III, reference should be made to Article 17 which establishes a scheme for traditional specialties guaranteed to safeguard

upon project procurement', in: D. Walker & S. Rowlinson (eds.), *Procurement Systems: A cross-industry project management perspective,* Taylor&Francis, United Kingdom, 2008, pp. 277-310.

[50] Case C-286/86 *Deserbais,* ECLI:EU:C:1988:434; §13; Case C-366/98 *Geffroy*, ECLI:EU:C:2000:430, § 22; Case C-448/98 *Guimont,* ECLI:EU:C:2000:663, §30; Case C-12/00 *Commission v Spain,* ECLI:EU:C :2003 :21, § 85.

[51] Case C-269/89 *Bonfait,* ECLI:EU:C:1999:399, § 15; Case C-383/97 *Van der Laan,* ECLI:EU:C:1999:64, §24; Case C-12/00 *Commission v Spain,* ECLI:EU:C:2003 :21, §86.

[52] See e.g. Council Directive 73/241/EEC of 24 July 1973 on the approximation of the laws of the Member States relating to cocoa and chocolate products intended for human consumption, OJ 1973, L228, p. 23. Next to rules that are only applicable to certain types of food, a general Regulation exist on the provision to food *information* to consumers which establishes the general principles, requirements and responsibilities governing food information, and in particular food labelling: See Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, OJ L 304, 22.11.2011, p. 18–63.

[53] Regulation 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, OJ L 343, 14.12.2012, pp. 1-29. This regulation has repealed Council Regulation 509/2006 of 20 March 2006 on agricultural products and foodstuffs as traditional specialities guaranteed, OJ L 93, 31.3.2006, pp. 1-11.

[54] Recital 2-4 Regulation 1151/2012.

[55] Article 2 Regulation 1151/2012 jo Annex I to the TFEU.

traditional methods of production and recipes by helping producers of traditional products in marketing and communicating of the value-adding attributes of their traditional recipes and products to consumers. Such specialty has to comply with a specification which comprises, amongst other things, the main physical, chemical, microbiological or organoleptic characteristics of the product and a description of the production methods including where appropriate, the nature and characteristics of the raw materials or ingredients used.[56] Article 23(1) indicates that a name registered as a traditional specialty guaranteed may be used by any operator marketing a product that conforms to the corresponding specifications. It is hence clear that the use of such name is not related to the place of production or the registered seat of a company. In 1998 Mozzarella' was entered in the 'Register of traditional specialties guaranteed' on the basis of an application[57] by the Associazione Italiana Lattiero-Casearia in which the Associazione also laid down the product characteristics and production method of 'Mozzarella'.[58] Indeed, these relate to the chemical and microbiological characteristics of the product and do not relate to the geographical place of production. The entry in the register ensures that Mozzarella produced from cows' milk is protected at EU level as a traditional speciality guaranteed which entails in principle that the product gets a Union symbol and that the registered name has to be protected against any misuse, imitation or evocation or against any other practice liable to mislead the consumer.[59]

When taking a closer look at Title II which deals with protected designations of origin and protected geographical indications (hereinafter: GIs), it can be seen that Article 4 of the Regulation establishes a scheme for protected designations of origin and protected GIs in order to help producers of products linked to a geographical area by securing fair returns for the qualities of their products, ensuring uniform protection of the names as an intellectual property right in the territory of the Union and providing clear information on the value-adding attributes of the product to consumers. A designation of origin is a name with identifies a product by its origin in a specific place, region or, in exceptional cases, a country;

[56] Article 19(1) Regulation 1151/2012.

[57] The articles that are currently applicable with regard to the application, are Article 20 and 49 of Regulation 1151/2012.

[58] Article 1 jo Annex I of Commission Regulation 1204/2008 of 3 December 2008 on the entry of certain names in the Register of traditional specialties guaranteed provided for in Council Regulation 509/2006 on agricultural products and foodstuffs as traditional specialties guaranteed, OJ L 326, 4.12.2008, pp. 7-11. This Regulation repealed Commission Regulation 2527/98 of 25 November 1998 supplementing the Annex to Regulation 2301/97 on the entry of certain names in the 'Register of certificates of specific character' provided for in Council Regulation 2082/92 on certificates of specific character for agricultural products and foodstuffs, OJ L 317 of 26.11.1998, pp. 14-18.

