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RETHINKING LOCAL CONTENT REQUIREMENTS IN EU PUBLIC PROCUREMENT WITHIN THE PARADIGM OF SUSTAINABLE DEVELOPMENT

NOWE SPOJRZENIE NA KONCEPCJĘ *LOCAL CONTENT* W ZAMÓWIENIACH PUBLICZNYCH W ŚWIETLE ZASADY ZRÓWNOWAŻONEGO ROZWOJU

The European Union (EU) has traditionally opposed local content requirements (LCRs) in public procurement, viewing them as contrary to the principles of free trade and competition. However, recent global crises, including the COVID-19 pandemic, geopolitical tensions, and supply chain disruptions, have prompted a reconsideration of these policies. This article explores how the concept of sustainable development, enshrined in EU law, provides a framework for justifying LCRs under specific conditions. By analysing EU case law and policy developments, the study argues that LCRs can be permissible if they serve broader strategic goals determined within the sustainable development paradigm, such as environmental protection and social welfare, rather than economic protectionism. Ultimately, the findings suggest that carefully designed LCRs can enhance economic resilience while remaining compatible with EU legal principles. It is, however, crucial to emphasize that LCRs may be permissible, provided that they are proportionate to the contracting authority's objectively justified needs, assessed with due diligence.

Keywords: local content requirements (LCRs); public procurement; protectionism; sustainable development; EU law

Unia Europejska (UE) tradycyjnie sprzeciwiała się tzw. wymogom dotyczącym lokalnej zawartości (*local content requirements* [LCRs]) w zamówieniach publicznych, uznając je za sprzeczne z fundamentalnymi zasadami rynku wewnętrznego. Jednak niedawne globalne kryzysy, w tym w szczególności pandemia COVID-19, agresja Rosji na Ukrainę, napięcia geopolityczne oraz zakłócenia w łańcuchach dostaw, uruchomiły procesy, które zdają się prowadzić do rewizji tych założeń. W artykule poddano weryfikacji hipotezę, że LCRs pod pewnymi warunkami mogą być *de lege lata* dopuszczalne. Zwrócono uwagę, że koncepcja zrównoważonego rozwoju – tak silnie zakorzeniona w prawie UE – może w tym kontekście stanowić szczególne uzasadnienie aksjologiczne dla stosowania LCRs. Przeprowadzone rozważania – w tym w szczególności analiza orzecznictwa Trybunału Sprawiedliwości UE – potwierdziło, że LCRs mogą być dopuszczalne, jeśli są proporcjonalne względem obiektywnie uzasadnionych potrzeb zamawiającego, w szcze-

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gólności jeśli odwołują się celów strategicznych identyfikowanych w paradygmacie zrównoważonego rozwoju.

Słowa kluczowe: wymogi dotyczące lokalnej zawartości (LCRs); zamówienia publiczne; protekcjonizm; zrównoważony rozwój; prawo UE

I. INTRODUCTION

It would be a truism to say that we are currently witnessing a global economic transition with momentous consequences for virtually all national economies. Therefore, many countries see increasing calls for a revision of economic concepts that promote minimal trade barriers, such as offshoring and detachment from supply chain control (Chilimoniuk-Przeździecka, 2018, p. 19). Meanwhile, there is a growing emphasis on the need to address security issues and make national or regional economies more resilient and independent. The recent activities of the European Union (EU) institutions provide an interesting example in this regard. There is no doubt that the EU's organization and legal system can easily be seen as aligned with the liberal concept of economy, based on the principles of free movement of capital, goods, and services. Therefore, concepts advocating the preferential treatment of contractors and the goods and services they offer based on their location and origin have been considered, at the very least, a taboo subject. The application of mechanisms such as Local Content Requirements (LCRs) has been consistently deemed impermissible. Moreover, the EU not only regards the use of LCRs as inadmissible within its Member States but also criticizes third countries that employ LCR instruments, including those with which the EU has not entered into any international agreements on the mutual liberalization of public procurement markets.[1]

