



Promoting Social Considerations into Public Procurement Procedures for Social Economy Enterprises

Matrix explaining how social considerations have been embedded in the Italian law transposing Directive 24/2014/EU

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January 2019

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Article 18(2) of the Directive ► Article 30 (3) of D.lgs. no. 50/2016 (Code)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Article 30 - Principles for the awarding and execution of contracts and concessions</p> <p>3. In the execution of public contracts and concessions, economic operators comply with applicable obligations in the fields of environmental, social and labour law established by European and national legislation, collective agreements or international provisions listed in Annex X.</p>	<p>The provision requires economic operators to comply with environmental, social and labour obligations established by European and national legislation, collective agreements and international provisions as set out in Annex X of the new code.</p> <p>The international conventions referred to by the provision are the most important conventions in force in the social field, concerning the protection of workers' rights and the protection of the environment.</p> <p>The provision of paragraph 3 receives further specification from the subsequent paragraphs of Article 30, with particular regard to labour protection regulations.</p> <p>In fact, Article 30, paragraph 4, specifies that the personnel employed in the works, services and supplies subject to public contracts and concessions is applied the national collective contract and territorial in force for the sector and for the area in which they perform the work services stipulated by the associations employers and comparatively more representative employers at national level and those whose scope of application is closely related to the activity covered by the contract or the concession carried out by the company even predominantly.</p> <p>Paragraph 6 of Article 30 specifies that the delay in the payment of salaries due to staff constitutes a precise breach by the contractor; the single manager of the proceedings must challenge him and order</p>	<p>The provision is part of a more general provision which establishes the general principles applicable to the procedures for the awarding of public contracts and their execution.</p> <p>It is expected that in the execution of public tenders and concessions, economic operators are obliged to comply with the rules for the protection of social, environmental and labour rights.</p> <p>From this derives the obligation for the contracting authority to request the necessary evidence in the verification of the anomaly of the offer (Article 97, paragraph 5 letter a).</p> <p>Therefore, the contracting authority must exclude the proposed offer without respecting the minimum wage obligations in favour of the workers, and this regardless of the adequacy of the bid as a whole. In this the newness with respect to the previous discipline is substantiated.</p> <p>From a textual and systematic examination, it emerges, in fact, that the reason of the provision, and of the whole new code, consists in the protection of minimum rights where the primary</p>	<p>The rule is particularly important because it is expressly referred to repeatedly in the Code (Legislative Decree no. 50 of 2016) in relation to the causes of exclusion from participation in the procurement procedure or its awarding. In particular:</p> <ul style="list-style-type: none"> - Article 80, paragraph 5, letter a), provides for exclusion from the tender in the event that the contracting authority can demonstrate by any appropriate means the presence of serious infringements duly established to the rules on health and safety at work and the obligations referred to in Article 30, paragraph 3. - Article 94, paragraph 2, provides that the contracting authority may decide not to award the contract to the bidder who submitted the most economically advantageous bid, if he has established that the bid does not meet the obligations under Article 30, paragraph 3. - Article 97, paragraph 5, letter a): in the case of abnormally low tenders, the contracting authority requests in writing, giving the competitor a term of not less than fifteen days, the presentation of explanations in writing. <p>It excludes the offer only if the explanation provided does not sufficiently justify the low level of prices or proposed costs, taking into account some elements of production indicated in paragraph 4 (process economy, technical solutions, originality of the works) or if it has established that the offer is abnormally low as it does not comply with the obligations set out in Article 30, paragraph 3.</p> <ul style="list-style-type: none"> - Article 97, paragraph 6: No justifications are

	<p>him to make the payments within the following 15 days and that - in the absence of formal and justified contestation of the request by the defaulting contractor - the contracting authority will pay the back pay directly to the workers, deducting the relative amount from the sums owed to the debtor.</p> <p>The obligation to apply national collective and territorial collective bargaining also applies to subcontractors, whose control is also a clear obligation of the main contractor.</p>	<p>environmental, social and labour interests are involved.</p> <p>The application of this provision is mainly the necessity that the offers of economic operators in contract award procedures are in compliance with the obligations deriving from the aforementioned rules and that compliance with them is a specific and mandatory contractual obligation, in case of non-compliance - of the sanctions provided for by the negotiating regulation (for example, Article 108 of the code concerning the termination of the contract).</p>	<p>allowed in relation to minimum mandatory salary treatment established by law or sources authorised by law. Furthermore, no justifications are permitted in relation to the security charges referred to in the security and coordination plan provided for by article 100 of the Legislative Decree of 9 April 2008, no. 81.</p> <p>- Article 100, paragraph 1: Contracting authorities may require special requirements for the execution of the contract, provided they are compatible with European law and with the principles of equal treatment, non-discrimination, transparency, proportionality and innovation and are specified in the contract notice, or in the invitation in case of procedures without tender or in the contract documents. These conditions may concern social and environmental requirements.</p> <p>***</p> <p>- The Law no. 221/2015 has imposed the obligation for the Public Administration to contribute to eco-innovation through so-called green procurements, obliging public administrations to minimise the environmental impacts related to the life cycle of goods and services as well as the work it acquires.</p> <p>- To protect workers in the field of private procurement, Article 1676 of the Civil Code establishes that the economic operator's employees may request payment of the remuneration payable to them directly to the subject who commissioned the work, within the limits of the debt one has towards the other.</p>
<p>Open questions</p>			
<p>Example of application from the national level (where applicable)</p>	<p>Contracting authorities cannot select economic operators who violate environmental, social and labour obligations, established by European and national law, collective agreements and the most relevant international conventions.</p> <p>In the execution of public contracts and concessions, it is not permitted to violate the environmental, social and labour obligations established by European and national law, collective agreements and the most relevant international conventions regulating these matters.</p>		

Article 20 of the Directive ► Article 112 of D.lgs. no. 50/2016 (Code)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Article 112 - Reserved contracts and concessions</p> <p>1. Without prejudice to the provisions in force concerning social cooperatives and social enterprises, the contracting authorities may reserve the right to participate in procurement and concession procedures or may reserve their execution to economic operators and social cooperatives and their consortia, whose main aim is the social and professional integration of people with disabilities or disadvantaged people or may reserve their execution in the context of protected work programmes when at least 30 % of the workers of the aforementioned economic operators are workers with disabilities or workers disadvantaged.</p> <p>2. For the purposes of this article, persons with disabilities are considered to be those referred to in Article 1 of the Law of 12 March 1999, no. 68, disadvantaged people, those provided for in Article 4 of the Law of 8 November 1991, no. 381, former patients of psychiatric hospitals, including judicial ones, subjects undergoing psychiatric treatment, drug addicts, alcoholics, minors of working age in situations of family difficulty, persons detained or interned in prisons, convicted persons and interns admitted to alternative measures to detention and to work outside in accordance with Article 21 of the Law of 26 July 1975, no. 354 and subsequent modifications.</p> <p>3. The call for tenders or the pre-information notice expressly declare that the contract or concession is reserved.</p>	<p>The "reserve" can be applied also in the context of concessions and not just contracts.</p> <p>The subjective scope of applicability of the provision is broadened compared to the previous legislation: the rule refers in general to economic operators and social cooperatives and their consortia whose main purpose is the social and professional integration of people with disabilities or disadvantaged, the reserve is therefore in favour of economic operators who employ not only the disabled (as was previously provided) but also disadvantaged people.</p> <p>It is possible to reserve the execution of the contract, as well as in the cases indicated above, also in the context of protected work programmes, when at least 30 per cent (no longer "the majority" as provided for by the provision of the previous legislation) of workers of the aforementioned economic operators is composed of workers with disabilities or disadvantaged workers.</p> <p>This provision introduces, in paragraph 2, an express definition of "workers with disabilities" and "disadvantaged workers", with reference to the respective sector disciplines.</p> <p>The call for tenders or the prior information notice must explicitly state that the contract or concession is reserved.</p> <p>The provision contains a broad definition of the subjects that fall within its scope, which includes all "economic operators" (as well as social cooperatives and their consortia) whose main purpose is the social and professional integration</p>	<p>Contracting authorities may reserve the right to participate in procurement or concession procedures - with express mention in the contract notice or the pre-information notice in the case of service concessions - to sheltered workshops and economic operators, the main purpose of which is the social and professional integration of disabled or disadvantaged persons or the possibility of reserving their execution where at least 30 % of the employees of the workshops and operators concerned, or the majority of the employees concerned, are disabled or disadvantaged persons.</p> <p>The aim of this provision is to promote the social and professional integration of people with disabilities or disadvantaged people.</p> <p>In incorporating the provisions of Article 20 of Directive 24/2014/EU, Legislative Decree 50/2016 established a regulation of "reserved contracts" in line with the provisions of the procurement directive and in part different from the previous regulatory framework established by Legislative Decree no. 163/2006.</p> <p>While the previous rule (Art. 52 of Legislative Decree no. 163/2006) fixed the number of disabled workers at the majority, the new provision, in addition to providing for a percentage of at least 30 %, also includes the category of disadvantaged workers.</p>	<ul style="list-style-type: none"> - Article 1 Letter c) of the Law no. 11 of 2016, which establishes the provision of technical specifications in the criteria for the award of a contract, in the conditions of execution of the same as well as in the criteria for the selection of information and communication technologies to ensure the accessibility of people with disabilities, in accordance with European standards. - Legislative Decree no. 112/2017 governing social enterprises. - Law of 8 November 1991, no. 381 "<i>Discipline of the social cooperatives</i>", with particular regard to the discipline of the type B cooperatives that foresees the carrying out of agricultural, industrial, commercial or service activities, aimed at the employment of disadvantaged people.

	of people with disabilities or disadvantaged.		
Open questions	<p>▪ There is legal uncertainty about the scope of the regulation from a subjective point of view. It is believed that the generic expression used by the provision may also include "sheltered laboratories", even if not explicitly mentioned, as they fall within the definition of "economic operators" whose main purpose is the social and professional integration of people with disabilities. The National Anti-Corruption Authority (ANAC) has clarified that, in order to be recognised as a "protected laboratory", an operator must have the following requisites:</p> <ul style="list-style-type: none"> - to be a legal entity that exercises in a stable and principal way an organised economic activity; - provide in social documents, among the purposes of the institution, that of the employment of disabled people; - have a majority of disabled workers in their area. <p>In other words, it is believed that the legislator, in order to guarantee application of the reserve in line with the objectives pursued by the procurement directive (as explained in Recital 36), wished to resort to a generic definition, that of "economic operators", which can include all the subjects that pursue, as main purpose, the social and professional integration of people with disabilities or disadvantaged.</p>		
Example of application from the national level (where applicable)	The provision does not allow the possibility of reserved contracts or concessions in cases where the economic operator has a share of disabled or disadvantaged workers of less than 30 %.		

Article 40 of the Directive ► Article 66 D.lgs. 50/2016 (Code)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Article 66 - Preliminary market consultations.</p> <p>1. Before the launch of a procurement procedure, contracting authorities may conduct market consultations for the preparation of the contract and for the performance of the procedure and for informing economic operators of the contracts they have planned and the requirements relating to these last.</p> <p>2. For the purposes referred to in paragraph 1, contracting authorities may acquire advice, reports or other technical documentation from experts, market participants in compliance with the provisions established in this code, or by independent authorities. This documentation may be used in the planning and execution of the procurement procedure, provided that it does not have the effect of distorting competition and does not lead to an infringement of the principles of non-discrimination and transparency.</p>	<p>The provision gives the possibility for contracting authorities to acquire a technical contribution for the preparation of the procurement procedure and to guarantee transparent information to economic operators in relation to the planned procurements.</p> <p>In this activity, the administrations have the right to acquire technical advice, reports or other technical documentation from three categories of subjects:</p> <ul style="list-style-type: none"> a) experts in the subject matter of the contract; b) operators of the reference market; c) independent authorities. <p>The provision specifically allows the consultations before the start of the procurement procedure and, therefore, must take place before the publication of the feasibility study or, according to other opinion, until before the decision to call a procedure contract.</p> <p>The same contracting authorities may acquire also reports or other technical documentation by experts (in compliance with the provisions of the measure in question) or independent authorities.</p>	<p>Article 66 of the Code of Public Contracts, amended by Legislative Decree 56/2017, transposes Article 40 of Directive 2014/24/EU on preliminary market consultations and reproduces the same content.</p> <p>The provision recognises that contracting authorities have the possibility to carry out, prior to the launch of a procurement procedure, a market consultation aimed at collecting information and carrying out preparatory work for the purpose of preparing the procedure and its subsequent development, as well as informing the economic operators on the planning of the contracts and on the requirements that will be required.</p> <p>The preliminary market consultation is therefore preliminary to compare the experiences of the experts and to acquire technical knowledge, aimed at improving the preparation of the tender documents.</p> <p>The preliminary consultation procedure is based on a cognitive, informative, documentary lack of technical, technological, scientific, economic or organisational nature on the part of the contracting authority.</p> <p>In the document it was made clear that at the base of the consultation, there must always be a real need of the administration to acquire useful elements for the preparation of the lex specialis.</p> <p>This provision represents a significant change in the Italian legal system of procurement law and the modernisation of procedures, as it allows contracting authorities to have more information</p>	<p>- Article 67 of the Code on "Previous Participation of Candidates or Bidders" that identifies the remedies to guarantee free competition in case of participation in a procedure for candidates or bidders who have participated in preliminary market consultations.</p>

		instrumental to improving procedures.	
Open questions	<ul style="list-style-type: none"> - Preliminary market consultations, open to the same potential participants in the procurement procedure, lend themselves to possible abuses, as market operators are given the opportunity to legitimately interfere with the preparation of the procedure. - Elements of legal uncertainty related to the nature of preliminary market consultations. The jurisprudence has specified that the preliminary market consultation is a simple pre-tender phase, not aimed at the awarding of any contract. <p>In fact, participation in the preliminary consultation does not constitute a condition of access to the subsequent tender and, indeed, in some cases may result in the subsequent inability to contract with the contracting authority, pursuant to the following Article 67 of the Code (Tar Calabria, Reggio Calabria, Sentence No. 340/2018).</p>		
Example of application from the national level (where applicable)	<p>The use of preliminary market consultations should not distort competition between potential candidates and should not lead to the violation of the principles of non-discrimination and transparency.</p> <p>Contracting authorities are not allowed, during preliminary consultation, to change the nature of the procedure or to direct its purposes in the sense of a different procedure from the one with which the consultation was launched.</p>		

