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# The Use of Languages in Public Procurement Procedures: a Hidden Non-Tariff Barrier to Free Movement?

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## 1. Introduction

In the European Union, the award of public contracts by contracting authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. In principle, all procurement procedures start with a contract notice which is used as a means of calling for competition in respect of all procedures. By informing all economic operators about the possible business opportunities, European public procurement rules seek to promote competition and aim to open up the procurement market to undertakings beyond national borders. This is expected to lead to lower prices and more choice. Contract notices include information on the language(s) in which tenders or requests to participate must be drawn up which entails that economic operators are bound to draw up their tender proposal in the language(s) chosen by the contracting authority. It is not hard to imagine that this may seriously hinder free movement and restrict competition in the internal market.

This contribution will focus on the use of languages in public procurement procedures and reflect on whether Directive 2014/24/EU, which finds it legal basis in the Articles 53(1) TFEU on freedom of establishment, 62 TFEU (free provision of services) and 114 TFEU (approximation of provisions relating to the establishment and functioning of the internal market) is not in itself hindering free movement by its regulation on languages.

The topic of this contribution is chosen in light of Hildegard's expertise in free movement law and her interest in public procurement law. In 2011 Hildegard inspired and encouraged me to submit an application for a Jean Monnet teaching module on 'State aid and Public Procurement in the European Union'. After a positive evaluation by the Education, Audiovisual & Culture Executive Agency of the DG

Education and Culture of the European Commission, the course was introduced at the faculty of law and it is taught ever since. A focus on the link between public procurement and language is an obvious choice for this contribution as it combines several of Hildegard's fields of interest: free movement law and cultural and linguistic policies.

## 2. Goals and principles of procurement

Directive 2014/24/EU on public procurement[1] is applicable whenever one or more contracting authorities[2] want to acquire works, supplies or services by means of a public contract from one or more economic operators chosen by those contracting authorities and the thresholds that are stipulated in Article 4 have been reached.[3] Every year, over 250,000 public authorities in the EU spend around 14% of GDP (around 2 trillion euros per year) on the purchase of services, works and supplies.[4] Directive 2014/24/EU is designed to achieve a competitive and open procurement market in which public funds are used most efficiently. Public procurement is hence considered to be a key market-based instrument to achieve substantial savings.

At the same time public procurement contributes to smart, sustainable and inclusive growth, enabling procurers to make better use of public procurement in support of common societal goals and facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement.[5]

Article 18 of the Directive contains the fundamental principles of public procurement. It stipulates that contracting authorities have to treat economic operators equally and without discrimination and have to act in a transparent and proportionate matter.

[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, [2014] OJ L 94/65.
[2] Contracting authorities are defined in Article 2(1)(1) as the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.
[3] The Directive contains several specific exclusions in section 3 of Chapter I of Title I. The Directive is not applicable in these situations.
[4] European Commission, *Public Procurement,* available at <https://ec.europa.eu/growth/single-market/public-procurement_en> last accessed on 23 February 2022.
[5] Recitals 2 and 78 Directive 2014/24/EU.

When it comes to equal treatment, the Court already held in Storebaelt[6], even before the principle was expressly codified in the procurement Directive that was in force at the time[7], that the duty to observe the principle lies at the very heart of the Directive whose purpose is to ensure in particular the development of effective competition in the field of public contracts and which lays down criteria for selection and for award of the contracts, by means of which such competition is ensured. As held in recital 90, to ensure compliance with the principle of equal treatment in the award of contracts, contracting authorities are obliged to create the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied in the contract award decision. Indeed, transparency is mainly a correlative to the principle of equal treatment and a means to ensure its respect.[8] As the Court held in *Michaniki AE, '*Observance of the principle of equal treatment and of the principle of transparency, entailed by the latter, are binding on contracting authorities and mean in particular that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority'.[9]

The principle of non-discrimination is a specific expression of the principle of equal treatment as well.[10] It is more limited in scope and specifically aims to ensure that there is no (in)direct discrimination between domestic and foreign products or service providers on the basis of nationality. The non-discrimination principle reflects the principle of national treatment as laid down in the Government Procurement Agreement (GPA) in the context of the World Trade Organization to which the EU is a party with regard to its 27 Member States. Parties to the GPA are required to give the same treatment to national providers and products and providers and products from other signatory states. [11]

The proportionality principle ensures that all requirements imposed by a contracting authority are proportionate to the objects and scope of the public contract. For example, overly demanding requirements concerning the economic and financial capacity of economic operators are considered to constitute an

