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Promoting local food systems through public procurement in the European Union

Promuovere i sistemi alimentari locali
attraverso gli appalti pubblici in agricoltura

An attempt is made in this article to determine the possible role of strategic public procurement in the promotion of local food systems. The question asked is whether the principles of competition law that regulates the EU's single market, fully applied in the framework of public procurement, stand in confrontation with the promotion of local food systems. It has been shown that local food systems can be a valid strategical clause included in public procurement procedures, as they enhance various social and environmental general interests that provide consumer's welfare by improving competition. The local food clause should be defined in the public procurement procedures without reference to a specific administrative territory, whether national or regional and be proportional and suitable to secure the attainment of the general interests' objectives.

Keywords: local food systems, food public procurement, strategic procurement, alternative food systems

L'articolo discute l'uso degli appalti strategici per promuovere i sistemi alimentari locali. Si incentra sulla domanda se le norme in materia di concorrenza, che regolano il mercato unico dell'UE e che sono applicabili appieno agli appalti pubblici, siano in conflitto con la promozione dei sistemi alimentari locali. L'analisi svolta ha dimostrato che i sistemi alimentari locali possono rappresentare una clausola di importanza strategica presente nelle procedure di appalto pubblico in quanto essi rafforzano vari interessi generali, sociali e ambientali, i quali, migliorando la concorrenza, garantiscono il benessere dei consumatori. Nelle procedure di appalto pubblico la clausola alimentare locale dovrebbe essere definita senza riferimento a uno specifico ambito amministrativo, nazionale o regionale, nonché essere proporzionata e adeguata a raggiungere obiettivi di interesse generale.

Parole chiave: sistemi alimentari locali, appalti pubblici per forniture di derrate alimentari, appalti strategici, sistemi alimentari alternativi

Introduction

Since the nineties, the challenges of sustainable food systems have been a source of growing concern. In the EU, the institutional culmination of these concerns was the promulgation of the Farm to Fork Strategy in 2020,¹ one of the main pillars of the European Green Deal² which sets out a European Union plan to achieve carbon neutrality by 2050.³

Among the various competences of public authorities to move towards a more sustainable food system, there is one powerful and influential tool at their disposal: strategic public procurement. Strategic procurement is not only intended to meet the needs of the public sector, but it is also envisioned as an instrument to achieve general interest objectives, especially environmental and social ones.⁴ In the EU, public spending is approximately 2.5 billion euros on food procurement.⁵ Because of its impact on the economy, public authorities have the capacity to significantly contribute to the transition towards a more sustainable food system through food procurement.⁶

Local food systems (LFS) emerged in 1990 and have been in operation since then, driven by social society as an influential alternative to the cur-

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system*, COM (2020) 381 final, p. 14.

² Communication from the Commission, *The European Green Deal*, COM (2019) 640 final.

³ In order to achieve the commitments established in the Paris Agreement by the Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality, OJ L 243, 9.7.2021 (“European Climate Law”).

⁴ T. Medina Arnáiz, *La contratación pública estratégica*, in: T. Quintana López (ed.), *La contratación pública estratégica en la contratación del Sector Público*, Valencia 2020, pp. 81–100.

⁵ Data obtained from OpenTender for the 27 EU MS in 2022. OpenTender is a European public procurement platform developed by Government Transparency Institute, to improve transparency and facilitate government accountability. The following CPV codes were looked up: Food, beverages, tobacco, and related products: 15000000; restaurant and catering services: 55300000; catering services: 55320000; cafeteria services: 55330000. 55500000 canteen and catering services from outside; 55510000 canteen services; 55520000 catering services from outside.

⁶ Around 14% of the EU’s GDP is spent on public procurement. European Commission, *Buying green! A handbook on green public procurement*, Luxembourg 2016; E. Fisher, *The Power of Purchase: Addressing Sustainability through Public Procurement*, “European Procurement & Public Private Partnership Law Review” 2013, vol. 8, no. 1.

rent food system, highly industrialized and globalized.⁷ LFS advocate for the settlement of the entire food chain within a reduced territory. Thus, all actors in the food chain – from production to waste disposal – participate in the food governance of a small territory in order to organize themselves to produce and consume food.⁸ The two fundamental differences between the current global food system and an LFS are the geographical space, where actors interact, and the participatory governance, which advocates food democracy.⁹ LFS are very heterogeneous, but their common objective is to reduce the negative externalities of the dominant food system; some of them focus on addressing negative health externalities, others on environmental or social ones.¹⁰