Article 42(1) of the Directive ► Article 68 (1-3) of D.Lgs 50/2016 (Code)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Article 68 - Technical specifications</p> <p>1. The technical specifications set out in point 1 of Annex XIII are included in the procurement documents and define the characteristics required for works, services or supplies. These characteristics may also refer to the specific process or method of production or performance of the works, supplies or services required, or to a specific process for another phase of their life cycle even if these factors are not part of their substantial content, provided they are connected to the subject matter of the contract and proportionate to its value and objectives.</p> <p>(...)</p> <p>3. For all procurements which are intended for use by natural persons, whether it be the public or the staff of a contracting authority, it is necessary that the technical specifications, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or adequate design for all users. Where mandatory accessibility requirements are adopted by a legal act of the European Union, technical specifications shall, as far as accessibility criteria for persons with disabilities or adequate design for all users are concerned, be defined by reference thereto.</p>	<p>The article provides that the technical specifications are included in the tender documents and define the characteristics envisaged for works, services or supplies.</p> <p>For all procurements that are intended for use by natural persons, whether it be the public or the staff of a contracting authority, paragraph 3 of the Article 68 provides for the need for technical specifications to be drawn up in such a way as to take into account accessibility criteria for persons with disabilities or adequate design for all users, without prejudice to cases where this is not possible for duly justified reasons on the part of the contracting authority.</p> <p>In addition, if the mandatory accessibility requirements are adopted with a legal act of the European Union, the standard provides that the technical specifications are defined in accordance with the standards contained therein.</p> <p>The identification of the technical specifications to which the competitors are required to comply is peacefully included in the wide discretion of the contracting authority.</p> <p>The article also specifies that the technical specifications must allow equal access for economic operators to the award procedure and must not directly or indirectly impose unjustified obstacles to the opening of public procurement to competition. Therefore, the modalities with which these technical specifications must be formulated are identified. For the sake of competition, it is provided that, unless justified by the subject of the contract, the technical</p>	<p>Article 68 regulates the insertion in the tender documents of the technical specifications indicated in point 1 of Annex XIII of the Code, which defines the characteristics envisaged for the works, services or supplies involved in the procedure. These characteristics must be relevant to the subject matter of the contract and proportionate to its value and its objectives.</p> <p>The provision incorporates Article 42 of Directive 2014/24/EU and implements Article 1, paragraph 1, letter c) epp), of the Law of 28 January 2016, no. 11, with regard to technical specifications.</p> <p>Therefore, it contains the novelty in terms of the obligation on the part of the contracting authority to take into account the technical specifications compatible with the disability, except in duly justified cases.</p>	<ul style="list-style-type: none"> - Article 82 of the Code regulates the means of proof of compliance with the requirements of the technical specifications. - Article 134, paragraph 2, of the Code provides for the use of technical specifications as true conditions for registration in the qualification systems of contracts in special sectors. - The principle of free competition, generally provided for the tender procedures by Art. 30, paragraph 1, of the Code, informs in a meaningful manner also the punctual discipline of the technical specifications referred to in Art. 68.

	<p>specifications cannot mention a specific manufacture or provenance or a particular procedure characteristic of the products or services supplied by a specific economic operator, or reference to a trade mark, a patent or a type, a specific origin or production which would have the effect of favouring or eliminating certain undertakings or products. However, such mention or reference is permitted, exceptionally, where a sufficiently precise and intelligible description of the subject of the contract is not possible. In this case the mention or reference is accompanied by the expression "or equivalent".</p> <p>Contracting authorities may not in any case declare an offer inadmissible or exclude for the reason that the works, supplies or services offered do not conform to the technical specifications to which they refer, if the tenderer demonstrates in their tender, by any appropriate means, that the proposed solutions comply with the requirements defined by the technical specifications.</p> <p>(Consiglio di Stato, section III, March 2, 2018, no. 1316).</p>		
Open questions	The element of legal uncertainty concerns the limit of the judicial review on the adequate motivation to justify " <i>in duly justified cases</i> ", i.e. the cases of exclusion of the accessibility criteria for people with disabilities.		
Example of application from the national level (where applicable)	Contracting authorities may not exclude technical requirements that take into account accessibility criteria for persons with disabilities or design for all users, except in duly justified cases		

Article 43 of the Directive ► Article 69 of D.lgs 50/2016 (Code)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Article 69 – Labels</p> <p>1. Contracting authorities which intend to purchase works, supplies or services with specific environmental, social or other characteristics may oblige a specific labelling in the technical specifications, in the award criteria or in the conditions relating to carrying out the contract, as a means of proof that the works, supplies or services correspond to the characteristics required, when all of the following conditions are fulfilled:</p> <p>a) the label requirements are suitable to define the characteristics of the works, supplies and services covered by the contract and relate only to the criteria connected to it;</p> <p>b) the label requirements are based on objective, verifiable and non-discriminatory criteria;</p> <p>c) the labels are established in the context of a specifically elaborated open and transparent procedure in which all the parties involved can participate, including public bodies, consumers, social partners, producers, distributors and non-governmental organisations;</p> <p>d) the labels are accessible to all the interested parties;</p> <p>e) the label requirements are established by third parties upon which the economic operator requesting the labelling cannot exercise a decisive influence.</p> <p>2. If the contracting authorities do not require the works, supplies or services to fulfil all the</p>	<p>It allows contracting authorities to demand a particular labelling in the technical specifications, the award criteria or the conditions relating to carrying out the contract, but only in those cases in which a series of conditions specified by the provision are met. These are:</p> <p>(a) the requirements for labelling must be appropriate for defining the characteristics of the works, supplies and services dealt with in the contract and relate only to the criteria related to it (paragraph 1, letter a); therefore, the contracting authority may demand the use of labelling only if the latter is suitable for the specific characteristics of the contract in question;</p> <p>(b) the requirements for labelling must be based on objective, verifiable and non-discriminatory criteria (paragraph 1, letter b); therefore, the discretion of the contracting authority in the activity of labelling will meet the ordinary limits deriving from the necessary respect for the principles of reasonableness, proportionality, transparency and protection of competition that guide the administrative action and that are specifically mentioned in Article 30 of the Code;</p> <p>(c) the labelling must be established by means of an appropriate open and transparent procedure in which all the interested parties, including public bodies, consumers, social partners, producers, distributors and non-governmental organisations can participate (paragraph 1, letter c);</p> <p>(d) the labelling must be accessible to all the interested parties; so as to apply the principles of transparency and parity (<i>par condicio</i>) between the potential participants in the tender;</p> <p>(e) the requirements for labelling must be established by third parties upon which the economic operator requesting the labelling cannot exercise a decisive influence. This is in order to avoid, once again, any damage to free competition between the potential bidders.</p> <p>The article contains two further provisions that were not contained in the previous national legislation.</p>	<p>Article 69 fully transposes Article 43 of Directive 2014/24/EU.</p> <p>This provision gives contracting authorities – in the context of their activity of formulating the technical specifications, award criteria or conditions of carrying out the contract – the possibility, under certain conditions, to demand a specific labelling so as to provide proof that the works, supplies or services correspond to specific environmental, social or other characteristics requested by the same contracting authorities.</p> <p>In the previous code of public contracts, the provision relating to labelling consisted of a single norm (Art. 68 of Legislative Decree no. 163/2006), concerning technical specifications. Instead, the new Code, which fully incorporates Article 43 of the EU Directive, has entrusted</p>	<p>Interactions with other articles of Legislative Decree no. 50/2016:</p> <ul style="list-style-type: none"> - Article 3 paragraph letter iii) defines "Labelling" and iv) defines the "Requirements for labelling"; - Article 68 "Technical specifications".

<p>labelling requirements, they shall indicate which labelling requirements they refer to. Contracting authorities, which demand a specific labelling, shall accept all the labels which confirm that the works, supplies or services fulfil the equivalent requirements.</p> <p>3. If an economic operator demonstrates that it is unable to obtain the specific labelling indicated by the contracting authority or an equivalent label within the requested time-limits, for reasons that are not attributable to it, the contracting authority accepts other means of proof, including technical documentation of the manufacturer, which are able to demonstrate that the works, supplies or services that the economic operator concerned is obliged to provide fulfil the specific labelling requirements or the specific requirements indicated by the contracting authority.</p> <p>4. When a label fulfils the conditions indicated in paragraph 1, letters b), c), d) and e), but establishes requirements that are not linked to the object of the contract, contracting authorities may not require labelling as such, but may define the technical specifications with reference to the detailed specifications of this labelling, or, if necessary, to parts of these, related to the object of the contract and suitable for defining its characteristics.</p>	<p>The first, contained in paragraph 2, establishes that administrations may resort to a partial use of the labelling requirements, indicating which requirements they refer to.</p> <p>Furthermore, in view of the fact that such labelling may incur a cost, the requirements may be fulfilled also by equivalent requirements and those contracting authorities that may require a specific labelling must accept other means of proof, including a technical documentation of the manufacturer. These means of proof must be suitable for demonstrating that the works, supplies or services meet the requirements of specific labelling or the specific requirements specified by the contracting authority, in those cases in which there is no possibility for the economic operator to obtain the specific or equivalent labelling within the terms required for reasons that are outside its power or control (paragraph 3).</p> <p>This provision also introduces the principle of equivalence into the specific regulation of labelling, which is already generally applied to all the technical specifications in the previous Article 68 of the Code.</p> <p>The second provision, included in paragraph 4 of Article 69, allows for the case in which a label, while satisfying the conditions indicated in paragraph 1, letters b), c), d) and e), establishes requirements that are unrelated to the object of the contract. In such a case the contracting authorities cannot demand the labelling as such, but may define the technical specifications with reference to the detailed specifications of this labelling, or if necessary, to parts of these that are related to the object of the contract and are suitable for defining its characteristics.</p>	<p>the regulation of labelling to an autonomous provision, contained in Article 69 of the revised Legislative Decree.</p> <p>The provisions regarding labelling have thus taken on a more flexible form than was the case of the previous formulation. They are now more adaptable to the specific needs of contracting authorities that intend to use them for defining the technical characteristics of tender contracts, with the possibility of partial uses of labelling, depending on the nature and characteristics of the works, services or supplies of each single procedure.</p>	
<p>Open questions</p>	<p>The prevailing jurisprudence does not consider the mechanism of assistance in compiling the documentation to be applicable. The question concerns whether or not the candidate is able to demonstrate for the first time during a tender the possession of a product provided with labelling, via a late integration of the initial technical offer.</p> <p>According to the prevailing jurisprudence the mechanism of assistance in compiling the documentation cannot be considered applicable in such circumstances, as in all cases of non-compliance with the technical specifications (Consiglio di Stato, section III, 13 January 2016, No. 75).</p>		

Example of application from the national level (where applicable)

The provision does not allow the contracting authorities to use labelling as a means of proof that the works, services or supplies correspond to the characteristics required, if the five conditions set out in Article 69 are not met.

Furthermore, the candidate's possession of a labelled product may not be shown or proven for the first time in the context of a tender by means of a later addition to the initial technical proposal.

Article 46 of the Directive ► Article 51 of D.Lgs 50/2016 (Code)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>1. In compliance with the Community rules on public procurement, both in the ordinary sectors and in the special sectors, in order to facilitate access for micro-enterprises, small and medium-sized enterprises, the contracting authorities divide the contracts into functional lots referred to in Article 3 , paragraph 1, letter qq), or in lots of performance referred to in Article 3, paragraph 1, letter ggggg), in accordance with the categories or specialisations in the field of works, services and supplies. The contracting authorities shall justify the failure to split the contract into lots in the contract notice or in the invitation letter and in the single report referred to in Articles 99 and 139. In the case of subdivision into lots, the relevant value must be adjusted to ensure the effective possibility of participation by micro, small and medium-sized enterprises. It is forbidden for contracting authorities to subdivide into lots for the sole purpose of circumventing the application of the provisions of this code, as well as to award via the artificial aggregation of contracts.</p> <p>2. The contracting authorities also indicate in the contract notice or in the letter of invitation, if the tenders can be submitted for a single lot, for some lots or for all.</p> <p>3. Contracting authorities may, even where there is an option to bid for some or all lots, limit the number of lots that can be awarded to a single tenderer, provided that the maximum number of lots per bidder is indicated in the tender notice or in the invitation to confirm interest, to bid or to negotiate. The same tender documents also indicate the objective or non-discriminatory rules or criteria that they intend to apply to determine which lots will be awarded, if the application of the award criteria leads to the awarding to a single bidder of a number of lots greater than maximum number.</p> <p>4. Contracting authorities may award contracts which associate some or all lots to the same bidder, if they have specified, in the contract notice or in the invitation to confirm interest, that they reserve this possibility and indicate the lots or groups of lots which may be associated, as well as the means by which to perform a comparative evaluation between the offers on the individual lots and</p>	<p>This article allows the division of the contract into lots both in the ordinary sectors and in the special sectors.</p> <p>A different decision must be motivated by the contracting authority.</p> <p>The article clarifies that the division into lots can be on a quantitative or qualitative basis, to better adapt the content of individual contracts to the specialised sectors of SMEs.</p>	<p>This provision pursues the objective of encouraging the participation of micro, small and medium-sized enterprises in public procurement, through the division of contracts into lots.</p> <p>No mention is contained in the provision on other subjects, of which the Directive clearly intends to encourage participation, such as civil society organisations and social enterprises.</p> <p>After subdividing the subject matter of the contract into lots, the contracting authorities must specify the modalities for the submission of tenders, for example, if the offer can be submitted for a single lot, for two or more lots or, if it is possible to present a single offer for all the lots.</p> <p>If authorities decide not to organise the contracts into lots, they must provide the reasons for its decision, which is the expression of a discretionary choice that can be resolved within the limits of reasonableness and proportionality, as well as the adequacy of the preliminary activity (Consiglio di Stato, Sez. V, 3 April 2018, No. 2044).</p>	<ul style="list-style-type: none"> - Article 1 Law no. 241/1990 which establishes that the administrative activity is governed by criteria of economy and efficiency. - Article 3, paragraph 1, letter aa) of the Code that gives the definition of micro, small and medium enterprises. - Article 35, paragraphs 9, 10 and 11 of the Code which establishes the methods for calculating the value of the contract divided into lots.