[59] Article 23(2) and 24(1) Regulation 1151/1201. As the protection of the name 'Mozzarella' occurred before the entry into force of Regulation 1151/2012 so that on the basis of Article 25(2) the requirements of Article 13(1) of Regulation 509/2006 may continue to be used until 4 January 2023, the product has so far however only been protected 'without reservation of a name'. This means that the entry in the Register did not prevent the continued use of this name in accordance with a specification other than that which is protected, provided that the labelling does not bear the Community symbol or description: See preamble Commission Regulation 2527/98. In December 2020, the Commission published an application for approval of an amendment, which is not minor, to a product specification in conformity with Article 50(2)(b) of Regulation 1151/2012 to change the name 'Mozzarella' to 'Mozzarella Traditionale'. The aim of this request for amendment is to standardize Mozzarella cheese in its most traditional form and to change the protection from 'without reservation of a name' to 'with reservation of a name'. The Publication indicates that it confers the right to oppose the amendment within three months from the date of publication in conformity with Article 51 of Regulation 1151/2012. At the time of writing it is not clear whether a notice of opposition has been lodged.

whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors; and the production steps all take place in the defined geographical area.[60] Registered names are protected against any direct or indirect commercial use of a registered name in respect of products not covered by the registration where those products are comparable to the products registered under that name or when using the name exploits the reputation of the protected name.[61] Article 6 of this Regulation stipulates that generic terms cannot be registered as protected designations of origin or protected GIs. Since the name 'Mozzarella' is generic, Mozzarella cheese -an unripened, rindless cheese with long stranded protein structures[62]- cannot as such get protection under Title II of the Regulation.[63]

Notwithstanding the generic status of Mozzarella, protected designation of origin has been granted to 'Mozzarella di Bufala Campana' produced from buffalo milk.[64] This cheese is known for its unique flavour that is influenced by the buffalo's diet.[65] All the fodder that animas eat is drawn from the local area (South-Central Italy), which, with its unique environment of small streams crisscrossing the volcanic plaints and the artisanal skill of its producers, imparts a particular set of flavours.[66] The requirement regarding the place of production is strictly scrutinized and every stage in the production process should ensure that the product can be traced.[67] For this reason, the Court of Justice has held that national rules which provide that this type of mozzarella must be produced in areas exclusively designated for the production of that cheese -including within one set of premises, in which the holding and storage of milk originating from farms that are not subject to the monitoring system for the protected designation of origin is -prohibited, are not precluded, if those rules are a necessary and proportionate means of safeguarding the quality of that product or ensuring that the specification for that protected designation of origin is monitored. The national court has to verify this.[68]

Relevance of this secondary legislation in the context of procurement procedures

[60] Article 5 Regulation 1151/2012.
[61] Article 13(1) Regulation 1151/2012.
[62] See United Nations Food and Agriculture Organization, Codex Standard for Mozzarella, STAN 262-2006.
[63] In addition, according to Article 13(2) of Regulation 1151/2002, protected designations or origin and protected geographical indications shall not become generic.
[64] Commission Regulation 1107/96 of 12 June on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Council Regulation 2081/92, OJ L 148 of 21.6.1996, 99. 1-10.
[65] See for the product specifications: Publication of an amendment application pursuant to Article 6(2) of Council Regulation 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, OJ 2007 C 90, p. 5.
[66] European Commission, *Mozarella die Bufala Campana POD,* https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/eu-quality-food-and-drink/mozzarella-di-bufala-campana_en.
[67] See paragraph 4.4 of the product specifications. Another example of a type of mozzarella that has been entered in the register due to its specific quality characteristics that are partly related to the specific geographical conditions is 'Mozzarella di Gioia del Colle'. See Commission Implementing Regulation 2020/2018 of 9 December 2020 entering a name in the register of protected designations of origin and protected geographical indications (Mozzarella di Gioia del Colle, OJ L 415/46 of 10.12.2020, pp. 11-12.
[68] Case C-569/18 *Caseificio Cirigliana,* ECLI:EU:C:2019:873, §45.

While the secondary legislation referred to above is specifically applicable to producers of Mozzarella cheese and to Member States when protecting registered names against misleading use[69] or when taking steps to prevent the unlawful use or protected designations of origin and protected geographical indications[70], it is now time to verify in how far it is relevant for contracting authorities when drafting up tender specifications in the framework of a public procurement procedure.