Even though LFS are not defined in European Union Law, they are of interest for the EU's institutions.¹¹ The EU Joint Research Centre describes LFS as those “where the production, processing, trade and consumption of food occur in a defined reduced geographical area.”¹²

LFS can be a sustainable alternative to the negative externalities of the current food system if they incorporate three main parameters: the enhance-

⁷ L. Enthoven, G. Van den Broeck, *Local food systems: Reviewing two decades of research*, “Agricultural Systems” 2021, vol. 193, article 103226.

⁸ L. Malassis, *Nourrir les hommes: un exposé pour comprendre, un essai pour réfléchir*, Paris 1994.

⁹ The notion of food democracy was conceived by Tim Lang in order to conceptualize citizens' demands against the “controlling forces” of the agri-food industry. T. Lang, *Food policy for the 21st century: can it be both radical*, in: M. Koc, R. MacRae, L.J.A. Mougeot, J. Welsh (eds.), *For Hunger-proof Cities: Sustainable Urban Food Systems*, vol. 216, Ottawa 1999, p. 218.

¹⁰ J. Muchnik et al., *Systèmes agroalimentaires localisés: état des recherches et perspectives*, “Cahiers Agricoles” 2008, vol. 17, no. 6, pp. 513–519.

¹¹ Opinion of the European Committee of the Regions on ‘*Local food systems*’ (outlook opinion) 2011/C 104/01, point 21. Commission Staff Working Document on various aspects of short food supply chains accompanying the document Report from the Commission to the European Parliament and the Council on the case for a local farming and direct sales labelling scheme COM (2013) 866 final, p. 5. European Parliament Briefing, M.L. Augère-Granier, *Short food supply chains and local food systems in the EU*, Strassbourg 2016; European Committee of the Regions, *Sustainable public procurement of food*, Bruxelles 2018, p. 17; European Committee of the Regions, *The role of local and regional authorities in making food systems more sustainable*, Bruxelles 2020, p. 32; Opinion of the European Committee of the Regions, *From farm to fork the local and regional dimension*, 2021/C 37/04, point 8.

¹² M. Kneafsey et al., *Short Food Supply Chains and Local Food Systems in the EU. A State of Play of their Socio-Economic Characteristics*, JRC Scientific and Policy Reports, European Commission, 2013, p. 13 and 23.

ment of local, seasonal and organically produced food.¹³ Ultimately, they advocate proximity in the food chain. However, in this conceptual framework, proximity is conceived not only as physical (geographical distance) or social closeness (between the farmer and the consumer), but also as eco-systemic proximity; in others words, LFS intend to adapt food production and consumption to the surrounding natural ecosystem, all within a reduced space. The final objective of LFS is to establish a link between natural resources and the food needs of the citizens of a small territory.¹⁴

The aim of these considerations is to analyze if public authorities can use public procurement to enhance local food systems, justifying it by environmental and social general interests. Public procurement regulation, as is well-known, is characterized by a strong tension between the preservation of the EU single market and the pursuit of other strategic goals, either social or environmental. Therefore, the promotion of LFS through public procurement lies between these legal frictions.

1. Strategic public procurement: area of confluence between competition law and environmental and social protection

Strategic public procurement in the EU has been widely analyzed in the legal literature. On the one hand, some authors consider that the main challenge to include strategic objectives in public procurement, such as the promotion of LFS, is the confrontation with competition law principles' regulating EU single market. According to these authors, strategic public procurement is a space of confrontation between economic and environmental or social interests.¹⁵ On the other hand, an opposite segment of the

¹³ Other important parameter is reducing meat consumption. H. Ritchie, P. Rosado, M. Roser, *Environmental Impacts of Food Production*, OurWorldInData.org, 2022, <https://ourworldindata.org/environmental-impacts-of-food> [accessed on 28.10.2023]; A. Maia Vargas et al., *The Role of Local Seasonal Foods in Enhancing Sustainable Food Consumption: A Systematic Literature Review*, "Foods" 2021, vol. 10, no. 9, p. 2206; J. Poore, T. Nemecek, *Reducing food's environmental impacts through producers and consumers*, "Science" 2018, vol. 360, no. 6392, pp. 987–992; M. Springmann et al., *Options for keeping the food system within environmental limits*, "Nature" 2018, vol. 562, no. 7728, pp. 519–525.