the offers on the associations of lots.			
Open questions	<p>One possible element of legal uncertainty lies in the relationship between this provision, which aims to encourage the participation of SMEs in tenders, and the principle of cost-effectiveness and efficiency of administrative action.</p> <p>According to the national jurisprudence, in fact, the obligation for administrations to favour to a maximum extent the participation of SMEs to public procurements must always be balanced with the principles of adequacy, proportionality and economic efficiency (Consiglio di Stato, Sez. V, No. 123/2018).</p>		
Example of application from the national level (where applicable)	<p>It is not allowed for a contracting authority to decide not to divide a contract into lots without providing the reasons for its decision.</p> <p>It is forbidden for the contracting authorities to divide the object of the contract into lots in order to pursue the exclusive purpose of avoiding the application of the provisions of the present code, as well as to award the contracts through the artificial aggregation.</p>		

Article 56 of the Directive ► Article 94 and article 83.9 of D.Lgs 50/2016 (Code)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Article 94 - General principles regarding selection</p> <p>1. Contracts shall be awarded on the basis of criteria laid down in accordance with Articles 95 to 97, subject to verification, pursuant to Articles 85, 86 and 88, the existence of the following conditions:</p> <p>(a) the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents, taking into account, where applicable, Article 95, paragraph 14;</p> <p>(b) the tender comes from a tenderer that is not excluded in accordance with Article 80 and that meets the selection criteria set out by the contracting authority in accordance with Article 83 and, where applicable, the non-discriminatory rules and criteria referred to in Article 91.</p> <p>2. Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the obligations referred to in Article 30, paragraph 3.</p> <p>(transposition of first paragraph Article 56 of Directive 24/2014/EU)</p> <p>[The provision in the second paragraph of art. 56 has not been transposed]</p>	<p>Article 94 of the Code of Public Contracts fully incorporates the Article 56, first paragraph, of Directive 2014/24/EU with regard to the general principles on selection.</p> <p>This provision represents an important "step forward" made in the course of a profound change in the discipline of public procurement, on the impulse of Directive 24/2014/EU.</p> <p>There is a significant focus on market opening and competition, in order to implement the fundamental principles of the Treaties, with consequent indirect benefits for the administrations.</p> <p>In fact, a competitive market system on the tender side, induced by the rules established for the award procedures, will generally result in the emergence of favourable conditions for convenient purchases also by public entities.</p> <p>The provision ensures not only the interest of the contracting parties for the convenience of their purchases, but also the need in the public procurement sector for freedom of movement of goods, establishment and provision of services and with</p>	<p>Article 94 establishes the principle for which contracts are awarded on the basis of criteria established by the contracting authorities in accordance with the provisions of the following Articles 95, 96 and 97.</p> <p>Before awarding the contract, the contracting authorities must verify that there are two conditions:</p> <p>1) the suitability of documentation proving the possession of the general, technical-professional and financial-economic requisites (Article 81);</p> <p>2) the offer has been submitted by a person who is not excluded (pursuant to Article 80) and who at the same time meets the selection criteria set by the contracting authority through verification of compliance with the requirements or criteria established in the technical specifications, the award criteria or the conditions related to the performance of the contract (Article 83), as well as the selection criteria (Article 91) such as:</p> <p>1. the requisites of professional competence;</p> <p>2. professional economic capacity;</p> <p>3. technical and professional skills.</p> <p>The offer must therefore comply with the requirements, conditions and criteria indicated in the call for tenders or in the invitation.</p> <p>Furthermore, the same offer must be excluded if it comes from an economic operator convicted with a final sentence or a penal decree that has become irrevocable, also referred to a subcontractor, for one of the crimes listed in Article 80 of the Code.</p> <p>Finally, paragraph 2 of Article 94 states that the</p>	<p>Sub article 94 of the Code:</p> <p>- Article 1, letter r) Law 28 January 2016, no. 11 established the general principle: <i>"definition of the requisites of economic-financial, technical, including organizational, and professional capacity, relevant and proportionate to the subject of the contract, that the economic operators must possess to participate in the tender procedures, keeping in mind the public interest to have the largest number of potential participants, respecting the principles of transparency and rotation, as well as favouring access by micro, small and medium enterprises"</i>.</p> <p>- Article 30, paragraph 3, Legislative Decree no. 50/2016 (Code) provides that in the execution of public contracts and concessions, economic operators comply with applicable obligations in the fields of environmental, social and labour law established by European and national legislation, collective agreements or international provisions listed in Annex X.</p> <p>- Article 95, paragraph 14, Legislative Decree no. 50/2016 (Code) provides that: "As regards the award criteria, in cases of adoption of the best value for money, the following provisions also apply:</p> <p>(a) the contracting authorities may authorise or require the submission of variants by tenderers. They shall indicate in</p>

Article 83 paragraph 9. Selection criteria and preliminary aid

9. The deficiencies of any formal element of the application can be remedied through the mechanism of assistance in compiling the documentation referred to in this paragraph. In particular, in case of lack, incompleteness and any other essential irregularity of the elements and of the single European tender document referred to in Article 85, with the exception of those relating to the economic offer and the technical offer, the contracting authority assigns to the competitor a term, not exceeding ten days, for the necessary declarations to be made, supplemented or regularised, indicating the content and the subjects who must render them. In case of unnecessary completion of the regularisation deadline, the competitor is excluded from the tender. The deficiencies in the documentation that do not allow the identification of the content or of the person responsible for the same constitute essential irregularities that cannot be remedied.

(transposition of third paragraph of Article 56 of Directive 24/2014/EU).

them the effective competition.

The provision is also aimed at allowing the achievement of a common environmental policy.

Consequently, procurement matters contribute to achieving the Union's environmental objectives.

The Article 83 paragraph 9, as replaced by Article 52 of Legislative Decree no. 56/2017, incorporates the Article 56 paragraph of the Directive in question, specifying the content.

This provision regulates the mechanism of assistance in compiling the documentation deficiencies of the application.

The purpose is to prevent the exclusion of a competitor for exclusively formal reasons, which can be remedied within a short time.

In this way it is intended to limit the hypothesis of exclusion of economic operators from tender procedures only to cases of serious and substantial shortcomings of the requirements for participation in the tender, and consequently the possibility of contributing to the award of the public contract is extended, in compliance with the principle of the "*favor participationis*".

The rewriting of the norm referred to in Article 83, paragraph 9, in

contracting authority may decide not to award the contract to the tenderer who submitted the most economically advantageous tender if he finds that the tender does not comply with the environmental, social and labour obligations laid down by European legislation and national, collective agreements or international provisions listed in Annex X, in accordance with the provisions of Article 30 paragraph 3.

This is a normative provision through which the administration is explicitly attributed, at the end of the procedure for the choice of the contractor, the power to deny the award, in view of ascertaining the non-compliance of the offer with respect to certain obligations. Since this is a provision of general application, it is also applicable where it has not been specifically covered by the call for tenders.

The wording of the article, therefore, distinguishes the cases in which there is a ban on the awarding of cases in which (second paragraph) the administration has the right not to award.

Sub article 83 paragraph 9.

As part of the procedures for awarding public contracts, the preliminary aid is the tool that allows to remedy any omissions, incompleteness and/or irregularities of information and documents useful for the purposes of participation in the tender by integration, in case of omission or incompleteness of documentation, or the regularisation of documents already presented but affected by irregularities or material errors.

The important change introduced by Legislative Decree no. 56/2017, compared to the previous regulation, consists in the fact that it is allowed to regularise and/or supplement incomplete and/or irregular declarations and documents without having to incur any financial burden.

In this way, an opinion of the Council of State was

the contract notice or, if a prior information notice is used as a means of calling for a tender, in the invitation to confirm interest if they authorise or request variants; in the absence of this indication, variants are not authorised. The variants are however linked to the subject of the contract (10);

(b) the contracting authorities authorising or requesting the variants shall mention in the procurement documents the minimum requirements to be met by the variants, as well as the specific arrangements for their submission; in particular if variants can be submitted only if a tender has also been submitted. offer, which is different from a variant. They also ensure that the award criteria chosen can be applied to variants that meet these minimum requirements and to compliant offers that are not variants;

(c) only variants which meet the minimum requirements laid down by contracting authorities shall be taken into consideration;

(d) in the procedures for the award of public supply or service contracts, contracting authorities which have authorised or requested variants cannot exclude a variation solely because, if accepted, they would constitute, respectively, a service contract rather than a contract public supply or a supply contract rather than a public service contract".

Law no. 221/2015 (the so-called environmental related) has determined the obligation for the Public Administration to contribute to eco-innovation and to drive the economy with green procurement, a provision that largely takes over the European provisions, forcing public

	<p>addition to eliminating the burden of the institution, has exceeded the previous and uncertain distinction between essential and non-essential irregularities, with the result that economic operators will be able to integrate or regularise any formal element of the application with the exception of those concerning the economic and technical offer.</p>	<p>adopted (opinion No. 855/2016), which considered that the preliminary aid was more compliant with Directive 2014/24/EU.</p> <p>The rewriting of the norm referred to in Article 83, paragraph 9, in addition to eliminating the burden of the institution, has exceeded the previous and uncertain distinction between essential and non-essential irregularities, with the result that economic operators will be able to integrate or regularise any formal element of the application with the exception of those concerning the economic and technical offer.</p>	<p>administrations to reduce at least the environmental impacts related to the life cycle of goods and services, as well as the work it acquires.</p> <p>Sub article. 83, paragraph 9, of the Code: Article 6 Law no. 241/1990 on the administrative procedure establishes in general that the person in charge of the proceeding may request the rectification of erroneous or incomplete declarations or requests. As a result of this provision, contained in the general law on the administrative procedure, the assistance in compiling is a fundamental principle of administrative action.</p>
<p>Open questions</p>	<p><u>What happens in the cases of conditional offer?</u> The case of "<i>conditional offer</i>" occurs when the bidder subordinates its contractual commitment to a modifying scheme with respect to that proposed by the contracting authority. The jurisprudence has clarified that in this case the offer must be declared inadmissible because public procurement requires the perfect compliance between the contract regulation prepared by the contracting authority and the tender submitted by the candidate, to protect the equal conditions and the certainty of legal relationships (TAR Lazio, Rome, Section I, sentence No. 4001/2017).</p> <p><u>Given the failure to transpose the Article 56 second paragraph of Directive 24/2014/EU the problem arises: what fate will the applicability of this provision?</u></p> <p>Part of the Italian doctrine supports the direct applicability of the standard, as it has the characteristics of "<i>self-executing</i>", also because there is no explicit limitation or exclusion in the Public Procurement Code.</p>		
<p>Example of application from the national level (where applicable)</p>	<p>The rule does not allow derogations from the criteria set out in Articles 95 to 97.</p> <p>Therefore, the provision does not allow the award of the contract in cases where the offer is in contrast with the requirements indicated and in case that it comes from an economic operator convicted of certain crimes.</p> <p>Article 83, paragraph 9 of the Code does not allow to correct irregularities concerning the economic offer and the technical offer, in order to avoid violations of the principle of <i>par condicio</i> among the competitors (ANAC Determination No. 1/2015 has been implemented).</p> <p>Moreover, this article does not allow to correct irregularities on essential elements consisting of deficiencies in the documentation that do not allow the identification of the content and the subject responsible for it.</p>		