A first issue to take into account is whether the purchase of Mozzarella cheese should be considered a supply or services contract. In case it would be considered to be a supply, the full Directive would be applicable, at least if the thresholds set in Article 4 would be reached. However, if the purchase would be part of school catering services and/or school meal services, only Chapter I of Title III is applicable[71] as these services are also mentioned in Annex XIV but then not as a cultural service but as a restaurant service. In the latter case Article 42 of Directive 2014/24/EU on technical specifications is as such not applicable but this does not mean that the principles of equal treatment, transparency and non-discrimination do not have to be respected.

A second issue to take into account is that Mozzarella cheese, while finding its origin in Italy, is not solely produced in Italy or by Italian undertakings. Mozzarella cheese is also produced in several other European countries and even on other continents. As indicated above, the name Mozzarella is not attached to the place of production, but to the ingredients and the production process of the cheese. As such, it cannot be argued that the principles of equal treatment or non-discrimination would be violated or that competition would be limited when a contracting authority wants to buy Mozzarella cheese. The fact that producers of Gouda cheese might not be able to sell their product is inherent in procurement procedures. After all, procurement procedures do not regulate what a contracting authority is buying, but how they should buy. What is important is that the tender for the purchase of Mozzarella cheese, i.e. cheese that satisfies the product specifications of the generic product Mozzarella, gives the opportunity to all producers, wherever they are located, to participate in the procurement procedure. The fact that Mozzarella that is produced from cows' milk is protected at EU level as a traditional speciality guaranteed does not lead to any other conclusion.[72] There can hence not be any question of discriminatory tender specifications.

Another question is whether the analysis would be similar if the tender specifications would not refer to Mozzarella cheese but to Mozzarella di Bufala Campana. As held above, this Mozzarella was granted protected designation of origin status[73] which entails that the product has to comply with certain requirements, such as product specifications that include the definition of the geographical area delimited and the link between the quality or characteristics of the product and the geographical environment or where appropriate, the link between a given quality, the reputation or other characteristics of the product and the geographical origin.[74] While the product specifications leave room for competition among the

[69] Article 13(1) Regulation 1151/2012.
[70] Article 24 (1) and (2) Regulation 1151/2012.
[71] This is of course the case if the threshold set out in Article 4 of Directive 2014/24/EU has been reached.
[72] Annex I of Commission Regulation 1204/2008.
[73] Commission Regulation 1107/96.
[74] Article 7 Regulation 1151/2012.

producers within the restricted area, it cannot be denied that the reference to Mozzarella di Bufala Campana or even to its product specifications as such inherently limit competition. Indeed, economic operators who produce cheese that does not originate in the geographical area delimited cannot take part in the procurement procedure which seems to be an indirect discrimination or at least a hindrance to free movement and a restriction of competition. In this regard reference should be made again to Article 42(1) of Directive 2014/24/EU[75] which stipulates that technical specifications have to be set out in the procurement documents and have to lay down the characteristics required of a works, services or supply. These specifications may refer to the specific process or method of production and have to afford equal access of economic operators to the procurement procedure and cannot have the effect of creating unjustified obstacles to the opening up of public procurement to competition.[76] In addition, as held by Article 42(4) of Directive 2014/24/EU, unless justified by the subject-matter of the contract, technical specifications cannot refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or *a specific origin or production* with the effect of *favouring or eliminating certain undertakings or certain products*. Such reference shall only be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract is not possible. In addition, equivalent products have to be accepted as well.

When applying this to our example, it should be noted that when launching a tender for the purchase of Mozzarella di Bufala Campana, the tender specifications by nature contain a reference to a specific origin or production. The question should be asked whether this is done with the effect of favouring or eliminating certain undertakings or certain products. When answering this question, it should be repeated that the procurement directives do not determine *what* contracting authorities should buy, but rather *how* they should buy. In this regard it can be stated that Mozzarella di Bufala Campana and other types of Mozzarella are different products as the Campana cheese received its protected status specifically because it complies with certain requirements that link between the quality or characteristics of the product and its geographical environment. Also from a competition law point of view, it can be argued that Mozzarella di Bufala Campana belongs to a different product group either because of the product characteristics -softer, creamier taste- as defined the famous *United Brands* case[77] or because application of the SSNIP[78] test which will most likely reveal that consumers are willing to pay more for Mozzarella di Bufala due to its special products characteristics. Nevertheless, the reference to 'Bufala Campana' has the *effect* that producers that do not produce in the designated area or who create cheese that is very much resembling the desired product characteristics can in principle not participate in the tender procedure.