¹⁴ J.-L. Rastion, *Accélérer la transition vers une alimentation durable par un changement de paradigme scientifique et économique et des politiques publiques innovantes*, "Systèmes Alimentaires" 2018, no. 3, pp. 17–27.

¹⁵ S. Tavares da Silva, *La sostenibilidad ambiental en las directivas sobre contratación administrativa*, in: R. Galán Vioque (ed.), *Las cláusulas ambientales en la contratación pú-*

legal literature defends that the incorporation of strategic considerations in public procurement improves competition¹⁶ as the latter is conceived to achieve consumer welfare.¹⁷ These authors argue that there is no dilemma opposing two protected legal interests, but rather an accommodation of previously non-interacting branches of law. Consequently, public procurement is a privileged space of confluence¹⁸ and reciprocal accommodation between competition law and environmental and social laws.

Moreover, it should be remembered that the EU project rooted its legitimacy on the quest for an ever closer union among the European peoples.¹⁹ In the beginning, this union was to be achieved through the single market; the chosen instrument to attain a close union between the peoples of Europe was the economic integration. Thus, the EU single market is not only thought of as an area of economic freedom between Member States²⁰ but its legal regime is the result of the conciliation of different public interests protected by the EU.²¹ So, the EU's conception of the market is close to ordoliberalism,²² according to which, democratic power must intervene in

blica, Sevilla 2018, pp. 49–63; A. Sánchez Graells, *Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?* “European Public Law” 2016, vol. 22, no. 2, pp. 377–394; J. Hettne, *Sustainable Public Procurement and the Single Market. Is there a conflict of interest?* “European Procurement & Public Private Partnership Law Review” 2013, vol. 8, no. 1, pp. 31–40; R. Le Velly, *Quand la concurrence rencontre la durabilité: l'introduction du développement durable dans le droit de la commande publique*, “Droit et Société” 2022, no. 110.

¹⁶ J. Hojnik, *Environmental Protection v. Free Trade-Buy Local as a Barrier to EU Internal Market*, “Environmental Policy & Law” 2016, vol. 46, pp. 246–253; A. Gerbrandy, *Solving a sustainability deficit in European Competition Law*, “World Competition” 2017, vol. 40, no. 4, pp. 539–562; F. Riem, *L'aliment, entre droit du marché et pratiques dans les filières agricoles*, “Droit et Société” 2019, no. 101, pp. 37–52.

¹⁷ R. Inderst, S. Thomas, *Integrating Benefits from Sustainability into the Competitive Assessment – How Can We Measure Them?* “Journal of European Competition Law & Practice” 2021, vol. 12, no. 9, pp. 705–709.

¹⁸ The term confluence is understood as the place where two rivers flow together and become one.

¹⁹ As Robert Schuman declared on 9 May 1950: “Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity.”

²⁰ According to article 3.3 of the current TEU, the single market “shall work for the sustainable development of Europe based on [...] a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.”

²¹ J. Hettne, *Sustainable Public Procurement...*, pp. 31–40.

²² E. Deutscher, S. Makris, *Exploring the ordoliberal paradigm: the competition-democracy nexus*, “Competition Law Review” 2016, vol. 11, pp. 181–214.

the free market by proclaiming an economic constitution in accordance with the values of society.²³ The EU single market is not an end in itself,²⁴ but a means to a greater end,²⁵ a political union founded to address a range of contemporary problems that Member States would be unable to deal with individually; yesterday it was the threat of a new war, today the ecological perils.

The four economic freedoms, enshrined in the Treaty of Rome,²⁶ as well as the competition regime, were fully applied to national public procurement legal systems to ensure a level playing field in tendering procedures.²⁷ Public procurement was an important obstacle to the construction of the common market, because, as a historically protectionist arena, the temptation for contracting authorities to award the contract to national bidders was, and still is, considerable.²⁸ Competition rules were applied to public procurement to prevent restrictions and distortions within the common market, in particular to avoid national preference. Public procurement procedures cannot be designed to favour certain economic operators; for instance, advantaging foodstuffs on the basis of their origin is, in principle, illegal as it would be discriminatory and an obstacle to the competition rules of the single market.²⁹ Nevertheless, purely economic considerations are not absolute in competition law, as others competitive parameters representing general

²³ S. Kingston, *Greening EU Competition Law and Policy*, Cambridge 2012, p. 14.