[6] Case C-243/89, *Storebaelt*, ECLI:EU:C:1993:257, para. 33.
[7] Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, OJ 1971 (II), p. 682, para. 33.
[8] European Commission, Interpretatie communication of the 23rd of June 2006, OJ C 179/1.8.2006, p. 2; C. Moukiou, 'The Principles of Transparency and Anti-Bribery in Public Procurement: A Slow Engagement with the Letter and Spirit of the EU Public Procurement Directives', in *European Procurement and Public Private Partnership Law Review*, 2/2016, Lexxion, Berlin, 2016, p. 75.
[9] Case C-231/07 *Michaniki AE*, ECLI:EU:C:2008:731, para. 45.
[10] Case C-458/03 *Parking Brixen*, ECLI:EU:C:2005:605, para. 48.
[11] Art. IV (1) and (2) of the Government Procurement Agreement.

unjustified obstacle to the involvement of SMEs.[12] Technical specifications which lay down the characteristics required of a work, service or supply should also be linked to the subject-matter of the contract and proportionate to its value and objectives.[13]

Even when procurement contracts do not fall within the scope of the directive in view of their value, the above-mentioned procurement principles still have to be observed provided that those contracts have a certain cross-border interest in light of certain objective criteria.[14] This means that the contract may be of interest to an undertaking located in a Member State other than in which the contract is awarded.[15] A contract may display such an interest due to its value, in conjunction with the place where the service is to be carried out or the specific characteristics of the contract.[16] When the specific procedural rules of the Directive are not applicable because the thresholds are not reached, the obligation of transparency to be complied with by public authorities consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to allow the contract to be opened up to competition and the impartiality of the award procedures to be reviewed.[17]

## 3. Cross-border procurement

While Directive 2014/24/EU has led to a significant increase of total award values, cross-border procurement is still very low and is even decreasing.[18] Several studies reach this conclusion although the exact numbers are not identical which can be due to the fact that different time slots have been considered and different methodologies have been used[19]. While the volume of cross-border contracts increased from approximately 11.3 billion euros in 2013 to 17.7 billion euros in 2018, its share in comparison to the total award volume (190.5 billion euros in 2013 and 526 billion euros in 2017) decreased from 5.95% to only 3.36%[20]. According

[12] Article 58 and recital 83 Directive 2014/24/EU.
[13] Article 42(1) Directive 2014/24/EU.
[14] Case C-144/17 *Lloyd's of London* ECLI:EU:C:2018:78, para. 23.
[15] Case C-91/08 *Wall* ECLI:EU:C:2010:182, para. 34.
[16] Case C-699/17 *Allianz Vorsorgekasse* ECLI:EU:C:2019:290, para. 50.
[17] Case C-65/17 *Oftalma Hospital* ECLI:EU:C:2018:263, para. 36.
[18] J. Becker, M. Niemann & S. Halsbenning, *Contribution to Growth – European Public Procurement – Delivering Economic Benefits for Citizens and Businesses,* study requested by the IMCO Committee of the European Parliament, 2019, p. 17, available at <https://www.europarl.europa.eu/RegData/etudes/STUD/2018/631048/IPOL_STU(2018)631048_EN.pdf> last accessed on 23 February 2022.
[19] The study of Becker, Niemann & Halsbenning for IMCO refers to cross-border procurement in general terms while the study of the European Commission makes a distinction between direct and indirect cross-border public procurement.
[20] Becker, Niemann & Halsbenning, 2019, p. 7.

to the European Commission, in 2015 direct cross-border purchasing, which corresponds to contracts won from awarding authorities located in a Member State different from where the bidding firm is located, remains very low at just 2% of the number of awards and 3.5% of the value of awards. The number of indirect cross-border purchasing, which corresponds to contracts won from awarding authorities located in the same Member State as the bidding firm but where this firm's ultimate owner is from a different Member State, is substantially higher, at above 20% of both number and value of awards.[21] This is still very low by comparison to the levels of import penetration in the EU economies overall.[22] As held by the Commission, penetration of cross-border purchasing in public procurement is a gauge of the extent to which public procurement rules have successfully created transparent and competitive markets for public purchasing across all EU Member States, specifically as the EU public procurement rules seek to promote transparency and competition in procurement markets.[23] It appears that the public procurement legislative framework has not been that successful this regard.

The low number of cross-border awards is held to be due to natural barriers like language, geography and lack of international experience of involved companies as well as to other hampering factors which include technical barriers, product-specific information costs and the spatial clustering of firms.[24] According to the Commission's study[25], 23% of businesses reported language barriers as a main obstacle for bidding cross-border[26], in addition to high competition from national bidders (40%), perceived preference among

[21] European Commission, *Measurement of impact of cross-border penetration in public procurement,* 2017, p. xiv, available at <https://op.europa.eu/en/publication-detail/-/publication/5c148423-39e2-11e7-a08e-01aa75ed71a1> last accessed on 23 February 2022.

[22] Given the complexity of cross-border procurement and the particularities of each EU country, firms see direct cross-border bidding as less likely to succeed than indirect cross-border. As the firms' strategy to reach cross-border markets develops, they are therefore more likely to establish a subsidiary to deal with the complexity of country-specific requirements. See *Ibid* p. 111.

[23] *Ibid*, p. x.