Article 57 of the Directive ► Article 80 of D. lgs 50/2016 (Code)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Article 80 – Exclusion grounds</p> <p>1. It constitutes a reason for the exclusion of an economic operator from participation in a tender or concession procedure, the conviction with final sentence or criminal decree of irrevocable sentence or sentence of application of the penalty on request in accordance with Article 444 of the Code of Criminal Procedure, also referred to a subcontractor in the cases referred to in Article 105, paragraph 6, for one of the following offences:</p> <p>(...)</p> <p>f) exploitation of child labour and other forms of trafficking in human beings defined by Legislative Decree 4 March 2014, no. 24;</p> <p>(...)</p> <p>[transposition first paragraph Art. 57 Dir. 24/2014/EU]</p> <p>3. The exclusion referred to in paragraphs 1 and 2 must be ordered if the judgment or the decree or the disqualification measure have been issued to: the owner or the technical director, if it is an individual company; of a partner or technical director, if it is a collective partnership; of the general partners or the technical director, in the case of a limited partnership; of the members of the board of directors who have been given legal representation, including instigators and general attorneys, of the members of the bodies with management or supervisory powers or of the subjects with powers of representation, direction or control, of the technical director of the sole shareholder, i.e. the majority shareholder in the case of companies with less than four shareholders, in the case of another type of company or consortium.</p> <p>In any case, the exclusion and the prohibition also</p>	<p>Article 80 allows contracting authorities to exclude an operator from the tender. This happens in some cases automatically; in other cases, after evaluation of the relevance of the infraction committed.</p> <p>Self-cleaning measures are allowed. Therefore, the economic operator is allowed to prove that he is reliable, despite the existence of grounds for exclusion.</p> <p>This measure presupposes respect for the principles of loyalty towards the contracting authority and therefore, in the event of false or reticent declarations, the contracting authority can disregard it by ordering the immediate exclusion of the competitor (Consiglio di Stato no. 4192/17).</p>	<p>Article 80 of the Code of public contracts has implemented Article 57 of Directive 2014/24/EU and the similar provisions of Directive 2014/23/EU and 2014/25/EU.</p> <p>The provision regulates the general requirements that competitors must possess in order to participate in public tenders and establishes exclusions relating to violations of social and labour obligations.</p> <p>Paragraph 1 of the provision establishes that the conviction with final sentence or criminal decree of irrevocable sentence or sentence of application of the sentence upon request (pursuant to Article 444 of the criminal procedure code) for a list of strictly indicated crimes constitutes a reason for exclusion of an economic operator by participation in a tender or concession procedure.</p> <p>The exclusion applies even if the sentence is referred to a subcontractor of the economic operator in the cases provided for by Article 105, paragraph 6.</p> <p>The important element of the provision is the inclusion, among the reasons for the mandatory exclusion, of crimes concerning the exploitation of child labour and other forms of trafficking in human beings (paragraph 1, letter f).</p> <p>Paragraph 3 extends the application of the provision to a specific set of people in a top position within the company.</p> <p>Beyond the members of the bodies with management or supervisory powers or the subjects with powers of management or control</p>	<ul style="list-style-type: none"> - Legislative Decree 4 March 2014, no. 24 ("Prevention and repression of trafficking in human beings and protection of victims" referred to in Article 80 paragraph 1 letter f) clarifies that "on the basis of an individual assessment of the victim, the specific situation of vulnerable persons is taken into account such as minors, unaccompanied minors, the elderly, the disabled, women, particularly pregnant, single parents with minor children, people with mental disorders, people who have been tortured, raped or otherwise severe psychological, physical, sexual or gender abuse". - Art. 105, paragraph 6 of the Code that extends to the subcontract the grounds for exclusion provided for by art. 80 - Anti-mafia law Legislative Decree no. 159/2011 and Law no. 161/2017: It is a reason for exclusion pursuant to Article 80, paragraph 2, also the existence of causes of

operate in respect of the subjects ceased from office in the year prior to the publication date of the call for tenders, if the company does not show that there has been complete and effective dissociation of the conduct penalised; the exclusion should not be ordered and the prohibition does not apply when the crime has been decriminalised or when the rehabilitation has taken place or when the crime has been declared extinguished after the conviction or in the event of revocation of the same sentence.

[transposition first paragraph Art. 57 Dir. 24/2014/EU].

4. An economic operator is excluded from participating in a procurement procedure if he has committed serious, definitively established violations of the obligations relating to the payment of taxes and social security contributions, according to Italian legislation or that of the State in which they are established. Serious violations are those that entail an omitted payment of taxes and duties higher than the amount referred to in Article 48-bis, paragraphs 1 and 2-bis of the Presidential Decree of 29 September 1973, no. 602. Those contained in judgments or administrative acts no longer subject to appeal constitute constitutive violations. Serious violations in the contributory and social security matters are those impeding the issuance of the single document of contribution regularity (DURC), as per the decree of the Ministry of Labour and Social Policies 30 January 2015, published in the Official Gazette no. 125 of 1 June 2015, or the certifications issued by the social security institutions that are not part of the system of the single pension office. This subparagraph shall not apply when the economic operator has complied with its obligations by paying or bindingly to pay the taxes or social security contributions due, including any interest or fines, provided that the payment or commitment has been formalised before the due date the deadline for submitting applications.

[transposition according to paragraph Art. 57 Dir.

(indicated in Article 57 of the Directive), the standard specifies a list of persons holding corporate positions.

The exclusion and the prohibition also operate in respect of the subjects ceased from office in the year prior to the publication date of the call for tenders, unless the company demonstrates a complete and effective dissociation from the conduct sanctioned. There is no exclusion or the prohibition is applied, if the offence has been decriminalised or if the rehabilitation has taken place or the offence has been declared extinguished after the conviction or in the event of revocation of the conviction.

Paragraph 4 provides that an economic operator must be excluded from participation in a procurement procedure if he has committed serious and definitively established violations concerning the obligations relating to the payment of taxes and social security contributions according to Italian legislation or that of the State. in which they are established. Definitively ascertained are the violations ascertained with a sentence or in administrative acts no longer subject to appeal.

The forecast specifies that:

- serious violations are those that entail an omitted payment of taxes and duties higher than the amount referred to in Article 48-bis co. 1 and 2-bis Presidential Decree no. 602 of 29/9/1973 (€10 000);
- for serious violations of social security and social security contributions those impeding the issuance of the single document of contribution regularity (DURC) or the certifications issued by the social security institutions of reference.

This exclusion, however, does not operate if the operator has complied with its obligations by

forfeiture, suspension or prohibition provided for by Article 67 anti-mafia law or an attempted mafia infiltration pursuant to Article 84 anti-mafia law. The adoption of an interdictive anti-mafia measure is part of a logic of anticipating the threshold of defence of the public economic order.

- **Decree Min. Labour 30 January 2015 Article 8 and Annex A** containing the list of provisions concerning the protection of working conditions, the violation of which is an impediment to the regularity of contributions.

<p>24/2014/EU]</p> <p>5. Contracting authorities shall exclude from participation in the procurement procedure an economic operator in one of the following situations, also referred to a subcontractor in the cases referred to in Article 105, paragraph 6, if:</p> <p>a) the contracting authority can demonstrate by any appropriate means the presence of serious infringements duly established to the rules on health and safety at work and the obligations referred to in Article 30, paragraph 3 of this Code;</p> <p>(...)</p> <p>c) the contracting authority demonstrates by appropriate means that the economic operator has been guilty of serious professional malfeasance, such as to make its integrity or reliability questionable. These include: significant deficiencies in the execution of a previous contract or concession contract that caused early termination, not challenged in court, or confirmed at the outcome of a judgment, or gave rise to a sentence to compensation damage or other penalties; the attempt to unduly influence the decision-making process of the contracting authority or obtain confidential information for the purpose of its own benefit; the provision, even by negligence, of false or misleading information likely to influence the decisions on exclusion, selection or award or the omission of information due to the correct execution of the selection procedure;</p> <p>(...)</p> <p>[transposition fourth paragraph lett. a, c, g Art. 57 Dir. 24/2014/EU]</p> <p>6. Contracting authorities shall exclude an economic operator at any time during the procedure if it is found that the economic operator is, due to acts committed or omitted before or during the procedure, in one of the situations referred to in paragraphs 1.2, 4 and 5.</p> <p>[fifth paragraph transposition Art. 57 Dir. 24/2014/EU]</p>		<p>paying or bindingly to pay (as in the case of payment) the taxes or social security contributions due, including any interest or fines.</p> <p>On this point, the national legislator has established that the payment or commitment must be formalised before the deadline for submission of applications has expired.</p> <p>The 5th paragraph provides for a further 11 grounds for exclusion. The assumptions concerning social and labour rights are the letters A and C.</p> <p>The hypothesis under letter A concerns the ascertainment of serious infringements of the regulations concerning health and safety at work and the obligations set forth in Art. 30 co. 3; in this case the contracting stations can demonstrate their existence by any suitable means.</p> <p>The hypothesis under letter C concerns the case in which the economic operator has been responsible for serious professional malfeasance that could call into question its integrity or reliability. Determine the causes of exclusion for serious professional offences such as to make the integrity of the competitor dubious, understood as professional morality or reliability as a real technical and professional capacity in the assignment (in this regard ANAC guidelines 6/16). In this case the contracting authorities can prove their existence by adequate means, so it is up to the administration to assess the relevance of the infraction committed.</p> <p>The meaning of this provision lies in the need to verify the overall reliability of the economic operator who will negotiate with the administration and prevent the latter from relating to subjects lacking moral and professional reliability.</p>	
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<p>7. An economic operator, or a subcontractor, who is in one of the situations referred to in paragraph 1, limited to the cases in which the final sentence imposed a custodial sentence not exceeding 18 months or recognised the mitigating of the collaboration as defined for individual offences, or paragraph 5, are allowed to prove compensation or have committed to compensate any damage caused by the crime or the offence and to have taken concrete measures of a technical, organisational and personnel nature suitable for prevent further crimes or wrongdoing.</p> <p>[sixth paragraph transposition Art. 57 Dir. 24/2014/EU]</p> <p>8. If the contracting authority considers that the measures referred to in paragraph 7 are sufficient, the economic operator is not excluded from the procurement procedure; vice versa of the exclusion, motivated communication is given to the economic operator.</p> <p>[sixth paragraph transposition Art. 57 Dir. 24/2014/EU]</p> <p>9. An excluded economic operator with a final judgment from participation in the procurement procedures can not avail itself of the possibility provided for by paragraphs 7 and 8 during the exclusion period deriving from that sentence.</p> <p>[sixth paragraph transposition Art. 57 Dir. 24/2014/EU]</p> <p>10. If the sentence of final conviction does not fix the duration of the accessory punishment of the inability to contract with the public administration, or no rehabilitation has taken place, this duration is five years, unless the main sentence is of shorter duration, and in this case is equal to the duration of the principal sentence and to three years, starting from the date of its definitive assessment, in the cases referred to in paragraphs 4 and 5 where no sentence has been passed.</p> <p>[transposition seventh paragraph Art. 57 Dir. 24/2014/EU]</p> <p>(...)</p>		<p>The legislator has expressly predetermined 3 hypotheses of particularly serious professional tort.</p> <p>At the 13th paragraph the legislator devolved to the ANAC the possibility of adopting specific guidelines in order to specify on the one hand the appropriate means of proof for the demonstration of such exclusionary circumstances and on the other the possible shortcomings in the execution of a previous contract to be considered significant for the purpose of execution. This also in order to promote a uniform application in practice by the contracting authorities.</p> <p>If the grounds for exclusion indicated in the provision are found, the contracting authorities proceed to the exclusion at any time of the procedure.</p> <p>Furthermore, the economic operator can prove that he has taken sufficient measures to demonstrate integrity and reliability in the performance of the contract.</p> <p>These are self-cleaning measures, which allow an economic operator, or a subcontractor, to demonstrate that it is reliable, despite the existence of grounds for exclusion.</p> <p>In particular, the economic operator or the subcontractor are allowed to prove to have compensated or committed to compensate any damage caused by the crime or the offence, and to have taken concrete measures of technical, organisational and personnel characteristics to prevent further crimes or offences.</p> <p>If the contracting authority considers that the measures are sufficient, the economic operator is not excluded from the procurement procedure; vice versa of the exclusion, motivated communication is given to the economic operator. In any case, however, it is envisaged</p>	
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<p>13. With guidelines, to be adopted within ninety days from the date of entry into force of the present code, the ANAC may specify, in order to guarantee homogeneity of practice on the part of the contracting authorities, which means of proof to consider adequate for the demonstration of the exclusion circumstances referred to in paragraph 5, letter c), or what deficiencies in the execution of a procurement contract are significant for the purposes of the same paragraph 5, letter c)</p> <p>14. The subjects for which the reasons for exclusion provided for in this article occur cannot be subcontracted and cannot stipulate the related contracts.</p>		<p>that the economic operator can't make use of this institution, if it has been excluded by definitive ruling from participation in the procurement procedures during the exclusion period deriving from this sentence (paragraphs 7, 8, 9).</p> <p>In accordance with paragraph 7, Art. 57 Dir. 24/2014/EU, paragraph 10 establishes the maximum duration of the exclusion in 5 years specifying if the main sentence has a shorter duration, the duration of the exclusion is equal to the duration of the main sentence and, in the cases referred to in paragraphs 4 and 5 if no sentence has been passed, it is three years.</p>	
<p>Open questions</p>	<p>Some interpretative problems arose in reference to the members of the board of directors who have been given the legal representation of management or supervision; in fact, the Italian legal system does not provide for a board of directors or a supervisory board within the framework of organisational models of joint-stock companies. As clarified by the ANAC with a press release dated 26 October 2016, this provision must be interpreted by the Contracting Authorities, taking as a parameter the administration and control systems of the joint-stock companies envisaged by the Civil Code, in particular Art. 2380 bis of the Civil Code, 2409 octies c.c. 2409 sexiesdecies, paragraph 1 c.c.</p> <p>In relation to the coordination between the principles implemented by the Community Directive and Art. 37 of the penal code in the part regarding the duration of the accessory sentences: compared to the formulation of the Community Directives, in fact, it is not provided that the sentences set "the period of exclusion of participation in the tender procedures". On the other hand, the accessory punishment of the inability to contract with the public administration (Article 32 ter c.p.), which has a wider scope, is envisaged.</p> <p>Therefore, accepting the opinion of Consiglio di Stato on the issue, in Art. 80 paragraph 10 (amended by Legislative Decree no. 56/2017) was ordered that: <i>"If the sentence of final conviction does not fix the duration of the accessory punishment of the inability to contract with the public administration, or if no rehabilitation has occurred, this duration is equal to five years, unless the principal sentence is of shorter duration, and in this case is equal to the duration of the principal sentence"</i>.</p>		
<p>Example of application from the national level (where applicable)</p>	<p>Contracting authorities are not allowed to choose an economic operator for which the grounds for exclusion provided for in the article occur, nor can these be subcontracted.</p> <p>Contracting authorities cannot choose an economic operator for which there are grounds for exclusion provided for in this article.</p>		