[75] Even though this Article may not be applicable, it has to be noted that the underlying principle of equal treatment is always relevant, at least in case there is a cross border interest. Even though Mozzarella di Buffalo Campana is only produced in Italy, it is still conceivable that producers of other types of cheese that are located in other Member States are interested in supplying their products to schools and may argue that the contract specifications are discriminatory in nature.

[76] Article 42(2) Directive 2014/24/EU.

[77] Case C-27/76 *United Brands* ECLI:EU:C:1978:22, §31.

[78] Small but Significant and Non Transitory Increase in Price. In competition law this test is relevant to determine which product market should be taken into account to verify whether a company has significant market power.

The question can be asked whether this can be remedied by arguing that a sufficiently precise and intelligible description of the subject-matter of the contract is not possible without the specific reference to the specific origin or production. In this regard one should be able to prove that this reference is needed because a sufficiently precise description of the subject-matter of the contract would not be possible without it. In this regard it should be noted that the designation of origin specifically entails that the quality or characteristics of a product are essentially or exclusively due to a particular geographical environment. It would hence not even be possible to refer to the buffalo Mozzarella without including its place or production. From that point of view a tender for the purchase of Mozzarella di Bufala Campana is hence not violating Directive 2014/24/EU. In this regard it should be added however that Article 42(4) of the Directive requires that such references are accompanied by the words 'or equivalent'. When applying this to our example, it should be noted that since Mozzarella di Bufala Campana has received protection at EU level due to its special characteristics, it is extremely hard for a competitor or a public authority to successfully claim that other Mozzarella is equivalent. While the equivalent nature of other products is an issue that has be determined by the contracting authority that has launched the tender, producers of Mozzarella di Bufala Campana can invoke Commission Regulation 1107/96 that granted protected designation of origin to their product to argue that equivalent products do simply not exist. It follows that in cases like this, Article 42(3) of Directive 2014/24/EU which states references in technical specifications should always be accompanied with the words 'or equivalent' will often seem to be an empty box. This is a crucial finding as it may open the door for 'buy local' policies in which contracting authorities artificially limit their purchases to products with a protected designation of origin in their state.

Relevance of this secondary legislation with regard to culture

The analysis above has demonstrated that a tender procedure for Mozzarella di Bufala Campana at such does not seem to violate Directive 2014/24/EU. This does not mean however that such purchase can however artificially restrict effective competition and create unjustified obstacles to the opening up of procurement markets. As held by Article 18 of Directive 2014/24/EU, the design of the procurement shall not be made with the intention of artificially narrowing competition. Competition is considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators. It can be argued that the very narrow description of the type of cheese one wants to buy does create an obstacle to competition. Whether this is done with the intention to artificially narrow competition or whether this is justified depends on whether there is a valid reason to argue that one needs this specific cheese. In this regard I believe that the contracting authority can for example try to argue that the Campana product is more healthy -which in terms of fat content is not the case- or that it wants to introduce pupils in school canteens to certain typical cultural and traditional local products. Looking back at our analysis in paragraph 3.1 it, one can only say that it remains to be seen whether such argument would be accepted by the Court if such case would ever come in front of it, specifically because the amount of case law on culture as an overriding reason of public interest is still rather limited. It would be specifically interesting to see how far this notion can be stretched and whether in a procurement context culture and/or cultural

heritage also includes food preferences and can be part of public policy as referred to in recital 41 of the Directive.