[24] Beckler, Niemann & Halsbenning, 2019, p.19, referring to N. Chen, 'Intra-National versus International Trade in the European Union: Why Do National Borders Matter?' in *Journal of International Economics* (63:1), 2004, pp. 93–118.

[25] The study considers all public procurement contract awards in the TED databases from 2009 to 2015 and 1,791 companies completed the Commission's survey. It has to be noted that the influence of Directive 2014/24/EU could not be taken into account due to the fact that most of the provisions of this Directive only had to be implemented by 18 April 2016. The Becker, Niemann & Halsbenning study includes the years 2016 and 2017 as well and it appears that cross-border procurement was also then in a downward spiral.

[26] It should be noted that also outside procurement lack of knowledge of foreign languages has been identified by professionals as a difficulty to sell services. 35,8 % of all EU merchant respondents (1,107 from the EU; UK respondents were excluded) view languages as a significant or extremely significant barrier in 2019. See E. Dahlberg et al., *Legal Obstacles in Member States to Single Market Rules,* study requested by the IMCO Committee of the European Parliament, 2020, p. 79 and 116, available at <https://www.bruegel.org/wp-content/uploads/2020/11/IPOL_STU2020658189_EN.pdf> last accessed on 23 February 2022. According to a 2011 study by H. Egger and A. Lassmann, in international trade, a common language (official or spoken) increases trade

contracting authorities for local bidders (39%), unfamiliar legal context or formal requirements leading to market entry barriers in the awarding country (32%) and additional costs due to the geographic distance (30%).[27] SMEs consider most of these barriers to be more problematic than large entities. The report concluded that a local presence is perceived as an advantage by cross-border bidders because contracting authorities are perceived to favour contractors who speak their language and are not geographically remote.[28] For instance, a high percentage of Portuguese intra-EU imports are from Spain and a high percentage of Irish imports are from the UK.[29]

This contribution will focus on the use of contract notices as a tool to obtain transparency regarding the needs and wishes of contracting authorities and as a means of calling for competition. More specifically will this contribution focus on language *requirements* that are provided for in the Directive relating to such notices and on the possibilities for contracting authorities to require in a contract notice the use of (a) certain language(s) by economic operators when making their tender proposals or requests to participate. The goal of this contribution is to assess whether the Directive may in fact contribute to the low rate for cross-border procurement because of language rules.

## 4. Language requirements in procurement procedures

### 4.1. The language of the contract notice

In essence contract notices are used as a means of calling for competition in respect of all public procurement procedures.[30] As held by Article 49, they shall contain the information set out in Annex V part C and shall be published in accordance with Article 51. Notices are published in the format of standard forms which are established by the European Commission by means of implementing acts. After they are drawn up, contracting authorities have to transmit their notice by electronic means to the Publications Office of the

flows directly by 44%. See P.H. Egger & A. Lassman, 'The Language Effect in International Trade: A Meta-Analysis' in *Economics Letters,* Elsevier, 2012*,* p. 221. There are many other sources covering this topic. See e.g. G.J. Felbermayr & F. Toubal, 'Cultural proximity and trade' in *European Economic Review,* Elsevier, 2010, pp. 279-293; L. Guiso, P. Sapienza & L. Zingales, 'Cultural Biases in Economic Exchange' in *The Quarterly Journal of Economics,* vol. 124, 3, Oxford University Press, 2009, pp. 1095-1131 and J. Melitz & F. Toubal, 'Native language, spoken language, translation and trade', in *Journal of International Economics,* 93, Elsevier, 2014, pp. 351-363.

[27] European Commission, *Measurement of impact of cross-border penetration in public procurement,* 2017, p. 105 and 120.

[28] European Commission, *Measurement of impact of cross-border penetration in public procurement,* 2017, p. 111, available at https://op.europa.eu/en/publication-detail/-/publication/5c148423-39e2-11e7-a08e-01aa75ed71a1

[29] European Commission, *Measurement of impact of cross-border penetration in public procurement,* 2017.

[30] Article 49 contains some exceptions. These will not be discussed within the scope of this contribution.

European Union.[31] In addition, contracting authorities may publish this information on the Internet on a 'buyer profile'.[32]

As held by Article 51(3), contract notices shall be published in the official language(s) of the institutions of the Union chosen by the contracting authority. That language version or those language versions shall constitute the sole authentic text(s). Only the summary of the important elements of each notice has to be published in the other official languages of the institutions of the Union. As held in Annex VIII, the format and procedure for sending notices electronically as established by the Commission are made accessible at the Internet address http://simap.europa.eu. The internet address is automatically changed into https://simap.ted.europa.eu , TED being an abbreviation for 'Tenders Electronic Daily'. The TED website is the online version of the 'Supplement to the Official Journal' of the EU, dedicated to European public procurement. Every day, from Monday to Friday about 2,600 public procurement notices are published on TED. Every year TED publishes 676 thousand procurement award notices , including 258 thousand calls for tenders which are worth approximately € 670 billion.[33] Everyone can browse, search and sort procurement notices by country, region, business sector and more. In this way TED provides free access to business opportunities from the European Union, the European Economic Area and beyond.