²⁴ J. Habermas, J. Derrida, *February 15, or what binds Europeans together: A plea for a common foreign policy, beginning in the core of Europe*, "Constellations" 2003, vol. 10, no. 3, pp. 291–297. The authors argued that political efforts to domesticate capitalism must not fall below the standards of social justice.

²⁵ F. Hervouët, *La dérive de l'Union européenne: de l'objectif de l'Union entre les peuples à celui de la concurrence*, "Revue de l'Union européenne" 2008, no. 514, pp. 9–14.

²⁶ Art. 3.b of the Treaty of Rome; current Art. 26.2 TFEU.

²⁷ As stated in the preamble of the repealed Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts. Since the 1970s onwards, the EEC law began to influence the public procurement's legal regime in the Member States, given the high significance of public procurement in quantitative and cultural terms for the Single Market.

²⁸ This obstacle was stated by the ECJ in C-360/96: "it must be borne in mind that the purpose of coordinating at Community level the procedures for the award of public service contracts is to eliminate barriers to the freedom to provide services and therefore to protect the interests of economic operators established in a Member State who wish to offer goods or services to contracting authorities in another Member State" § 44. "The objective of Directive 92/50 is to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities" § 42.

²⁹ Art. 18.1 of Directive 2014/24/EU on public procurement.

interests, such as environmental or social protection, must be included. This accommodation of interests is particularly strong in the so-called strategic public procurement.³⁰

Since the landmark *Concordia Bus Finland* judgment, contracting authorities are allowed to take into consideration ecological criteria to determine the most advantageous tender in a public procurement process.³¹ Hence, since 2002 onwards, strategic clauses have begun to be admitted in public contracts, overcoming the purely economic view based on the sacrosanct cheapest bidder.³² Although strategic objectives were considered as secondary, the enactment of the 2014 Directives, the fourth and current package on public procurement package in the EU³³, gave a new impetus to the legal feasibility of pursuing these general interest objectives, such as ecological or social ones, through public procurement. The subordination of strategic procurement objectives to the economic freedoms of the single market has recently undergone a major change. Recently, in case C-395/18 of 30 January 2020, the Court of Justice of the European Union has elevated compliance with environmental requirements to the status of a general principle of public procurement: “[...] it should be noted that Article 18 of Directive 2014/24, entitled ‘Principles of procurement,’ is the first article of Chapter II of that Directive devoted to ‘general rules’ on public procurement procedures. Accordingly, by providing in paragraph 2 of that article that economic operators must comply, in the performance of the contract, with obligations relating to environmental, social and labour law, the Union legislature sought to establish that requirement as a principle, like the other principles referred to in paragraph 1 of that article, namely the principles of equal treatment, non-discrimination, transparency, proportionality and prohibiting the exclusion of a contract from the scope of Directive 2014/24 or artificially narrowing competition. It follows that such a requirement constitutes, in the general scheme of that directive, a cardinal value with

³⁰ J. Tejedor Bielsa, *El principio de competencia en la contratación pública. Delimitación, riesgos y garantías*, in: J.M. Gimeno Feliú (ed.), *Observatorio de los Contratos Públicos 2018*, Pamplona 2019, pp. 395–437.

³¹ Judgment of the ECJ of 17 September 2002, case C-513/99, para 55, *Concordia Bus Finland Oy Ab v City of Helsinki*.

³² T. Quintana López, *La contratación pública estratégica en la contratación del Sector Público*, Valencia 2020, pp. 64–66; V. Aguado i Cudolà, *La contratación pública responsable. Funciones, límites y régimen jurídico*, Pamplona 2021, pp. 36–43.