Article 67 of the Directive ► Article 95 of D.lgs 50/2016 (Code)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Article 95 – Contract award criteria</p> <p>1. The award criteria do not give the contracting authority unlimited power to choose the offer. They guarantee the possibility of effective competition and are accompanied by specifications allowing the effective verification of the information provided by bidders in order to assess the degree of satisfaction of the criteria for the awarding of bids. The contracting authorities verify the accuracy of the information and evidence provided by the bidders.</p> <p>[fourth paragraph transposition Art. 67 Dir. 24/2014/EU]</p> <p>2. Without prejudice to the laws, regulations or administrative provisions relating to the price of certain supplies or the remuneration of specific services, the contracting authorities, in compliance with the principles of transparency, non-discrimination and equal treatment, shall proceed to the award of contracts and the awarding of design contests and competitions of ideas, on the basis of the most economically advantageous bid criterion identified on the basis of the best quality / price ratio or on the basis of the price or cost element, following a cost comparison criterion / effectiveness such as life cycle cost, in accordance with Article 96.</p> <p>3. They are awarded exclusively on the basis of the most economically advantageous bid criterion identified on the basis of the best quality / price ratio:</p> <p>a) contracts relating to social and hospital catering, welfare and school services, as well as labour-intensive services, as defined in Article 50, paragraph 1, without prejudice to assignments pursuant to Article 36, paragraph 2, letter a);</p> <p>b) contracts relating to the assignment of engineering and architecture services and other services of a technical and intellectual nature for an amount equal to or greater than €40 000.</p>	<p>The provision contains a general limit to the power of the contracting authority in the selection of the criteria for the award of the bid. The contracting authorities ensure the effective competition by the tenderers.</p> <p>The provision allows the contracting authorities to use the criterion of the bid that is economically more advantageous in general and without a specific motivation and the criterion of lower price in the cases provided for in paragraph 4, giving adequate reasons and indicating in the call for tenders the criterion applied to select the best offer.</p> <p>It allows the possibility to assign to the price a score that is particularly low (or zero) or to provide a calculation method able to zero the price component. The paragraph 7 of the Article 95, in fact, allows the element relating to the cost to take the form of a fixed price or cost, on the basis of which the economic operators compete exclusively on quality.</p> <p>The provision also allows in paragraph 10 that the contracting authority establishes the maximum ceiling by economic score, in order to avoid that this element is so prevalent on the others that it will be determined, in practice, the application of the criterion of lower price, avoiding the purpose of the norm.</p> <p>The contracting authorities are allowed to decide not to proceed with the award if no offer is convenient or suitable in relation to the subject of the contract, but this right must be indicated explicitly in the call for tenders or in the letter of invitation.</p>	<p>Article 95 of the Code of public contracts has implemented almost identically the content and purposes of Article 67 of Directive 2014/24/EU.</p> <p>The first problem that the contracting authority must place in the preparation of the tender documents is the definition of the objectives it intends to pursue and the importance it intends to attribute to each of them. This translates into the identification of the elements (or criteria) that one intends to evaluate and the relative weight or weighting factor.</p> <p>The evaluation criteria may include the price or the cost of the product life cycle, the technical characteristics and also the social and environmental impact.</p> <p>Each of these objectives in order to be taken into consideration in the most economically advantageous bid must be measurable.</p> <p>The rule favours the criterion of the bid that is economically more advantageous than that of</p>	<p>- ANAC Guidelines on Article 95: because of its length and the consequent articulation, Article 95 is not easy to read and interpret. For this reason, the ANAC with the Guidelines has tried to provide operators in the sector with some operative indications regarding the evaluation of quantitative and qualitative elements and the formation of the final ranking.</p>

<p>4. The criterion of the lower price can be used:</p> <p>a) without prejudice to the provisions of Article 36, paragraph 2, letter d), for works of an amount equal to or less than €2 000 000, when work is entrusted with ordinary procedures, on the basis of the executive project; in such cases, if the contracting authority applies the automatic exclusion, the same has the obligation to resort to the procedures referred to in Article 97, paragraphs 2 and 8;</p> <p>b) for services and supplies with standardized features or whose conditions are defined by the market;</p> <p>c) for services and supplies of up to €40 000, as well as for services and supplies for an amount equal to or greater than €40 000 and up to the threshold referred to in Article 35 only if characterised by high repetitiveness, except for those of considerable technological content or which have an innovative character.</p> <p>5. The contracting stations that make the award pursuant to paragraph 4 give adequate reasons and indicate in the call for tender the criterion applied to select the best offer.</p> <p>6. The tender documents establish the criteria for the award of the bid, which are relevant to the nature, object and characteristics of the contract. In particular, the most economically advantageous offer identified on the basis of the best quality / price ratio, is evaluated on the basis of objective criteria, such as qualitative, environmental or social aspects related to the object of the contract. Within these criteria can include:</p> <p>a) the quality, which includes technical merit, aesthetic and functional characteristics, accessibility for people with disabilities, adequate design for all users, certifications and certifications regarding the safety and health of workers, such as OSHAS 18001, social and environmental characteristics, containment of energy consumption and environmental resources of the work or product, innovative features, marketing and related conditions;</p> <p>b) the possession of an EU eco-label in relation to the goods or services covered by the contract, equal to or higher than 30 per cent of the value of the supplies or services covered</p>		<p>the lower price and, consequently, establishes an overrun of the tendential freedom of choice in relation to the two criteria for the selection of offers.</p> <p>Thus, the criterion of the most economically advantageous tender becomes the rule and, on the other hand, the criterion of the lowest price is the exception.</p> <p>The criterion of the economically most advantageous offer is radically reformulated with respect to the previous national legislation, since the best offer is identified on the basis of the best quality / price ratio, assessed according to objective criteria such as qualitative and environmental aspects and / or social related to the subject of the contract referred to in paragraph 6, an illustrative list is provided, or based on the price or cost element, but following a cost / effectiveness approach such as the life cycle cost (in accordance with following Article 96 of the Code)</p> <p>The four innovative elements of the arrangement are:</p> <p>1) explicit preference for the criterion of the most</p>	
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<p>by the contract;</p> <p>c) the cost of use and maintenance also with regard to the consumption of energy and natural resources, to polluting emissions and overall costs, including external ones and to mitigate the impacts of climate change, referring to the entire life cycle of the work, goods or service, with the strategic objective of a more efficient use of resources and a circular economy that promotes environment and employment; (5)</p> <p>d) the compensation of greenhouse gas emissions associated with the company's activities calculated according to the methods established on the basis of recommendation no. 2013/179/EU of 9 April 2013 on the use of common methodologies for measuring and communicating environmental performance over the life cycle of products and organisations;</p> <p>e) the organisation, qualifications and experience of the personnel actually used in the procurement, if the quality of the personnel in charge may have a significant influence on the level of performance of the contract;</p> <p>f) after-sales service and technical assistance;</p> <p>g) delivery conditions such as delivery date, delivery process and delivery or execution time.</p> <p>7. The element relating to the cost, even in the cases referred to in the provisions referred to in paragraph 2, can take the form of a fixed price or cost on the basis of which the economic operators will compete only on the basis of qualitative criteria.</p> <p>8. The tender documents or, in the event of a competitive dialogue, the call for proposals or the descriptive document list the evaluation criteria and the relative weighting attributed to each of them, also providing for a range in which the gap between the minimum and the maximum must be adequate. For each chosen evaluation criterion, sub-criteria and sub-scores or sub-scores may be provided, where necessary.</p> <p>9. Contracting stations, when they consider the weighting referred to in paragraph 8 not possible for objective reasons, indicate in the contract notice and in the contract documents or, in the case of competitive dialogue, in the notice or in the</p>		<p>economically advantageous tender;</p> <p>2) the new interpretation of the most economically advantageous offer to be interpreted as the best quality / price ratio;</p> <p>3) the introduction of the cost next to the price, but at the same alternative, according to a cost / effectiveness approach;</p> <p>4) the normative clarification of the concept of cost as the cost of the "life cycle".</p> <p>The provision also contains some important changes regarding the economic aspect of the offers in order to direct the administrations to carefully evaluate the impact of economic aspects in the choice of the evaluation criteria of offers and opens the possibility to assess not only the direct costs linked acquisition but also indirect ones.</p> <p>Paragraph 10, as amended with the corrective of 2017, has provided that the economic operator must indicate the costs of labour in the economic offer. These costs must then be taken into account when assessing the anomaly of the offer.</p>	
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<p>descriptive document, the descending order of importance of the criteria. In order to implement the weighting or in any case assign the score to each element of the offer, the contracting authorities use methods that make it possible to identify the most advantageous offer with a single final numerical parameter.</p> <p>10. In the economic offer, the operator must indicate his labour costs and the business burdens concerning the fulfilment of the provisions on health and safety in the workplace, with the exception of supplies without installation, services of an intellectual nature and assignments in accordance with Article 36, paragraph 2, letter a). The contracting stations, with regard to labour costs, before the award process proceed to verify compliance with the provisions of Article 97, paragraph 5, letter d).</p> <p>10-bis. The contracting authority, in order to ensure the effective identification of the best quality / price ratio, enhances the qualitative elements of the offer and identifies criteria that guarantee an effective competitive comparison on the technical profiles. To this end the contracting authority sets a ceiling for the economic score within the limit of 30 per cent.</p> <p>11. The award criteria shall be considered related to the subject matter of the procurement where they relate to works, supplies or services to be supplied under this contract in any aspect and at any stage of their life cycle, including factors involved in the specific process of production, supply or exchange of these works, supplies or services or in a specific process for a subsequent phase of their life cycle, even if these factors are not part of their substantial content.</p> <p>12. Contracting authorities may decide not to proceed with the award if no offer is convenient or suitable in relation to the subject of the contract. This right is expressly indicated in the call for tender or in the letter of invitation.</p> <p>13. Compatibly with European Union law and the principles of equal treatment, non-discrimination, transparency, proportionality, contracting authorities shall indicate in the contract notice, in the notice or in the invitation, the award criteria that they intend to apply to the assessment of the</p>			
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<p>offer in relation to the bidder's highest legality and business rating, as well as to facilitate participation in award procedures for micro, small and medium-sized enterprises, young professionals and newly established companies. They also indicate the highest score on the offer concerning goods, works or services that have a lower impact on health and the environment, including goods or products from a short or zero-kilometre supply chain.</p> <p>14. With regard to the award criteria, in the cases of adoption of the best value for money, the following provisions also apply:</p> <p>(a) the contracting authorities may authorise or require the submission of variants by tenderers. They shall indicate in the contract notice or, if a prior information notice is used as a means of calling for a tender, in the invitation to confirm interest if they authorize or request variants; in the absence of this indication, variants are not authorized. The variants are however linked to the subject of the contract;</p> <p>(b) the contracting authorities authorising or requesting the variants shall mention in the procurement documents the minimum requirements to be met by the variants, as well as the specific arrangements for their submission, in particular if variants can be submitted only if a tender has also been submitted. offer, which is different from a variant. They also ensure that the award criteria chosen can be applied to variants that meet these minimum requirements and to compliant offers that are not variants;</p> <p>(c) only variants which meet the minimum requirements laid down by contracting authorities shall be taken into consideration;</p> <p>(d) in the procedures for the award of public supply or service contracts, contracting authorities which have authorized or requested variants cannot exclude a variation solely because, if accepted, they would constitute, respectively, a service contract rather than a contract public supply or a supply contract rather than a public service contract.</p> <p>14-bis. In the case of contracts awarded with the criterion referred to in paragraph 3, the contracting authorities cannot</p>			
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<p>attribute any score for the offer of additional works compared to the provisions of the executive project based on an auction.</p> <p>15. Any change that occurs, also as a result of a judicial decision, after the admission, regularisation or exclusion of offers is not relevant for the calculation of average in the procedure, nor for the identification of the anomaly threshold of the offers</p>			
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<p>Open questions</p>	<ul style="list-style-type: none"> - Some interpretative problems have arisen in relation to security charges with regard to two distinct profiles: <ol style="list-style-type: none"> 1) if the determination of security charges should be included in the offer; 2) if the assistance in compiling was admissible if the safety charges were not indicated. <p>This uncertainty has been resolved in the sense that:</p> <ol style="list-style-type: none"> 1) the security charges must be explicitly included in the economic offer; 2) the assistance in compiling is not allowed with regard to offers without the indication of safety charges "because the internal security charges directly concern the economic offer and, for their purpose of protection of the safety of the job, they constitute an element essential" (TAR Campania Naples Section III No. 2358/17, see also Council of State Section V No. 815/18). <p>In this regard, however, the automatic exclusion of a competing company, in the framework of European and national legislation, is illegitimate if the company demonstrates at least in justifications, that its offer substantially includes the security charges and these charges are reasonable. This, in truth, explicitly prescind from the debated question of the legitimacy of the preliminary investigation, having to observe that in any case the provision of art. 83, paragraph 9, which excludes from the preliminary investigation the incompleteness regarding the technical and economic offer when the contracting authority allows the company to specify the consistency of the security charges already excluded (but not distinct) in the total price of the offer, without obviously changing the offer in the course of a bid in violation of transparency and equal treatment of competitors (Council of State Section III, No. 2554/18).</p> <p>Another reason for uncertainty is given by the logical disorder of the provisions of the code concerning the choice of the criterion: The third paragraph indicates the contracts that can be awarded only on the basis of the quality / price ratio, which would suggest that for all the others there is freedom of the award criterion.</p> <p>The fourth paragraph indicates the contracts that can be awarded with the criterion of lower price, which would suggest that for all the others we must instead resort to the quality / price ratio, e-mail third paragraph does not pose a similar rule. Therefore, between the two paragraphs (3 and 4) opens an area relating to contracts not specifically covered by one or the other, in which can award on the basis of the quality / price ratio or the cost (life cycle), with the exclusion of the sole award at the lowest price. In this regard, the delegated law does not provide support for a correct interpretation of the law. It is believed that the legislator wished to identify the award according to the quality / price ratio as a general method and to limit the awarding cases at the best price only to the cases indicated in the fourth paragraph.</p> <p>Article 95, paragraph 7, of the Code provides for the possibility of assigning a particularly low (or zero) price to the price or to provide a calculation method that effectively eliminates the price component, and competes exclusively on quality. The rule however leaves open the definition of the cases for which it is possible to cancel the cost element.</p>
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Example of application from the national level (where applicable)

The provision does not permit the awarding of contracts relating to hospital and social services, catering and education, as well as labour-intensive services and contracts relating to the assignment of services and the others provided for in paragraph 3, on the basis of a criterion different from that of the most economically advantageous offer identified on the basis of the best quality / price ratio.