In light of this contribution it is interesting to note that the TED website specifically indicates that '*information about every procurement document is published in the 24 official EU languages*'.[34] However, as held above and in line with Article 51(3) of the Directive, contract notices are generally only published in the language chosen by the respective contracting authority as . While a summary of the important elements of each notice should be published in the other official languages of the institutions of the Union as well, it should be noted that only after registering on TED -which is nor a difficult nor a time consuming exercise- a request can be made to ask a translation of the summary of the contract notice. This translation is sent to the requester's email address within an hour and is for understanding only as it will be market 'unrevised machine translation'.

Notices from the EU institutions are published in full in all official EU languages however.[35]

[31] Article 51(2) Directive 2014/24/EU.
[32] Annex VIII Directive 2014/24/EU.
[33] Available at <https://ted.europa.eu/TED/misc/aboutTed.do> last accessed on 23 February 2022.
[34] Available at <https://ted.europa.eu/TED/main/HomePage.do> last accessed on 23 February 2022.
[35] Available at <https://ted.europa.eu/TED/misc/aboutTed.do> last accessed on 23 February 2022.

The question should be asked now whether it is problematic, from a legal point of view, that contract notices are not fully available in all official EU languages and whether it is in violation with EU law that summary translations are only available after registering on Ted, the translation being sent within an hour while being 'for understanding only'. This will be scrutinized in paragraph 4.

### 4.2. The language required by the contract notice

Annex V part C contains a list will all the information that has to be included in the contract notices. This information includes the data (name, address, telephone number etc) of the contracting authority, the description of the procurement (nature and extent of the works, nature and quantity or values of supplies, nature and extent of services), the estimated total order of magnitude of the contract, the time-frame for the delivery or provision of supplies, works or services and, as far as possible, the duration of the contract, the conditions for participating including a list and brief description of criteria regarding the personnel situation of economic operators that may lead to their exclusion and of selection criteria, the type of award procedure, the criteria to be used for award of the contract, the time limit for receipt of tenders or request to participate and the name and address of the body responsible for review. In addition the contract notice should also indicate in which language or languages[36] tenders or requests to participate must be drawn up. This entails that a Dutch contracting authority can indicate that tenders can only be submitted in the Dutch language.

## 5. Evaluation

### 5.1. Introduction

There is no doubt that language skills and requirements can have an influence on the amount of competitors taking part in a public procurement procedure organized by national, regional or local contracting authorities. The rate of cross-border public procurement is low and language skills are identified as a major concern by economic operators. Language has by some been considered as a non-tariff barrier as it increases the cost of communicating with distributors, retailers and customers; raises the difficulty of assessing the local market

[36] Annex V Part C point 22.

environment and may raise the transaction costs associate with any commercial documents and contractual agreements.[37]

Before analyzing the two references to language in Directive 2014/24/EU that were identified above, namely the language *of* the contract notice and the language *required by* the contract notice, some general remarks will be made first about the EU's language rules that are relevant in this context.

First of all it should be noted that according to Article 342 TFEU, the rules governing the languages of the institutions of the Union are determined by the Council, acting unanimously by means of regulation. On the basis of Council Regulation 1/1958[38] as amended most recently by Council Regulation 517/2013[39], there are currently 24 official languages in the European Union. The joint official status of these 24 languages is based on the principle of formal equality of languages. Multilingualism reflects the political equality of Member States and serves as a defence against international pressure from certain languages, especially English.[40]

Furthermore, Article 21 of the Charter holds that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, *language*, religion or belief, political or another opinion, membership of a national minority, property, birth, disability, age or sexual orientation is prohibited. It has to be noted however that the Charter is only applicable to the EU institutions and bodies of the Union and to the Member States when they are implementing Union law. When it comes to the EU institutions, this brings about that when a Directive such as Directive 2014/24/EU would require or allow Member States to act contrary to fundamental rights, the Charter may be violated. Indeed, as held in the case *European Parliament v Council*, a provision of a Union act can in itself not respect fundamental rights if it requires, or expressly or impliedly authorises, the Member States to adopt or retain national legislation not respecting those rights.[41] When it comes to the application of the Charter to the Member States it has to be noted that

[37] G. Deltas & S. Evenett, 'Language as a barrier to entry: Foreign competition in Georgian public procurement', in: *International Journal of Industrial Organization',* 73, 2020, p. 1-2.
[38] EEC Council Regulation No 1 determining the languages to be used by the European Economic Community, Official Journal 017, 06/10/1958, pp. 385-386.
[39] Council Regulation (EU) No 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia, [2013] OJ L 158/1.
[40] I. Urrutia & I. Lasagabaser, 'Language Rights as a General Principle of Community Law' in *German Law Journal,* vol. 8, issue 5, 2007, p. 482; M. Gazzola, 'Making Multilingualism in the European Union: Language Policy Evaluation for the European Parliament' in *Language Policy,* Springer, 2006, 5, p. 398.
[41] Case C-540/03 *European Parliament v Council* ECLI:EU:C:2006:429, para. 23.