When trying to answer this question in light of the GI status of Mozzarella di Bufala Campana, I believe it is relevant to underline that the fact that the protection of GIs is partly based on cultural considerations is rather straightforward. As held in the preamble of Regulation 1151/2012, the quality and diversity of the Union's agricultural production is one of its important strengths, giving a competitive advantage to the Union's producers and making a major contribution to its living cultural and gastronomic heritage. As held by Huysmans, where gastronationalism is at play, the protection of a GI in a trade agreement is indeed a symbolic affirmation of its value, an expression of national identity and a source or pride and each protected GI externally strengthens the (perceived) food culture of the relevant country.[79] In our Italian example, this argument is strengthened by the fact that 'The Italian Food and Wine Culture' is a UNESCO intangible cultural heritage candidate.[80] In addition, a study of a large amount of trade agreements that have been signed by the EU has revealed that also the demand for external trade protection is driven by economics as well as -and sometimes even more- by culture, more specifically the cultural attachment to food and the desire to protect it as an expression of cultural identity.[81] The European Commission has claimed in this regard that protection of GIs are key to the cultural heritage, traditional methods of production and national resources of the EU and developing countries.[82] Based on the above, it can be argued that cultural considerations are a relevant factor that can be taken into account in all public procurement procedures and not only in procedures that relate to explicit cultural works, supplies or services.

Be this as it may, it should be stressed that the problem lies in drawing the line between distinguished trade protectionism and bona fide cultural policy.[83] While it is often believed that protection of GIs do not aim to restrict trade but do aim to prevent fraud and protect consumers by informing them[84] about the reputation of the geographical production area, this protection can also be granted by more proportionate matters such as a prohibition on misleading labelling, without establishing quasi-intellectual property rights.[85] In this regard it has been argued that the status of protection of GIs is not just informational Protection of GIs are also considered to *add value* to a product by emphasising their special status which allows

[79] M. Huysman, 'Exporting protection: EU trade agreements, geographical indications, and gastronationalism', *Review of Interntional Political Economy,* Routled, 2020, p. 12. See also T. Broude, 'Taking trade and culture seriously: Geographical indications and cultural protection in WTO law', *University of Pennsylvania Journal of International Economic Law,* 26, 2005, p. 631; Z. Sorgho & B. Larue, 'Geographical indication regulation and intra-trade in the European Union', *Agricultural Economics,* 45(S1), 2014, p. 10.

[80] https://www.accademiaitalianadellacucina.it/en/notizie/notizia/italian-food-and-wine-culture-unesco-intangible-cultural-heritage-candidate

[81] M. Huysman, *op. cit.* footnote 68, pp. 21-22.

[82] See T. Broude 'Taking "Trade and Culture" Seriously: Geographical Indications and Cultural Protection in WTO Law', *The University of Pennsylvania Journal of International Law,* Philadelphia 2014, p. 631 referring to Delegation of the European Commission to Japan, *Why Do Geographical Indications Matter to Us?,* EU Background Note 01/04 of 10.02.2004.

[83] T. Broude, *op. cit.* footnote 68, p. 636.

[84] It should be noted that by the high amount of protection of geographical indications, consumers are overloaded with information which hinders them in taking the desired purchasing decisions. T. Broude, *op. cit.* foonote 68, p. 673.

[85] T. Broude, *op. cit.* footnote 6, p. 647-648.

that producers of these products charge higher prices. This entails that a cultural element is in essence converted into a commercial premium.[86] Furthermore, it has been established that the protection of GIs does not have the independent capacity to protect local cultures of production, consumption or identity or to prevent the erosion of cultural diversity. First of all, market forces inevitably induce changes in local production methods and consumption preferences in spite of the existence of protections of GIs; secondly protection of GIs can contribute to change cultures as the proliferation of protection of GIs confuses consumers who cannot associate the many names anymore with what they want to buy; thirdly the existence of protections of GIs provides an incentive to 'invent' traditions.[87] Taking these findings into account, it can be questioned whether the purchase of Mozzarella di Bufala Campana can ever be truly justified on cultural policy grounds.

4. Conclusion

This article aimed to address in how far cultural aspects can be taken into account in public procurement procedures. After first focusing on explicit cultural considerations that are referred to in Directive 2014/24/EU or in tender notices, the focus was shifted to the relevance of implicit cultural considerations, such as culinary traditions or preferences. The example of a tender procedure for Mozzarella cheese was taken to illustrate the considerations that play a role when assessing whether contracting authorities can actually buy products that have a protected designation of origin. Even though such protection is granted by Commission Regulation 1106/97 to Mozzarella di Bufala Campana, from a procurement perspective this should not open the door for 'buy local' policies as this may artificially narrow competition. This article has demonstrated that when push comes to shove, cultural considerations such as local or national culinary traditions, may certainly have the potential be considered in procurement procedures as overriding reasons of public interest.

[86] *Ibid.*, p. 649.
[87] *Ibid.*, p. 678.