According to paragraph 10 bis, the contracting authority establishes a maximum ceiling attributable to the economic score, which cannot exceed the limit of 30 per cent. By express provision of the standard, this measure is aimed at ensuring the effective identification of the best quality / price ratio and at enhancing the qualitative elements of the offer in such a way as to give space to criteria that guarantee an effective competitive comparison on the technical profiles.

Article 69 of the Directive ► Article 97 of D.lgs 50/2016 (Code)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Article 97 – Abnormally low tenders</p> <p>1. At the request of the contracting authority, economic operators shall provide explanations on the price or costs proposed in the tenders if these appear abnormally low, based on a technical judgment on the suitability, reliability, sustainability and feasibility of the offer.</p> <p>(...)</p> <p>4. The explanations referred to in paragraph 1 may, in particular, refer to:</p> <p>a) the economics of the manufacturing process, of the services provided or of the construction method;</p> <p>b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;</p> <p>c) the originality of the works, supplies or services proposed by the tenderer.</p> <p>5. The contracting authority requests in writing, giving the competitor a term of not less than fifteen days, the presentation in writing of the explanations. It excludes the offer only if the proof provided does not sufficiently justify the low level of prices or proposed costs, taking into account the elements referred to in paragraph 4 or if it has established, in the manner referred to in the first sentence, that the offer is abnormally low because:</p> <p>a) it does not comply with the obligations referred to in Article 30, paragraph 3.</p> <p>b) it does not comply with the obligations referred to in Article 105;</p> <p>c) the farm costs of the security referred to in Article 95, paragraph 10 are incongruent with respect to the size and characteristics of the works, services and supplies;</p> <p>d) the cost of personnel is lower than the minimum wage salaries indicated in the appropriate tables referred to in Article 23,</p>	<p>This provision allows contracting authorities to reject abnormally low tenders only if the tenderer is unable to provide sufficient explanation as to why the tender is abnormally low because:</p> <p>1) it does not comply with the environmental, social and labour obligations established by European and national legislation, collective agreements or international provisions listed in Annex X (Article 30, paragraph 3);</p> <p>2) it does not comply with the obligations regarding subcontracting (Article 105);</p> <p>3) the farm costs of the security are incongruous (Article 95, paragraph 10) with respect to the size and characteristics of the works, services and supplies;</p> <p>4) the cost of personnel is lower than the minimum wage salaries indicated in the appropriate tables determined by the Ministry of Labour and Social Policies (Article 23,</p>	<p>Article 97 of the Code of public contracts has implemented Article 69 of Directive 2014/24/EU, specifying better the situations in the presence of which an offer may be rejected by contracting authority.</p> <p>The article provides that a contracting authority in the presence of an offer that appears abnormally low may require operators to provide explanations on the price and costs proposed. It is a control mechanism that ensures the full reliability of the contract proposal and thus ensures compliance with labour and social laws in the procurement process.</p> <p>The contracting authority may request economic operators to provide, at the request of the contracting authority, justifications regarding the price or costs indicated in the tenders if they appear abnormally low, based on a technical judgment on the congruity, seriousness, sustainability and feasibility of the offer.</p> <p>Labour and social laws are designed to protect general interests and constitute constitutional precepts. Therefore, the justifications of the anomaly cannot go as far as the compression of mandatory rights such as, in fact, the minimum wages, also considering the constitutional principles that require a sufficient salary to ensure the worker a free and dignified existence.</p> <p>The sub-procedure for checking anomalous offers includes the following steps:</p>	<p>- Article 36, paragraph 1, Constitution: “The worker has the right to remuneration commensurate with the quantity and quality of his work and in any case sufficient to ensure a free and dignified existence for himself and his family”.</p> <p>- Law no. 381/1991: "Discipline of the social cooperatives" as modified by the Art. 1, paragraph 610, Law no. 190 of 2014, provides in Art. 5 that public bodies can stipulate agreements with cooperatives that carry out activities aimed at the employment of disadvantaged people, also in derogation from the discipline concerning public administration contracts, provided that these agreements are aimed at creating job opportunities for disadvantaged people. These agreements are stipulated following the selection procedures suitable to ensure compliance with the principles of transparency, non-discrimination and</p>

<p>paragraph 16.</p> <p>6. No justifications are allowed in relation to minimum mandatory salary treatment established by law or by sources authorised by law. Furthermore, no justifications are permitted in relation to the security charges referred to in the security and coordination plan provided for by Article 100 of the Legislative Decree of 9 April 2008, no. 81. The contracting authority may in each case evaluate the adequacy of each offer which, on the basis of specific elements, appears abnormally low.</p> <p>7. When a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be excluded on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 TFEU. The contracting authority excludes an offer in those circumstances and informs the European Commission.</p> <p>(...)</p> <p>9. The Control Room referred to in Article 212 shall, on request, make available to other Member States, by means of administrative cooperation any information at its disposal, such as laws, regulations, applicable collective agreements or national technical standards, relating to the evidence and documents produced in relation to details listed in paragraph 4 and 5.</p>	<p>paragraph 16).</p>	<ul style="list-style-type: none"> - request for justifications, in writing, with the right (non-obligation) to specify the components of the offer to be justified; - possibility to oblige to justify all the items; - deadline for submitting justifications not less than 15 days; - declaration of exclusion of those offers that were considered anomalous and with the award in favour of the best offer not found abnormal. <p>The effective contradiction is considered essential.</p> <p>In the case of State aid that is not compatible with the European Community Treaty, the exclusion of the tender must be assessed by the contracting authority. The tenderer will have the burden of proving the lawfulness of the aid.</p> <p>The contracting authorities are obliged to promptly inform the European Commission of the exclusion of an offer for anomaly in case of illegal State aid.</p>	<p>efficiency.</p> <ul style="list-style-type: none"> - Other articles of the Code of public contracts (Legislative Decree no. 50/2016): Article 30, paragraph 3 (principles for the awarding and execution of contracts and concessions); Article 105 (subcontracting); Article 95, paragraph 10 (contract award criteria).
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<p>Open questions</p>	<p><u>Does the social cooperative that does not pursue for-profit exempts the company from the burden of providing proof of the adequacy of its offer?</u> The jurisprudence has negatively solved the question, establishing that the social cooperative that does not pursue for profit must however demonstrate that, despite the reduced profit margin, the offer can still be made in conditions and with modalities such as to adequately satisfy the public interest in the regular performance of the contracted service or service; in fact, the operating margin constitutes the only certain data to maintain the quality of the services due and, therefore, from the point of view of the contracting authority, it represents the measure of the suitability of the company to satisfy the public interest in the regular execution of the contract (TAR Lazio, Rome, Section I No. 2392/08 and 6200/06, more generally on the participation of social cooperatives in public tenders TAR Lazio, Rome, Section III No. 15559/07).</p>
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Example of application from the national level (where applicable)

This provision does not allow justifications to be admitted in relation to minimum wage treatment established by law or by sources authorised by law, and the same cannot be done in relation to security charges.
It is not allowed to admit a justification based on State aid that has not been legally granted.
Contracting authorities are not authorised to reject a tender which appears to be abnormally low without allowing the tenderer to provide explanations.
They are not authorised to award a contract to a tender without having verified the relevant explanations about the low price or cost.

Article 70 of the Directive ► Article 100 of D.lgs. 50/2016 (Code)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Article 100 Requirements for performance of contracts</p> <p>1. Contracting authorities may require special conditions relating to the performance of a contract, provided that they are compatible with European law and the principles of equal treatment, non-discrimination, transparency, proportionality, innovation and are specified in the contract notice, or in invitation in the case of procedures without tender or in the contract documents. In particular, those conditions may abide by social and environmental needs.</p> <p>2. During the offer, economic operators declare that they accept the special requirements in the case in which they will be contractor.</p>	<p>This article stipulates that contracting authorities may require particular conditions regarding the performance of the contract in the manner and within the time limits set by the provisions on the criteria for the award of the contract.</p> <p>The provision also stipulates that the conditions for the performance of a contract must be indicated in the call for competition notice or in the tender documents.</p> <p>With regard to the specific nature of these conditions, the provision in question also refers to economic needs linked to innovation, as well as environmental and social considerations.</p> <p>In addition, economic operators are obliged to declare that they accept the particular requirements required, in the event that they will be successful</p>	<p>This provision incorporates, in substance, Article 70 of Directive 2014/24/EU, Art. 87 of Directive 2014/25/EU and implements Article 1 paragraph 1 letter p), letter l), letter ddd) of the Law no. 11 of 2016.</p> <p>Conditions for the performance of a contract are designed to establish specific requirements regarding the performance of the contract and can contribute to the achievement of social policy objectives.</p>	<p>Other articles of the Code of public contracts (Legislative Decree no. 50/2016):</p> <ul style="list-style-type: none"> - Article 30 "Principles for the awarding and execution of contracts and concessions": Elements of a social/ environmental nature, pertinent to the object of the award, may be inserted in compliance with the general principles set out in Article 30 of the Code of Public Contracts, with particular regard to: economy, non-discrimination and proportionality. - Article 50 "Social clauses of the call for tenders and notices": in view of the potential content of the conditions mentioned, Article 100 can be read in coordination with the provisions of Article 50 of the Code regarding social clauses. - Article 108 "Resolution": When contractors do not comply with the commitment assumed in the tender and contractually confirmed, the violation attributable to the contractor does not take place for the purpose of the award, since the social clause, according to the configuration found by the Article 100 of the Code of Contracts, constitutes a condition for performance of the contract. The non-fulfilment detects in the context of contractual liability, so that only the contracting authority is entitled to avail itself of the remedies of civil law, provided in the contract (example: express termination clause and penalties) and the law (Article 108 of the Code of Public Contracts).
<p>Open questions</p>	<p>The lack of a limit to the "particular requirements for execution", that the contracting authorities may ask competitors, may create a situation of uncertainty. Particular attention should therefore be paid to drafting the content of the conditions in order to prevent them from conflicting with the principles of Community relevance, such as equal treatment, non-discrimination, transparency, proportionality and innovation.</p>		
<p>Example of application from the national level (where applicable)</p>	<p>In transposing the Directive, the Italian legislator departed in part from the Directive by not referring to the necessary link with the subject-matter of the contract.</p> <p>Article 100 does not provide for any limit on the particular requirements for performance which contracting authorities may impose on competitors. This, in fact, extends the scope of application of the provision in relation to the European provision.</p> <p>The article specifies that the conditions can meet, in particular, "social and environmental needs". Therefore, compared to the European forecast it does not foresee that these conditions can include economic considerations, as well as linked to social and environmental needs, also related to innovation and employment.</p>		

The provision does not allow to request particular requirements for the execution of the contract after the publication of the call for tenders or the communication of the invitation in the case of procedures without prior notice.

Article 71 of the Directive ► Article 71 of D.lgs. 50/2016 (Code)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Article 105 – Subcontracting</p> <p>1. The parties to the contracts referred to in this code carry out on their own the works or works, services and supplies included in the contract. The contract cannot be assigned under penalty of nullity, without prejudice to the provisions of Article 106, paragraph 1, letter d). Subcontracting is permitted in accordance with the provisions of this article.</p> <p>2. Subcontracting is the contract by which the contractor assigns to third parties the execution of part of the services or works covered by the contract. Any contract concerning activities that require the use of manpower, such as supplies with installation and hot hire, shall be considered as subcontract, however, if they are individually for an amount greater than 2 per cent of the amount of the services entrusted or for an amount greater than EUR 100 000 and if the incidence of the cost of manpower and personnel is greater than 50 per cent of the amount of the contract to be entrusted. Without prejudice to the provisions of paragraph 5, any subcontracting may not exceed 30 per cent of the total amount of the works, services or supply contract. The contractor shall inform the contracting authority, before the start of the service, for all subcontracts which are not subcontracts, stipulated for the execution of the contract, of the name of the subcontractor, the amount of the subcontract, the object of the work, service or supply entrusted. Any changes to this information during the course of the subcontract shall also be communicated to the contracting authority. It is also obligatory to acquire new supplementary authorisation if the object of the subcontract undergoes changes and the amount of the same is increased as well as the requirements referred to in paragraph 7 have changed.</p> <p>3. The following categories of supplies or services, because of their specific nature, do not constitute subcontracted activities:</p> <p>(a) the assignment of specific activities to self-employed workers, for which notification must be made to the contracting authority;</p> <p>(b) catalogue subcontracting of computer products;</p>	<p>This provision allows contracting entities to subcontract the works, services or supplies included in the contract, subject to the prior authorisation of the contracting authority, provided that they comply with a number of conditions:</p> <ol style="list-style-type: none"> 1) the subcontractor did not take part in the tender; 2) the subcontractor is qualified in the relevant category; 3) the tender indicates the services to be subcontracted; 4) the tenderer proves that the subcontractor has no grounds for exclusion under Article 80 (Article 57 of the Directive). <p>In the contract notice, the contracting authority shall provide, for contracts below the thresholds referred to in Article 35: the procedures and time limits for verifying the exclusion conditions referred to in Article 80 before the conclusion of the contract, for the contractor and the subcontractors; the indication of the means of proof required for demonstrating the circumstances of exclusion for serious professional misconduct as referred to in paragraph 13 of Article 80.</p> <p>If the verification has shown that there are mandatory grounds for exclusion,</p>	<p>Article 105 of the Public Contracts Code has transposed Article 71 of Directive 2014/24/EU, as well as Article 88 of Directive 25/2014, providing special provisions for the protection of the subcontractor's employees.</p> <p>The provision allows for subcontracting with the aim of facilitating the involvement of SMEs, including social economy enterprises, in the public procurement market. The provision lays down a series of precautions in relation to subcontracting in order to prevent the violation of workers' rights.</p> <p>Article 105, paragraph 2, generally defines subcontracting as the contract by which the contractor entrusts third parties with the performance of part of the services or works covered by the contract, with the additional specification provided for in paragraph 2.</p> <p>The provision introduces a limit as a percentage of the value of the sub-contractable services with respect to the total amount of the contract or the share of 30 % of the total amount of the works, services and supplies contract.</p> <p>In accordance with the obligations</p>	<ul style="list-style-type: none"> - Article 1656 of the Civil Code states that <i>"the contractor may not subcontract the execution of the work or service, unless it has been authorised by the client"</i>. - Article 21 of Law no. 646/1982 prohibits the contractor from subcontracting the execution of the works entrusted to him or a part thereof without the authorisation of the competent authority. This rule is an imperative rule whose violation entails the nullity of the contract pursuant to art. 1418 of the Italian Civil Code. - Other articles of the Code of Public Contracts (Legislative Decree no. 50/2016): Article 30, paragraph 3 (principles for the award and execution of contracts and concessions); Article 80 (grounds for