Presently, even within the mainstream of the debate on EU reform, views are emerging that call for a reconsideration of the current approach to local content requirements (LCRs). Indicative of this shift are the declarations articulated by Ursula von der Leyen during the selection process for the President of the European Commission for the term 2024–2029. Specifically, in the document published by the European Commission, titled 'Europe's Choice Political Guidelines for the Next European Commission 2024–2029', the following statement was included: 'I will propose a revision of the Public Procurement Directive. This will enable preference to be given to European products in public procurement for certain strategic sectors. It will help ensure EU added value for our citizens, along with security of supply for vital technologies, products and services. It will also modernize and simplify our public pro-

[1] A good and representative example is the European Union's stance on the approach adopted towards LCRs in the Republic of South Africa. See, for example, the record of the European Commission's (2025) objections to the LCR regulations adopted in South Africa.

curement rules, in particular with EU start-ups and innovators in mind' (von der Leyen, 2024, pp. 11–12).

Such statements undoubtedly provide further evidence that the EU is undergoing a process that can be described as a rethinking of the paradigms which, over the past decades, have shaped the EU's economic actions. This paradigm may be characterized as the assumption that public procurement law should promote the liberalization of access to procurement markets – primarily within the EU internal market, but also as part of the broader process of liberalizing international trade – based on the principles of equal treatment and fair competition. This phenomenon of rethinking the paradigms of international trade is not unique to the EU but also aligns with global trends. Consequently, in the literature (Folliot Lalliot & Yukins, 2024; Kola, 2023) on public procurement, it is anticipated that, given the current challenges so closely linked to security (in its various dimensions), the EU institutions are beginning to call for greater sensitivity to the aforementioned security issues. For this reason, the public procurement market and its anticipated transformations deserve particular attention as a useful barometer of the direction of EU economic activity.

Naturally, it must be recognized – as already noted above – that the impetus for the rethinking of these established paradigms originates from outside the EU. In this regard, the EU remains largely reactive to the previously mentioned phenomena and their political and economic consequences. However, this does not make the process any less intriguing. On the contrary, due to largely external circumstances, the EU faces a significant challenge: it must adapt to new conditions and respond to processes grounded in mercantilist and protectionist principles, which are, at best, inconsistent with the EU's long-standing axiological framework that has shaped its relations, including those with third countries.

It is worth noting that at the level of political declarations, attempts to reconcile these conflicting priorities are increasingly evident. For example, the Council Conclusions on ICT Supply Chain Security, put forward the following proposal: 'Achieving strategic autonomy while preserving an open economy is a key objective of the Union'.[2] In this context, however, a key question arises: is the EU heading towards an identity crisis or does its reservoir of its jurisprudential experience provide a foundation for a necessary adjustment to its existing principles without requiring their outright rejection? In the author's view, the latter option is achievable, and the means to realize it is to invoke the concept of sustainable development. This hypothesis will be substantiated in subsequent sections by examining a proposal to rethink the EU's current approach to LCRs in public procurement, with reference to the concept of sustainable development.

[2] General Secretariat of the Council of the European Union, Council conclusions on ICT supply chain security – Council conclusions approved by the Council at its meeting on 17 October 2022, no. 13664/22, p. 5.

II. KEY CONCEPTS

The lack of consistent terminology is often a source of confusion in legal discourse. Therefore, it is essential to clarify the concepts that are central to the issue under consideration. This applies both to the legal term 'sustainable development' and the concept of LCRs, which is not a term of legal language (the language of legal texts) in EU law. Naturally, a comprehensive analysis and an attempt to formulate a precise definition of each concept fall beyond the scope of this article. However, this does not impede the research, as it focuses on the essence of the phenomena being discussed. Accordingly, the explanations below aim to establish the fundamental assumptions underlying both key concepts.

1. Sustainable development

The concept of *sustainable development* is a normative concept – a concept employed by the legislator in numerous legal acts. It is particularly significant as the EU legislator employs this concept in provisions of fundamental importance for characterizing the internal market. Specifically, Article 3 of the Treaty on European Union (TEU)[3] states: 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, 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. It shall promote scientific and technological advance.' The significance of this observation stems from the fact that the EU public procurement law is closely linked to the internal market and undoubtedly represents a regulation of critical importance for its effective functioning. Furthermore, under the applicable provisions, the European Commission is obligated to assess the economic impact of EU public procurement directives on the internal market, with particular emphasis on factors such as cross-border procurement.