³³ Directive 2014/24/EU on public procurement, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and Directive 2014/23/EU on concessions.

which the Member States must ensure compliance pursuant to the wording of Article 18(2) of that directive.”³⁴

As a result, environmental or social principles are placed on an equal footing with economic ones. Price is no longer the only parameter in procurement procedures, as it is necessary to incorporate green or social clauses to select the best tender.³⁵ Green public procurement is a reflection of the latest changes in environmental law whose rules are increasingly using market-based instruments to protect the environment.³⁶ Without a coherent approach, environmental measures can result into barriers to economic trade, while economic measures can hinder environmental protection.³⁷

2. Strategic food public procurement: the promotion of sustainable diets

According to Eurostat data, total expenditure on food and catering services for the 28 Member States in 2011 was 206.3 billion euros.³⁸ Thus, public procurement’s economic relevance and potential to change the food system is undeniable. The Commission considers public procurement as an essential tool to boost the ecological agri-food transition, and expresses its political determination to establish minimum mandatory criteria for sustainable food procurement.³⁹ At the time of writing, there is still no EU regulation compelling public authorities to include strategic clauses in food procurement contracts. Nonetheless, the Commission has recently announced a legislative proposal on sustainable food systems, which foresees the inclusion of mandatory minimum criteria for sustainable food public procurement.⁴⁰ We can

³⁴ Judgment of the CJEU of 30 January 2020, case 395/18, para 38, *Tim SpA – Direzione e coordinamento Vivendi SA v. Consip SpA i Ministero dell’Economia e delle Finanze*. Question referred for a preliminary ruling concerning the interpretation of Articles 57(4) and 71(6) of Directive 2014/24.

³⁵ Art. 67 of the Directive 2014/24/EU states that the award of public contracts shall be based on the most economically advantageous tender.

³⁶ S. Tavares da Silva, *La sostenibilidad ambiental...*, pp. 49–63.

³⁷ D.S. Olawuyi, *Environment*, in: D. Bethlehem et al. (eds.), *The Oxford Handbook of International Trade Law*, Oxford 2022, pp. 673–692.

³⁸ A. Boyano Larriba et al., *EU GPP criteria for food procurement, catering services and vending machines*, Luxembourg 2019, p. 9.

³⁹ Communication from the Commission. *A Farm to Fork...*, p. 14.

⁴⁰ European Commission. Draft technical specifications, *Supporting study for the development of minimum mandatory criteria for the sustainable procurement of food, catering services and vending machines*, Call for tenders JRC/SVQ/2023/MVP/0135.

but wait until its enactment to analyze the future mandatory criteria chosen to change the food system through public procurement.⁴¹

Even without mandatory minimum criteria, contracting authorities are increasingly including green or social criteria in their food procurement contracts, encouraged by EU policies. These strategic criteria are motivated by a raised institutional awareness of the current food system's detrimental effects on the environment, consumers health and farmers' livelihoods. Nowadays, there is no controversy about the need to reshape the current food system into a more sustainable one. The difference of opinions arises with the parameters at stake.⁴² What are the most effective parameters for building a sustainable food system? One of the most controversial parameters here is the promotion of a local food system, or the proximity food clause.⁴³ However, there are also other less contentious clauses used by the public purchase of sustainable food.

The unquestionable food sustainable clauses are included in the EU Green Public Procurement (GPP) criteria for food procurement, catering services and vending machines,⁴⁴ drawn up by the EU Commission. GPP are guidelines of conduct, therefore a soft law document whose objective is to facilitate the incorporation of green criteria in public procurement.⁴⁵ Even if the ecological clauses defined in the GPP are voluntary, the importance of these guidelines is irrefutable; they establish green criteria common definitions for all Member States, with the aim of using a common *acquis* and inserting green criteria accepted by the European public procurement legal system.⁴⁶

⁴¹ Legislative framework for sustainable food systems: https://food.ec.europa.eu/horizontal-topics/farm-fork-strategy/legislative-framework_en [accessed on 28.10.2023].

⁴² M. Springmann et al., *Options for keeping...*, pp. 519–525.

⁴³ B. Born, M. Purcell, *Avoiding the Local Trap. Scale and Food Systems in Planning Research*, “Journal of Planning Education and Research” 2006, vol. 26, no. 2, pp. 195–207; R. Sonnino, *Escaping the Local Trap: Insight on Re-localization from School Food Reform*, “Journal of Environmental Policy & Planning” 2010, vol. 12, no. 1, pp. 23–40.

⁴⁴ A. Boyano Larriba et al., *EU GPP criteria...*

⁴⁵ Common EU GPP criteria are those criteria that can be incorporated into a public procurement procedure for goods, services or works in order to reduce the environmental impact of a purchase. The Commission has promulgated 14 GPP sectoral guides (computers, electricity, furniture, road transport, etc.) More information: https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements_en [accessed on 28.10.2023].