<p>(c) the awarding of services of an amount of less than EUR 20 000 per year to farmers in municipalities classified as fully mountainous in the list of Italian municipalities drawn up by the National Institute of Statistics (ISTAT), or included in Circular of the Ministry of Finance No. 9 of 14 June 1993, published in Ordinary Supplement No. 53 to the Official Gazette of the Italian Republic No. 141 of 18 June 1993, and in the municipalities of the smaller islands listed in Annex A to Law No. 448 of 28 December 2001;</p> <p>(c-bis) services rendered in favour of the persons awarded the contract under continuous cooperation, service and/or supply contracts signed before the call for tenders for the award of the contract. The related contracts are deposited with the contracting authority before or at the same time as the contract is signed.</p> <p>4. The parties to the contracts referred to in this code may subcontract the works or works, services or supplies included in the contract, subject to the authorisation of the contracting authority provided that:</p> <p>(a) the subcontractor did not participate in the procedure for awarding the contract;</p> <p>(b) the subcontractor is qualified in the relevant category;</p> <p>(c) the works or parts of works or services and supplies or parts of services and supplies which it is intended to subcontract have been indicated in the tender;</p> <p>(d) the tenderer proves that the subcontractors are not covered by the grounds for exclusion set out in Article 80.</p> <p>5. For the works referred to in Article 89, paragraph 11, and without prejudice to the limits set out in the same paragraph, any subcontracting may not exceed thirty per cent of the amount of the works and may not, without objective reasons, be subdivided.</p> <p>6. The indication of the triad of subcontractors in the tender is compulsory, if the works, services and supply contracts are of a value equal to or greater than the thresholds set out in Article 35 or, independently of the basic amount of the tender, concern the activities most exposed to the risk of mafia infiltration, as identified in paragraph 53 of Article 1 of Law no. 190 of 6 November 2012. In the case of contracts having as their object more types of services, the triad of subcontractors must be indicated with reference to each type of homogeneous service provided for in the tender notice. In the invitation to tender or in the notice of invitation to tender, the contracting authority</p>	<p>the contractor must replace the subcontractors.</p> <p>The contracting authorities may ask the tenderer for information on the subcontract: the contractor, and through its subcontractors, shall send to the contracting authority, before the start of the works, the documentation of the complaint to the social security authorities, including the building, insurance and accident prevention fund.</p> <p>The contracting authority automatically acquires the single valid document on the regularity of contributions relating to the contractor and all the subcontractors, for the purpose of payment of social security benefits.</p> <p>The article allows direct payment to subcontractors in 3 cases:</p> <p>a) where the subcontractor or contractor is a micro or small enterprise;</p> <p>b) in the event of non-performance by the contractor;</p> <p>c) at the request of the subcontractor and if the nature of the contract so permits.</p> <p>The consent of the contractor to proceed with the direct payment is therefore irrelevant.</p>	<p>set out in Article 30(3) (corresponding to Article 18(2) of the Directive), and in order to avoid abuse through the use of subcontractors who do not comply with social and labour protection obligations, the provision provides that:</p> <ul style="list-style-type: none"> - the successful tenderer shall be jointly and severally liable with the subcontractor in respect of the pay and social security obligations. - the contractor must fully comply with the economic and regulatory treatment established by the national and territorial collective agreements in force for the sector and for the area in which the services are performed. <p>It is jointly and severally liable for the observance of these rules by subcontractors vis-à-vis their employees for the services rendered under the subcontract.</p> <p>Furthermore, the contractor is jointly and severally liable with the subcontractor for the latter's compliance with the safety obligations provided for by the regulations in force.</p> <p>Provisions are established in the event of failure to pay contributions or late payment of wages due to employees of the contractor or subcontractor (with reference to Art. 30 of the Code).</p>	<p>exclusion).</p>
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<p>shall provide, for contracts below the thresholds referred to in Article 35: the terms and conditions for verifying the exclusion conditions referred to in Article 80 before the conclusion of the contract, for the contractor and the subcontractors; the indication of the means of proof required for demonstrating the circumstances of exclusion for serious professional misconduct as provided for in paragraph 13 of Article 80.</p> <p>7. The contractor shall deposit the subcontracting contract with the contracting authority at least twenty days before the date on which the performance of the relevant services actually commences. When the subcontract contract is deposited with the contracting authority, the contractor shall also provide certification that the subcontractor meets the qualification requirements laid down in this code in relation to the subcontracted work and a declaration by the subcontractor that the subcontractors do not have the grounds for exclusion set out in Article 80. The subcontract contract, accompanied by the technical, administrative and graphic documentation directly derived from the acts of the contract entrusted, shall indicate the operating scope of the subcontract in both performance and economic terms.</p> <p>8. The main contractor shall be solely liable to the contracting authority. The successful tenderer shall be jointly and severally liable with the subcontractor in respect of its pay and social security obligations, in accordance with Article 29 of Legislative Decree No. 276 of 10 September 2003. In the cases referred to in paragraph 13(a) and (c), the contractor shall be relieved of joint and several liability as referred to in the first sentence.</p> <p>9. The contractor must fully comply with the economic and regulatory treatment established by the national and territorial collective agreements in force for the sector and for the area in which the services are performed. It is also jointly and severally liable for subcontractors' compliance with the above rules vis-à-vis their employees for services rendered in the context of subcontracting. The contractor and, through them, the subcontractors, shall send the contracting authority, before the start of the works, the documentation of the report to the social security authorities, including the Building Fund, if any, insurance and accident prevention agencies, as well as a copy of the plan referred to in paragraph 17. For the purposes of payment for services rendered under the contract or subcontract, the contracting authority shall automatically acquire the valid single document on the regularity of contributions relating to the contractor and to all subcontractors.</p>		<p>In order to combat the phenomenon of irregular work, the document on the regularity of contributions includes the verification of the appropriateness of the use of labour in relation to the specific contract.</p>	
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<p>10. For contracts relating to works, services and supplies, in the event of delay in the payment of wages due to the employees of the contractor or subcontractor or of the holders of subcontracts and piecework, as well as in the event of non-payment of contributions resulting from the single document on regularity of contributions, the provisions of Article 30, paragraphs 5 and 6 shall apply.</p> <p>11. In the event of a formal objection to the requests referred to in the preceding paragraph, the person responsible for the procedure shall forward the requests and objections to the provincial labour office for the necessary checks.</p> <p>12. The contractor must replace those subcontractors for whom a verification has shown that the grounds for exclusion set out in Article 80 are present.</p> <p>13. The contracting authority shall pay directly to the subcontractor, the subcontractor, the service provider and the supplier of goods or works, the amount due for the services performed by them in the following cases:</p> <ul style="list-style-type: none"> a) where the subcontractor or contractor is a micro or small enterprise; b) in the event of non-performance by the contractor; c) at the request of the subcontractor and if the nature of the contract so permits. <p>14. The contractor must apply the same unit prices for the subcontracted services as those resulting from the award, with a discount not exceeding twenty per cent, in compliance with the quality and performance standards laid down in the contract. The contractor shall pay the costs of safety and labour relating to the subcontracted services to the subcontractors without any discount; the contracting authority, after consulting the works supervisor, the safety coordinator during execution or the execution supervisor, shall ensure that this provision is actually applied. The contractor shall be jointly and severally liable with the subcontractor for the latter's compliance with the safety obligations laid down by the legislation in force.</p> <p>15. For works, signs outside the construction site must also indicate the names of all subcontractors.</p> <p>16. In order to combat the phenomenon of undeclared and irregular work, the single document on regularity of contributions shall include verification of the appropriateness of the incidence of labour relating to the specific contract awarded. For construction works, this adequacy is</p>			
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verified by the Cassa Edile on the basis of the agreement reached at national level between the social partners who signed the national collective agreement, which is comparatively more representative for the construction sector, and the Ministry of Labour and Social Policies; for non-construction works, it is verified in comparison with the specific collective agreement applied.

17. The safety plans referred to in Legislative Decree no. 81 of 9 April 2008 are made available to the competent authorities responsible for inspecting the control of construction sites. The contractor is required to coordinate all the subcontractors operating on the site in order to make the specific plans drawn up by the individual subcontractors compatible with each other and consistent with the plan presented by the contractor. In the case of temporary grouping or consortium, this obligation is incumbent on the contractor. The site manager is responsible for ensuring that the plan is complied with by all the firms involved in carrying out the work.

18. The contractor who uses subcontracting or piecework must attach to the certified copy of the contract a declaration as to whether or not there is any form of control or connection pursuant to Article 2359 of the Italian Civil Code with the holder of the subcontract or piecework. A similar declaration must be made by each of the parties involved in the case of a temporary grouping, company or consortium. The contracting authority shall issue the authorisation referred to in paragraph 4 within thirty days of the request; this period may be extended only once, where justified reasons exist. After this period has elapsed without any provision having been made, the authorisation shall be deemed to have been granted. For subcontracts or piecework for an amount of less than 2 per cent of the amount of the services entrusted or for an amount of less than EUR 100 000, the terms for the issue of authorisation by the contracting authority shall be reduced by half.

19. The performance of subcontracted services may not be the subject of further subcontracting.

20. The provisions of this article shall also apply to temporary groupings and to companies, including consortia, where the merged or associated undertakings do not intend to carry out the services that can be hived off directly. For the purposes of applying the provisions of this article, by way of derogation from the first sentence of Article 48 (9), the formation of a joint venture is permitted if the association does not intend to perform the services contracted directly.

<p>21. The right to regulate further cases of direct payment of subcontractors is reserved for the regions with special statutes and for the autonomous provinces of Trento and Bolzano, on the basis of their respective statutes and the relevant implementing rules and in compliance with the Community legislation in force and the principles of the Community legal order.</p> <p>22. The contracting authorities shall issue the certificates necessary for the participation and qualification referred to in Article 83(1) and Article 84(4) to the contractor, unbundling the value and category of the work carried out through subcontracting from the entire value of the contract. Subcontractors may request from the contracting authorities certificates relating to the services which they have actually contracted.</p>			
<p>Open questions</p>	<p>- re the quantitative restrictions on subcontracting laid down by national legislation contrary to European law? According to the case-law, this provision - even though it is not expressly based on Directive 2014/24/EU - does not infringe Community law. In this regard, Consiglio di Stato - Opinion 728/2017 stated that: "However, the overall discipline of the new directives, more attentive, in the matter of subcontracting, to the themes of transparency and protection of the work, in one with the further objective, overall pursued by the directives, of the protection of the micro, small and medium enterprises, can induce the reasonable interpretation that the quantitative limitations to subcontracting, provided for by the national legislator, are not in front contrast with the European law".</p>		
<p>Example of application from the national level (where applicable)</p>	<p>This provision does not allow subcontracting if the conditions expressly indicated (paragraph 4) are not met. Subcontracting may not exceed 30 per cent of the total amount of the works, services or supply contract. Subcontracting may not be further subcontracted. The payment of services is not permitted unless two conditions have been met:</p> <ol style="list-style-type: none"> 1) the contractor has sent the documentation relating to the complaint to the social security institutions and the security plan before the start of the work; 2) the contracting authority has acquired the DURC of the contractor and of all the subcontractors. 		