while the Charter is applicable to Member States when they implement Directive 2014/24/EU, it is not applicable to individual contracting authorities when acting as public buyers and using or referring to a specific language in their contract notice[42]

### 5.2. The language of the contract notice

It is not hard to imagine that economic operators that have no knowledge of the language(s) of the contracting authority, may be indirectly discriminated.[43] While the language of the contract notice may be the same for all operators, the fact that the notice is not fully available in all languages has a harsher impact on operators from other Member States that are not familiar with the specific languageThis may hinder the free provision of goods that are provided by those operators -in procurement terms 'supply contracts[44]'- and the freedom of services that are provided by those operators -in procurement terms 'services contracts[45]' or when certain conditions are fulfilled 'works contracts[46]'. As indicated by the Court in *Gebhard*[47], national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty are in principle not in conformity with EU law. In a procurement context, the Court has held that the obligation of transparency consists in ensuring, for the benefit of any potential tenderer, *a degree of advertising sufficient* to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.[48] It can be argued that the EU has to a certain extent codified the application of the principle of proportionality in this regard. Nevertheless, it can be questioned whether the market is really opened up to competition if the tender notice is not published fully in all EU languages. While there has not been a case in which this issue was disputed, it can be argued that the summary translation to all official languages may be sufficient to comply with the proportionality principle as it allows for economic operators to participate in the procurement procedure while at the same time taking into account of the principle of value for money. The quality of the service, supply or works as valued by the contracting authority is indeed often depending on the degree of understanding between the public authority and the economic operator. It should be noted however that even though contracting authorities at state, regional or local level

[42] Article 51 EU Charter.
[43] According to Deltas & Evenett, providing tender information only in a local language and not in an international lingua franca, such as English, is a form of discrimination. See , G. Deltas, & S. Evenett, 'Language as a barrier to entry: Foreign competition in Georgian public procurement', in: *International Journal of Industrial Organization',* 73, 2020. p. 13.
[44] Article 2(1)(8) Directive 2014/24/EU.
[45] Article 2(1)(9) Directive 2014/24/EU.
[46] Article 2(1)(7) Directive 2014/24/EU.
[47] Case C-55/94, *Gebhard*, ECLI:EU:C:1995:411, para. 39.
[48] Case C-324/98 *Telaustria,* ECLI:EU:C:2000:669, para. 62.

or bodies governed by public law are the ones that are responsible for drawing up the contract notices and to respect the transparency principle, it is the Directive2014/24/EU itself that allows those contracting authorities to choose the language they use and that holds that only a summary of the important elements will be translated in the other official languages. It is hard to say that contracting authorities, living up to these requirements, would be violating EU law as they are merely applying the provisions of the procurement Directive for which they can hardly be blamed.

It can then be asked whether the Directive itself is in fact hindering free movement and is as such not in conformity with the primary treaty articles. This question should of course also be answered in the negative, as the treaty articles are in essence addressed to the Member States and not to the institutions that made the Directive. Nevertheless, while Directive 2014/24/EU is available and published in all official EU languages, the information contained in the tender notices is not fully available in all EU languages and this is even specifically allowed for by Directive 2014/24/EU. While the articles on free movement are not addressed to the EU institutions, it has to be noted that the institutions are bound by the Charter of Fundamental Rights which stipulates in Article 22 that the Union shall respect cultural, religious and linguistic diversity. In addition, Article 21 prohibits discrimination on a number of different grounds, including language.

The question can then be asked whether the Directive itself specifically allows for discrimination on the basis of language which could be problematic in light of the above-mentioned case *European Parliament v Council.* As held by Article 5 of Regulation 1/1958, the Official Journal of the European Union shall be published in the official languages. As held above, on the basis of Article 51 of Directive 2014/24/EU contract notices are published in full in the official language(s) or the institution of the Union chosen by the contracting authority, which seems to be in contradiction with Regulation 1/1958 as this Regulation does not seem to provide for an exception when it comes to publications that are included in the 'supplement' to the Official Journal such as contract notices. A supplement can be defined as a separate part or an additional section of a publication.[49] Indeed, the Interinstitutional Style Guide of the EU specifically holds that the Official Journal consists of three series: the L series (Legislation-; the C series (Communication such as committee opinions, notices, case reports and information about judgements) and the S series which is the supplement and includes calls for tender for public contracts which are as said also available electronically on the TED

[49] Available at <https://www.collinsdictionary.com/us/dictionary/english/supplement> last accessed on 23 February 2022.

database. This entails that tender notices are indeed an actual part of the Official Journal and should hence in principle be fully published in all official EU languages.