⁴⁶ H. Schebesta, *Revision of the EU Green Public Procurement Criteria for Food Procurement and Catering Services – Certification Schemes as the Main Determinant for Public Sustainable Food Purchases?* “European Journal of Risk Regulation” 2018, vol. 9, no. 2, pp. 316–328.

The purpose of this paper is not to analyze each green food public procurement criterion recommended by the EU Commission in the GPP. Three green criteria, however, must be highlighted because of their importance or connection to food proximity. In the first place, the main green clause recommended by the EU guidelines is organic food as established by the Regulation (EU) 2018/848; according to this regulation, food proximity is not taken into account to obtain the organic certification.

Secondly, the Commission recommends using agricultural products labelled with geographical indications⁴⁷ as a green criterion, as these products should meet certain conditions such as protecting natural resources or the landscape of the production area. This recommendation should not be mistaken with a promotion of local food, as the geographical indication's recommendation is addressed to all contracting authorities and for all protected geographical indications; in other words, Lleida pears, which have a protected designation of origin, can be included in the contracting specifications of a Polish school as a green clause. Moreover, this green recommendation is open to criticism, since, according to the doctrine, agri-food quality schemes lack effective environmental protection.⁴⁸

Thirdly, GPP recommends using food transportation as an ecological clause in order to reduce GHG emissions. Curiously, though, since its recommended application is limited to catering services,⁴⁹ this clause does not take into account food proximity either. This recommendation assesses the transportation of the meals already prepared from the external kitchens to the public authority; therefore, this green criterion does not imply the promotion of proximity or local food.⁵⁰

⁴⁷ Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, OJ L 343, 14.12.2012. Food quality schemes are divided into geographical indications or designations of origin, depending on whether the entire food production process takes place in a defined geographical area or only some of the production's steps.

⁴⁸ A. Di Lauro, *L'insoutenable soutenabilité des AOP et IGP: quel avenir pour ces signes de qualité?* "Revue Européenne de Droit de la Consommation" 2020, vol. 1, pp. 119–145.

⁴⁹ Several types of public contracts fall outside this recommendation, such as supply contracts or service concessions. Furthermore, the Commission specifies that this food transportation criterion will only apply (1) when the delivery of food is part of the contracted service, (2) if the fleet is under the control of the tenderer.

⁵⁰ J.J. Czarnecki, S. Van Garsse, *What is life-cycle costing?* in: M. Andhov et al. (eds.), *Cost and EU Public Procurement Law. Life-Cycle Costing for Sustainability*, Oxon 2020, pp. 3–19.

Finally, the recent elimination of seasonal products as a green criterion is noteworthy. The Commission's argument for removing this criterion is not convincing; according to the Commission, consuming seasonal food is only one element of a sustainable diet and there are other dietary behaviours with better environmental benefits, such as reducing excessive meat consumption. Perhaps the reason for the Commission's decision to remove this criterion from its recommendations is its close link to geographical proximity and the prohibition of territorial roots.

3. Rationale to promote local food systems within public procurement regimes. Concluding remarks

Promoting LFS through public procurement might be considered discriminatory because it favours food produced in a particular area of a Member State. Food produced out of the particular areas would suffer discrimination and the free movement of goods would be hindered.⁵¹ Therefore, in principle, a local food clause would be null.

The promotion of LFS by public procurement may be connected with the prohibition of territorial rooting. Within the framework of public procurement, territorial rooting refers to those provisions which may, on the basis of establishment in a geographical area or a territorial connection, favour the participation of certain tenderers or improve their evaluation on the basis of such territorial criteria. In other words, territorial root is the requirement by a contracting authority that some of the relevant conditions of a tenderer is to be located within a particular territorial area.⁵²

The prohibition of territorial root is not absolute in the EU public procurement legal system, as exceptions have been elaborated by the CJEU's case-law.⁵³ A local food clause would be valid if it simultaneously meets four requirements. First, the clause should not be discriminatory. In order to meet this requirement, the definition of local food in the procurement document must be delimited in terms of a certain distance from the location where the

⁵¹ Judgment of the CJEU of 20 March 1990, case C-21/88, § 11, *Du Pont de Nemours Italiana SpA v Unità sanitaria locale*.