Article 74 of the Directive / Article 75 of the Directive / Article 76 of the Directive ► Article 142 of D.lgs. 50/2016 (Code)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Article 142 - Publication of notices</p> <p>1. Contracting authorities intending to award a public contract for the services referred to in Annex IX shall make known their intention by any of the following means:</p> <p>a) by means of a contract notice, which shall contain the information referred to in point F of Part I of Annex XIV, in accordance with the standard forms referred to in Article 72;</p> <p>b) by means of a prior information notice, which shall be published continuously and contain the information set out in Annex XIV, Part I. The prior information notice shall refer specifically to the types of services that will be the subject of the contracts to be awarded. It shall indicate that the contracts will be awarded without further publication and shall invite interested economic operators to express their interest in writing.</p> <p>2. The first subparagraph shall not apply where a negotiated procedure without prior publication is used for the award of public service contracts, in the presence of the conditions set out in Article 63.</p> <p>3. Contracting authorities that have awarded a public contract for services referred to in Annex IX shall make known the result of the procurement procedure by means of a contract award notice, which shall contain the information referred to in Annex XIV, Part I, point H, in accordance with the standard forms referred to in Article 72. They may, however, group such notices on a quarterly basis. In that</p>	<p>The rule provides that contracting authorities wishing to award a public contract in social services must make known their intention by means of a call for tenders or a prior information notice.</p> <p>The general rule, therefore, is the advertising obligation that is fulfilled by the contracting authority through:</p> <p>a) the publication of a contract notice covering all the information set out in Annex XIV, part I, lett. f (name, identification number, where applicable, address including NUTS code, e-mail and internet address of the contracting authority, a brief description of the contract, etc.) in accordance with the standard forms referred to in Article 72.</p> <p>b) a prior information notice published in a continuous manner and containing all the information that must appear in the notices and calls for tenders in the ordinary or special sectors and explicitly referred to the types of services that will be objects of the future contracts to be awarded.</p> <p>By choosing the prior information notice, the contracting authority may operate through successive invitation procedures according to a scheme which is in many respects similar to the restricted procedure.</p> <p>The advertising of the tender with a single call or the use of the prior information notice entail for the administration the satisfaction of the advertising obligations provided for</p>	<p>Article 142 of the Public Contracts Code has implemented Article 75 of Directive 2014/24/EU. The provision also seems to recall some principles expressed in Articles 74 and 76 of the same Directive, although it does not constitute a direct transposition of these articles.</p> <p>The specialty of the discipline is determined by the particularity of the sector, which is characterised by civic, solidarity and social utility purposes, and in which a perfectly competitive market does not always exist.</p> <p>It is a "lighter regime" with its own specificity and autonomy in relation to other sectors, aimed essentially at guaranteeing the publicity of contracts awarded in this sector.</p> <p>For a specific type of service included in Annex IX, the provision provides for the application of the so-called "less lightened" regime regulated by Art. 142, paragraphs 5-ter to 5-octies, introduced by corrective decree no. 56/2017. These services are essentially health services, social services and other related services, including services provided by associations (see Art. 142, paragraph 5-bis).</p> <p>The provision regulates the</p>	<ul style="list-style-type: none"> - Art. 140 of the Code, which has transposed Art. 91 of Directive 2014/25/EU, regulates the provision of social services and other specific services in special sectors. - Art. 36 of the Code, which regulates contracts below the threshold. - Art. 112 of the Code, which provides for the possibility of reserving the right to participate in procedures or execution to economic operators whose main purpose is the social and professional integration of people with disabilities or disadvantaged. - Legislative Decree no. 112/1998, Art. 128 defines social services: "<i>Pursuant to this legislative decree, social services means all activities relating to the provision and provision of services, free and paid, or economic services designed to remove and overcome the situations of need and difficulty that the human person encounters during his life, excluding only those insured by the social security system and the health system, and those insured in the administration of justice</i>". - Law 328/2000 "Framework law for the implementation of the integrated system of interventions and social services" according to which "<i>The Republic shall ensure that individuals and families have an integrated system of interventions and social services, shall promote interventions to</i>

<p>case, they shall send the grouped notices within 30 days of the end of each quarter.</p> <p>4. For contracts with a value equal to or above the thresholds referred to in Article 35, the standard forms referred to in paragraphs 1 and 3 of this Article shall be established by the European Commission by means of implementing acts.</p> <p>5. The notices referred to in this Article shall be published in accordance with Article 72.</p> <p>5-bis. The provisions of paragraphs 5-ter to 5-octies shall apply to the following services, as identified in Annex IX, in the ordinary sectors: health services, social and related services; social benefit services; other public, social and personal services, including services provided by trade unions, political organisations, youth organisations and other services of membership organisations.</p> <p>5-ter. The entrusting of the services referred to in paragraph 5-bis shall ensure the quality, continuity, accessibility, availability and completeness of the services, taking into account the specific needs of different categories of users, including disadvantaged groups and promoting the involvement and empowerment of users.</p> <p>5-quater. For the purposes of applying Article 21, contracting authorities shall approve the programming instruments in accordance with the provisions of the State and regional sectoral legislation.</p> <p>5-quinquies. The objectives set out in Articles 37 and 38 shall also be pursued through the forms of aggregation provided for in the sector-specific legislation, with particular regard to social and health districts and similar institutions.</p> <p>5-sexies. The award procedures set out in</p>	<p>by Art. 72 starting from communication to the EU. The only derogation provided for by the general system of mandatory advertising is the possibility of awarding public service contracts following a negotiated procedure without prior publication of a contract notice: this derogation is active for the award of social services both in the ordinary sectors and in the special sectors.</p> <p>Paragraph 5-bis and following, introduced by the Corrective of the Code, approved by Legislative Decree no. 56/2017, establishes a "less lightened" regime for the following ordinary services: health services, social services and related services; social services; other public, social and personal services, including services provided by trade unions from political organisations, youth associations and other services of membership organisations.</p> <p>This "less lightened" regime is regulated through references to various articles of the Code.</p> <p>This provision expands the services covered by the simplified regulation and identifies a legal advantage (favor legis) for the provision of services by non-profit organisations.</p> <p>In the planning of such contracts, the administrations must respect the state and regional legislation, and adopt the criterion of the most economically advantageous offer identified on the basis of the best quality/price ratio (criterion referred to in Art. 76 of the Directive).</p>	<p>procedures for publishing notices and contract notice that must be respected in order to award a public contract for social services and for specific services provided for in Annex IX (corresponding to Annex XIV of Directive 2014/24).</p> <p>More generally, social service contracts are treated in the Code as contracts with a special regime and subject to a simplified regulation that identifies a favor legis for the awarding of such services.</p> <p>Legislative Decree 50/2016 provides for the application of the Code's rules to social services when the threshold established by Art. 35 (contracts for an amount equal to or higher than EUR 750 000) and introduces a differentiated regime only with regard to the publication of notices (Article 142) and the possibility of assignment reserved to third sector organisations (Article 143).</p>	<p><i>guarantee the quality of life, equal opportunities, non-discrimination and citizenship rights, and shall prevent, eliminate or reduce the conditions of disability, individual and family need and distress resulting from inadequate income, social difficulties and conditions of non-autonomy, in accordance with Articles 2, 3 and 38 of the Constitution". Moreover, it provides that "the planning and organization of the integrated system of interventions and social services is the responsibility of local authorities, regions and the State in accordance with Legislative Decree no. 112 of 31 March 1998 and this law, according to the principles of subsidiarity, cooperation, effectiveness, efficiency and economy, homogeneity, financial coverage and assets, responsibility and uniqueness of the administration, organizational and regulatory autonomy of local authorities".</i></p> <ul style="list-style-type: none"> - Article 55 of Legislative Decree no. 117/2017 of the Third Sector Code establishes that public administrations, in the exercise of their functions of planning and organization at the territorial level and in the context of activities of general interest, including social services, ensure the active involvement of the bodies of the Third Sector through forms of co-programming and co-design and accreditation, implemented in compliance with the general principles on administrative procedure. - Article 56 of the Third Sector Code establishes that Administrations may
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<p>Articles 54 to 58 and 60 to 65 shall apply.</p> <p>5-septies. In addition to the provisions of paragraphs 1 to 5-sexies, the provisions of Articles 68, 69, 75, 79, 80, 83 and 95 must also be applied for the award of the contract, using the award criterion of the most economically advantageous tender identified on the basis of the best value for money.</p> <p>5-octies. The service contracts referred to in paragraph 5-bis, of an amount below the threshold referred to in Article 35, paragraph 1, letter d), are entrusted in compliance with the provisions of Article 36 (4).</p> <p>5-nonies. The provisions of paragraphs 5-ter to 5-octies shall apply to the services referred to in article 144, subject to the provisions of the same article.</p>			<p>enter into agreements with voluntary organisations and social promotion associations, in order to "carry out social activities or services of general interest for third parties", if such an instrument is "more favourable than recourse to the market".</p> <ul style="list-style-type: none"> - Art. 57 of the Third Sector Code states that the "emergency and emergency medical transport service" can be entrusted in agreement with voluntary organisations accredited under current legislation. - ANAC Guidelines Resolution no. 32/16 "Guidelines for the entrusting of services to third sector bodies and social cooperatives
<p>Open questions</p>	<p>A profile of legal uncertainty has been identified by the ANAC (National Anti-Corruption Authority) and by numerous institutional operators in the coordination between the discipline of the Code and the regulations of the Code of the Third Sector mentioned above. At the request of the ANAC, the Council of State issued an opinion on this subject in which it clarified that the procedures set out in the Third Sector Code (such as co-planning, accreditation or partnership) constitute, within the scope of Community law, social service contracts and, therefore, are subject to the rules of the Public Contracts Code, which supplements the provisions of the Third Sector Code. An exception is made for cases in which the procedures are non-selective, not aimed at entrusting the service, or are aimed at purely free relationships.</p> <p>Furthermore, the provisions contained in the Code of Public Contracts prevail in any case over the different provisions of the Code of the Third Sector, where these cannot in any way be interpreted in conformity with Euro-unit law.</p> <p>The procedures for awarding the social services envisaged in the Code of the Third Sector (in particular, accreditation, co-planning and partnership) are subject to the Code of Public Contracts, in order to protect competition also between third sector entities, in the event that the service is provided by the contractor in an onerous manner, which also recurs in the presence of mere reimbursement of flat-rate costs and/or extended to cover all or part of the cost of production factors. In addition, the Administration must specifically and punctually justify the use of these methods of assignment, which, as structurally reserved for non-profit entities, effectively deprive the profit enterprises of the possibility of being entrusted with the service (Consiglio di Stato, Opinion no. 2052 of 20 August 2018).</p>		
<p>Example of application from the national level (where applicable)</p>	<p>This provision does not allow contracting authorities to proceed with the award of a public contract for the services referred to in Annex IX without complying with the publicity and other requirements laid down therein.</p>		

Article 77 of the Directive ► Article 143 of D.lgs. 50/2016 (Code)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Article 143 - Reserved contracts for certain services</p> <p>1. Contracting authorities may reserve the right for organisations referred to in paragraph 2 to participate in procedures for the award of public contracts exclusively for those health, social and cultural services referred to in Annex IX, which are covered by CPV codes 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4, 98133110-8.</p> <p>2. The assignments referred to in paragraph 1 shall fulfil all of the following conditions:</p> <p>(a) the organisation's statutory objective is the pursuit of a public service mission linked to the delivery of the services referred to in paragraph 1;</p> <p>(b) profits of the organization are reinvested with a view to achieving the organisation's objective. Where profits are distributed or redistributed, this should be based on participatory considerations;</p> <p>(c) the structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and</p> <p>(d) the organisation has not been awarded a contract for the services concerned by the</p>	<p>The law provides for a direct legislative provision for certain services to organizations that have the following requirements:</p> <ol style="list-style-type: none"> 1) must pursue a public service mission linked to the provision of health, social and cultural services; 2) they must be able to reinvest their profits in order to achieve the organisation's objective. This also through the redistribution of the same profits on the basis of participatory considerations; 3) must have a management structure based exclusively on the principles of employee ownership, users or interested parties; 4) were not awarded tenders for the services in question in the last three years. <p>These are requirements that the beneficiary organisation must possess both in the awarding phase and during the execution of the contract.</p> <p>The use of the broad notion of organisations is not casual since the panorama of the c.d. the third sector offers a wide range of legal statutes (foundations, social enterprises associations, cooperatives, etc.).</p> <p>The provision also establishes that the contract must have a maximum duration of three years.</p> <p>As specified in paragraph 1 of the Art. 143, the contract notice must be prepared exclusively for the social and cultural health services contained in Annex IX, the CPV codes for:</p> <ul style="list-style-type: none"> - 75121000-0 Administrative services in the field of education; - 75122000-7 Administrative health services; - 75123000-4 Administrative building services; - 79622000-0 Supply services of domestic staff; - 79624000-4 Supply services of nursing personnel; - 79625000-1 Supply services of medical personnel; 	<p>Article 143 of the Code of Public Contracts has fully transposed the Article 77 of Directive 24/2014/EU, reproducing its content.</p> <p>This provision introduces a special reserved regime: it provides that the contracting authorities will be able to launch tender procedures reserved to certain organisations (of the so-called third sector) with specific and particular characteristics, for health, social and cultural services strictly listed in the same norm (paragraph 1).</p> <p>However, the national provision reproduces the provision of the Directive in an identical way, in which the characteristics of the organisations in favour of which certain services are reserved are generally indicated, without making the necessary specification of the subjects in relation to the national law.</p>	<p>Article 3 of the Decree of the President of the Council of Ministers D.P.C.M. March 30, 2001 (Act of addressing and coordinating the systems of assignment of personal services pursuant to Article 5 of the Law of November 8th, 2000, No. 328), concerning the coordination of systems for assigning personal services, the possibility for public bodies to establish "<i>forms of collaboration with voluntary organizations</i>" through the conventional tool envisaged by the framework law on volunteering (Law No. 266/1991 now repealed by Legislative Decree No. 117/2017 Code of the Third Sector, which introduced a new discipline of voluntary organisations).</p>

<p>contracting authority concerned pursuant to this Article within the past three years.</p> <p>3. The maximum duration of the contract shall not be longer than three years.</p> <p>4. The call for competition is prepared in accordance with the provisions of this article.</p>	<ul style="list-style-type: none"> - 80110000-8 Pre-school education services; - 80300000-7 Higher education services; - 80420000-4 E-learning services; - 80430000-7 Adult university education services; - 80511000-9 Employee training services; - 80520000-5 Training equipment; - 80590000-6 Tutoring services; - 85000000-9 Health and social work services; - 85323000-9 Municipal health services; - 92500000-6 Library, archives, museum and other cultural services; - 92600000-7 Sports services; - 98133000-4 Services provided by social membership organisations; - 98133110-8 Services provided by youth organisations. 		
<p>Open questions</p>	<ul style="list-style-type: none"> - The prevision of the duration of the contract entrusted under Article 143, limited to only three years, has caused some discussion, since it has been observed that personal services are very often managed by the same cooperatives operating in the territory and who designed the services. The risk is that the reserve, if used uncritically, could create undesirable effects, because in some sectors (think of delicate services for the disabled and children) what is most important for the user is not the rotation of the organisation but the continuity of the service. - The maintenance in the provision of transposition of the requirements of the organisation in general terms, without making the necessary adaptation in relation to internal legal system, may lead to uncertainties regarding the subjective scope of application of the provision. 		
<p>Example of application from the national level (where applicable)</p>	<p>According to the prohibition of renewal referred to in the second paragraph, letter d), an organization that has obtained the award of a reserved public contract may not participate in any subsequent reserved selection.</p> <p>Furthermore, the provision does not allow the establishment of a contract term of more than three years.</p>		