Even though the Court held in *Kik*[50] that there is no general principle of Community law that confers a right on every citizen to have a version of anything that might affect his interest drawn up in his language in all circumstances, it should be noted that that conclusion was made to explain that only the institutions and certain bodies of the Union that are referred to in the Treaties[51] are required to correspond with citizens in any of the treaty languages and to reply in the language chosen by the citizen. Bodies that are not included are not required to do this. The Court held that language regimes are the result of a difficult process which seeks to achieve the necessary balance between the interest of economic operators and the public interest in terms of the cost of proceedings.[52]

In this regard it should be noted firstly that even though there may be no general principle of Union law conferring a right on every citizen or company to have a version of anything that may affect his interest, the fact remains that Article 5 of Regulation 1/1958 specifically holds that the Official Journal (and not just some parts of it) should be published in all official EU languages. Furthermore, the argument in *Kik* regarding the balance between the interest of economic operators and the public interest in terms of the cost of proceedings can make sense from an economic point of view as it is specifically focusing on the indication of a second language when making an application for registering a trade mark as a possible language of proceedings for opposition, revocation or invalidity proceedings for the Office for Harmonisation in the Internal Market. However, transparency and equal treatment in public procurement procedures have the explicit goal of opening up the market, to increase competition and to have more value for money. It can be argued that by means of Directive 2014/24/EU the EU has explicitly allowed for specific language use as a mandatory reason of public interest to allow for a derogation to free movement in a procurement context. When it comes to the proportionality principle, it can be wondered whether the costs of full translation outweigh the benefits of possible increased competition. This is an exercise that requires an economic analysis that will not be made in this contribution. It should be noted however that the fact that a service is

[50] Case C-361/01 *Kik* ECLI:EU:C:2003:434, para 82.

[51] Citizens of the Union have for example, on the basis of Article 20 TFEU, the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language. The advisory bodies of the Union are enumerated in Article 300 TFEU. In addition, on the basis of Article 24 TFEU, every citizen of the Union may write to any of the institutions or bodies referred to in this article or in Article 13 TEU in one of the language(s) mentioned in Article 55(1) TEU and have an answer in the same language. The *Kik* case concerned the Office for Harmonization in the Internal Market which is not included in those lists.

[52] Case C-361/01 *Kik* ECLI:EU:C:2003:434, para. 92.

costly does not mean that it is *ipso facto* too expensive as the perception of how expensive a service is depends on the subjective value that the observer or the society attributes to it.[53] In any case, it is the author's opinion it that even though there may be high translation costs involved, such economic concerns should in principle not be a ground to violate the content of Article 5 of Regulation 1/1958 nor the general principle of equal treatment. However, as already mentioned before, easy access to a summary translation to all official EU languages can be considered as a proportionate measure to overcome the most pressing difficulties while ensuring value for money. Notwithstanding this, a study of Deltas & Evenett of the Georgian procurement market revealed measurable and statistically significant effects of English documentation on foreign participation, often leading to a doubling of foreign bidders. However, with foreign participation being low, a double of those rates only led to a small increase in total bidder participation in tenders.[54] Nevertheless, the fact that competition is significantly increased leads to more choice for the contracting authority and to lower prices[55] and/or higher quality.

Even if it would be considered that the procurement Directive is in principle not in conformity with Regulation 1/1958, the Court of Justice will most likely not find a violation due to the broad discretion of the EU legislator. Indeed, while it goes without saying that the EU legislator is bound to respect to fundamental rights and principles, the Court seems to be much more lenient when it is judicially reviewing compliance with those rights and principles compared to when it assesses national measures. As recently held by the Court in *Hungary v European Parliament*[56] in a case on the posting of workers, the EU legislature must be allowed a broad discretion in areas in which it action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. This broad discretion implies limited judicial review of its exercise.[57] The Court holds that the criterion to be applied is not whether a measure was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to

[53] M. Gazzola, 'Managing Multilingualism in the European Union: Language Policy Evaluation for the European Parliament' in *Language Policy,* 5, Springer, 2006, p. 400.

[55] In the study the price decrease due to English documentation was statistically significant and of the order of half to one percentage point. This can lower the profits of economic operators by 5 to 10%. Nonetheless, overall English documentation has a relatively minor impact. G. Deltas & S. Evenett, 'Language as a barrier to entry: Foreign competition in Georgian public procurement', in: *International Journal of Industrial Organization',* 73, 2020, p. 18.

[55] In the study the price decrease due to English documentation was statistically significant and of the order of half to one percentage point. This can lower the profits of economic operators by 5 to 10%. Nonetheless, overall English documentation has a relatively minor impact. G. Deltas & S. Evenett, 'Language as a barrier to entry: Foreign competition in Georgian public procurement', in: *International Journal of Industrial Organization',* 73, 2020, p. 18.

[56] Case C-620/18 *Hungary v European Parliament,* ECLI:EU:C:2020:1001, para. 112.