⁵² D. Melo Fernandes, *A contratação de proximidade na revisão do Código dos Contratos Públicos de 2022: o que mudou: muito, pouco ou nada?* “Revista de Direito Administrativo” 2023, no. 17, pp. 45–59.

⁵³ Judgment of the CJEU of 27 October 2005, case C-234/03, *Contse SA v Insalud*; Judgment of the CJEU of 23 December 2009, case C-376/08, *Serrantoni Srl v Comune di Milano*.

contract will be executed (expressed in kilometres, for example). It must overall avoid chauvinistic food favouritism, so local food should be defined without reference to a specific administrative territory, whether national or regional. Put differently, local vegetables cannot be defined as those from a certain region, but rather those within a radius, for example 100 km, from the school canteen, thus regardless of administrative borders. The second requirement concerns the suitability of the local food clause to secure the attainment of a general interest's objective.⁵⁴ Thirdly, the clause must be proportional, it should not go beyond what is necessary in order to attain the objective.⁵⁵

Finally, territorial rooting can be justified by overriding requirements in pursuit of general interests. As far ahead stated in Cassis de Dijon judgment, imperative requirements in the general interest can justify a limitation of the four single market's freedoms.⁵⁶ Promoting LFS through public procurement can be justified by a very wide set of general interests. LFS can be justified by the need to protect food security,⁵⁷ promote healthier and more nutritious diets,⁵⁸ protect the environment⁵⁹ or strengthen the position of primary pro-

⁵⁴ The contracting authority must prove that the local food criterion effectively contributes to the objective pursued. Judgment of the Court, 13 July 1994, case C-131/93, § 26, *Commission v Federal Republic of Germany*.

⁵⁵ For instance, if the local food's clause materializes as an award criterion, it would be proportionate if it does not have a very high percentage in the final weighing. Judgment of the Court, 18 May 2017, joined cases, C-360/15 and C-31/16, § 148, *College van Burgemeester v X BV*; R. Fernández Salcedo, *Los criterios de adjudicación al servicio de la calidad ambiental y de la lucha contra el cambio climático: el precio en jaque*, in: X. Lazo Vitoria (ed.), *Compra Pública Verde y Cambio Climático*, Barcelona 2022, pp. 209–261.

⁵⁶ M. Fakhri, *A History of Food Security and Agriculture in International Trade Law, 1945–2017*, in: J. Haskell, A. Rasulov (eds.), *New Voices and New Perspectives in International Economic Law*, Cham 2020, pp. 55–90; Judgment of the Court of 20 February 1979, case 120/78, § 8, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*.

⁵⁷ Judgment of the Court of 10 July 1984, case 72/83, § 7 and 8, *Campus Oil v Minister for Industry and Energy*.

⁵⁸ G. Sherriff, *Towards healthy local food: issues in achieving just sustainability*, "Local Environment" 2009, vol. 14, no. 1, pp. 73–92; C.E. Caspi, G. Sorensen, S.V. Subramanian, I. Kawachi, *The local food environment and diet: a systematic review*, "Health & Place" 2012, vol. 18, no. 5, pp. 1172–1187.

⁵⁹ A. Wood et al., *Reframing the local-global food systems debate through a resilience lens*, "Nature Food" 2023, vol. 4, no. 1, pp. 22–29; L. Mengyu et al., *Global food-miles account for nearly 20% of total food-systems emissions*, "Nature Food" 2022, vol. 3, no. 6, pp. 445–453; A.J. Stein, F. Santini, *The sustainability of 'local' food: a review for policy-makers*, "Review of Agricultural, Food and Environmental Studies" 2022, vol. 103, no. 1, pp. 77–89.

ducers in supply chains.⁶⁰ The rationale to promote LFS is interconnected and interdependent and comprises social and environmental aspects as well as those and based on the protection of public health. This range opens the door to the legal validity of the promotion of LFS through public procurement in the EU.

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⁶⁰ Despite their similarity, LFS is a different term from short supply chains, which aim to reduce the number of economic actors between the farmer and the consumer, as their main concern is to improve farmer’s incomes. Until the January 2023, the former Common Agricultural Policy had provided a legal definition of a short supply chain involving no more than one intermediary between farmer and consumer. Art. 2.1 m) of Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development. Art. 11.1 Commission Delegated Regulation (EU) No 807/2014 of 11 March. Nowadays, these provisions have been repealed as the new CAP does not define the short supply chain.

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