[57] Case C-620/18 *Hungary v European Parliament,* ECLI:EU:C:2020:1001, para. 114.

pursue.[58] When it comes to EU legislation there is no or less danger for hidden protectionism of national economies. In procurement procedures, it is crucial that contracting authorities are able to select the most economically advantageous tender. While language restrictions may limit competition, the use of a certain language by a contracting authority will to a certain extent ensure that it can communicate with the suppliers or service providers that understand this language and grasp what the authority needs. For this reason, the provisions of the Directive cannot be considered manifestly inappropriate to select the tender with the best value for money.

Finally, it can be argued that language is a part of culture and that according to Article 167(4) TFEU, the Union is obliged to take cultural aspects into account in its actions under other provisions of the treaties, in particular in order to respect and to promote the diversity of its cultures. Even though it is unlikely that this argument was made when drafting the procurement Directive, it can be argued that this is another reason why contracting authorities should have the right to publish contract notices in the language they choose.

### 5.3. The language required by the contract notice

The fact that contracting authorities can impose in which language tender proposals or requests to participate should be submitted is clearly a form of indirect discrimination which is apparently allowed for by the Directive. As held by the Court in *Pizzo*[59] the principles of transparency and equal treatment which govern all public procurement procedures require the substantive and procedural conditions concerning participation in a contract to be clearly defined in advance and made public, in particular the obligations of tenderers, in order that those tenderers may know exactly the procedural requirements and be sure that the same requirements apply to all candidates. In addition, application of the procurement principles should afford equality of opportunity to all tenderers when formulating their tenders.[60]

Demanding a specific language from all economic operators, does not lead to unequal treatment in the strict sense. Nevertheless, such requirement is liable to hinder or make less attractive the exercise of fundamental freedoms as meant in the *Gebhard* case. While indirectly discriminatory measures can in principle only be in conformity with EU law when they are justified and proportionate, it is clear that Directive 2014/24/EU does

[58] Case C-620/18 *Hungary v European Parliament,* ECLI:EU:C:2020:1001, para. 112. See also Case C-482/17 *Czech Republic v Parliament and Council,* ECLI:EU:C:2019:1035, para. 77 and Case C-58/08 *Vodafone and others,* ECLI:EU:C:2010:321, para. 52.
[59] Case C-27/15 *Pizzo,* ECLI:EU:C:2016:404, para. 37. See also Case C-531/16 *Ecoservice,* ECLI:EU:C:2018:324, para. 23.
[60] Case C-87/94 *Commission v Belgium,* ECLI:EU:C:1996:161, para. 54.

not even require a justification ground to be invoked. Indeed, in *Gebhard* the Court held that such measures must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.[61] The *Gebhard* ruling which was relevant regarding the freedom of establishment and the freedom to provide services followed the line of reasoning of the earlier *Dassonville*[62] judgement regarding the free movement of goods. In *Dassonville* the Court took the view that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade were to be considered as measures having an effect equivalent to quantitative restriction. The Court's reasoning was developed further in the *Cassis de Dijon*[63] judgment in which it was held that any product legally manufactured and marketed in a Member State in accordance with its fair and traditional rules, and with the manufacturing processes of that country, must be allowed onto the market of any other Member State. This is the basic reasoning underlying the debate on defining the principle of mutual recognition, operating in the absence of harmonisation. Indeed, even in the absence of EU harmonisation measures, Member States are obliged to allow goods that are legally produced and marketed in other Member States to circulate and to be placed on their markets.

Directive 2014/24/EU also contains a certain degree of harmonization as it ascertains the admitted limits of international unification but does not necessarily amount to a vision of total uniformity. Indeed, contracting authorities have to indicate in which language(s) a tender should be submitted while being free to decide on the number of languages they accept. With regard to free movement however the aim of harmonization is to establish common rules aimed at guaranteeing the free circulation of goods and products and guarantee a high level of protection of the public interest objectives such as protection of the environment and consumer protection. Harmonisation must be restricted to essential requirements, and is justified when national rules cannot be considered equivalent and create restrictions. It is clear that the language requirement does not live up to these goals and even limits the free movement of goods and persons in the EU as economic operators that are not knowledgeable of the language required, will refrain from participating in a public tender procedure.

[61] Case C-55/94 *Gebhard*, ECLI:EU:C:1995:411, para. 37.
[62] Case C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville*, ECLI:EU:C:1974:82, paras. 5.
[63] Case C-120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltun fuer Branttwein,* ECLI:EU:C:1979:42.

In this regard it should be questioned which overriding reason of public interest could be invoked to limit the use of languages that may be used by economic operators. Different arguments can be made. First, it is important that contracting authorities can thoroughly assess the tender proposals they receive in a language they understand. Specifically since the award of public contracts should be based on the criterion of the most economically advantageous tender which is identified on the basis of the price or cost and which may include a price-quality ratio and since Member States may even provide that contracting authorities may not use price only or cost only as the sole award criterion, it is clear that public officials need to understand much more than just the price tag. Reasons of quality, consumer protection, public safety and the fact that taxpayers' money should be spend efficiently bring about that contracting authorities should take their award decision with due care, being able to understand the content of all proposals. In procurement procedures contracting authorities can be seen as the consumer as they buy products on the market, next to the general public who in many cases ultimately benefits from the construction of a new road or the provisions of certain supplies. In many cases the Court considered that consumer protection was a valid justification to limit free movement by the introduction of a certain language requirement.[64]As indicated also with regard to the language of the contract notice, it can be argued that cultural and linguistic diversity as meant in Article 167(4) TFEU is another reason why contracting authorities should have the right to ask that tender proposals are drafted in a certain language. Of course the counter-argument lies around the corner, as the same can be said for economic operators who can claim that their right to express themselves in their own language should be respected as well.

Finally, it should be stressed that contracting authorities refer to (a) specific language(s) for submission of tender proposals *because the Directive specifically allows them to do so* which brings about that it is difficult to accuse contracting authorities for violating EU law . Again the question can be asked whether the Directive in itself is not violating the principle of equal treatment and the provisions of the Charter. As noted above, the Court is lenient and is of the opinion that the EU legislature must be allowed a broad discretion in areas in which it action involves political, economic and social choices.[65] Indeed, while language restrictions may limit competition, they also allow contracting authorities to take an informed decision. There would be no point in having a procurement procedure in case the authority is not in the possibility to critically assess the

[64] See e.g. Case C-424/97 *Haim*, ECLI:EU:C:2000:357; Case C-85/94 *Piageme*, ECLI:EU:C:1995:312; Case C-33/97 *Colim,* ECLI:EU:C:1999:274*;* Case C-506/04 *Wilson,* ECLI:EU:C:2006:587.
[65] Case C-620/18 *Hungary v European Parliament,* ECLI:EU:C:2020:1001, para. 114.

submitted tender proposals in a language that it masters. For this reason, the language requirements of the Directive cannot be considered manifestly inappropriate in light of its objective.

The somewhat seemingly harsh treatment of economic operators is to some extent mitigated by the European Single Procurement Document (ESPD), consisting of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the economic operator is not in one of the exclusion grounds and meets the relevant selection criteria.[66] A standard electronic form is drawn up for this and the Commission has made available all language versions of the ESPD in e-certis, the online repository of certificates.[67] As held in recital 86, the EPSD can reduce problems linked to the precise drafting of formal statements and declaration of consent as well as language issues. Another tool to mitigate language barriers to some extent is the application of the Internal Market Information System (IMI)[68] to public procurement.[69] In April 2015 the Commission launched a pilot project to help public authorities check the information and documentation provided by procurement companies from other European countries. In this way the IMI can serve as an electronic means to facilitate and enhance administrative cooperation managing the exchange of information on the basis of simple and unified procedures overcoming language barriers. It should be noted however that there is hardly any information available on the efficiency of the IMI system when it comes to procurement.

## 6. Conclusion

The 2014 procurement package aims for more transparency and efficiency, a smoother award of contracts, a better connection between price and quality, more competition and a growing economy.[70] In addition the Directive aims to contribute towards an improvement of the level of success of SMEs by adapting procurement procedures to the needs of SMEs.[71]

While from the outset it can be argued that the Directive indeed violates Article 21 and 22 of the Charter as the EU institutions seem to hamper linguistic diversity, one cannot forget that there are two sides to the

[66] Article 59(1) Directive 2014/24/EU.
[67] Article 61(3) Directive 2014/24/EU.
[68] Regulation 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market System and repealing Commission Decision 2008/49/EC, [2012] OJ L 316/1.
[69] Article 86 and recital 128 Directive 2014/24/EU.
[70] Communication of the Commission of 13 April 2011, "The single market act: Twelve levers to boost growth and confidence", IP/11/469.
[71] Recital 124 Directive 2014/24/EU.

same coin. While on the one hand it can be argued that economic operators should have the right to use their own language when participating in a tender procedure and to understand the details of every call for tenders, it should be noted on the other hand that also contracting authorities have the right to publish and evaluate tenders that are composed in their own language. If public authorities would be obliged to allow that tender proposals would be submitted in any EU language, they will most likely not be in the possibility to make informed and high quality decisions when assessing tender proposals. In addition, if contracting authorities would not be allowed to specifically ask for the language(s) they are most comfortable with, it can be argued that their right to cultural identity is hampered while the EU is bound to respect national and regional diversity on the basis of Article 167(1) TFEU and has to take cultural aspects into account in its action under other provisions of the treaties. The mandatory introduction of English as a lingua franca would lead to a similar conclusion. Be this as it may, it seems that there is a very thin line between the respect the Union should have for the use of a particular language on the one hand and discrimination based on the use of that particular language on the other hand. It can be concluded that the specific extent of linguistic rights and duties may still be open to argument.[72]

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[72] See also Urrutia & Lasagabaser, 2007, p. 500.

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