In addition, sustainable development is an example of an 'indeterminate term', which, from the perspective of legislative technique, should be classified as a general clause. The literature indicates (Choduń et al., 2013, p. 31) that the difference between general clauses and indeterminate terms contained in legal provisions, which are not general clauses, lies in the fact that the former refer to evaluations (even though such evaluations are not explicitly expressed in the referring term), while the latter do not refer to evaluations but instead require the determination of magnitudes.

These general clauses are referential in nature, in the sense that, by incorporating them into a legal text, the legislator directs the interpreter to an extralegal system of values, requiring that, in the process of applying the

[3] Treaty on European Union, OJ C 202, 7.6.2016.

law, the interpretation of provisions containing general clauses takes these values into account. This understanding of the function of general clauses is also adopted in the EU case law. For example, reference can be made to the position of Advocate General Philippe Léger, expressed in his opinion in *Carmine Salvatore Tralli v. European Central Bank*.[4] Advocate General Léger characterized general clauses as follows: 'these are flexible rules which have as their basis an intentionally indeterminate yardstick and which thus show the desire of the legislature to leave to the authorities concerned – whether they be administrative or judicial – the task of defining their scope on a case-by-case basis, so that their application may be best adapted to the facts before those authorities' (p. 57). As a result, the content of legal norms articulated in provisions containing general clauses is determined during the process of legal application, making their examination primarily reliant on an analysis of case law.

This ultimately means that any attempts to frame the concept of sustainable development within a definition intended to give it a binding and exhaustive character are destined to fail. Therefore, the concept of sustainable development should be interpreted as a paradigm or an interpretative directive addressed to entities applying the law based on provisions referencing sustainable development. This concept was aptly captured by the Polish Regional (Voivodeship) Administrative Court in Gorzów Wielkopolski, which, in its judgment of March 25, 2009, stated: 'it must be accepted that it [the constitutional principle of sustainable development] primarily serves as an interpretative directive. Thus, when doubts arise regarding the scope of obligations, the type of obligations, or the manner of their implementation, the principle of sustainable development should be used for guidance. It therefore plays a role similar to the principles of social coexistence or the socio-economic purpose in civil law.'[5]

This does not mean that all attempts to define sustainable development should, a priori, be deemed pointless. On the contrary, such efforts are often based on the characteristics that synthesize the body of case law developed by courts applying provisions containing the general clause of sustainable development. However, it is crucial that such definitions and characteristics are not treated as closed or exhaustive. Instead, they should be viewed as aids in the process of interpreting this general clause, which must always be construed with regard to the broader social and economic context in which the provisions containing the clause are applied. With this caveat in mind, it is safe to refer – by way of an inspiring example – to several proposed interpretations of *sustainability* and *sustainable development*.

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[4] Opinion of Advocate General Léger delivered on 13 January 2005, Case C-418/02, *Carmine Salvatore Tralli v. European Central Bank*, ECLI:EU:C:2005:12.

[5] Regional (Voivodship) Administrative Court in Gorzów Wielkopolski, which, in its judgment of March 25, 2009, Case No. II SA/Go 825/08 (all translations from Polish by the author).

An overview of the interpretations of this concept is best begun with an encyclopaedic perspective.[6] The definition presented in the *Cambridge Business Dictionary* (Combley, 2011) offers the following characteristics: 'sustainability is the principle that economies should be organized in ways that can enable growth without causing irreversible environmental damage, depletion of natural resources, etc.' (p. 835). This definition encompasses environmental, social, and economic aspects. However, it is difficult not to notice that the environmental perspective is given prominence. This emphasis, however, is hardly surprising. It likely stems from the fact that the origins of the concept of sustainable development – as it is commonly understood today – are often traced back to Brundtland's (1987) report. This seminal document was indeed significantly focused on aligning economic development with the objectives of environmental protection and combating climate change.

However, reducing sustainable development solely to environmental issues is a misconception. Environmental protection is not an end in itself but must be considered holistically – as an essential yet single component of sustainable development. Indeed, Brundtland (1987) explicitly emphasizes that the primary goal remains meeting the needs and aspirations of humanity, albeit through planning that incorporates a long-term perspective, including ecological considerations. It is worth noting that the EU legislator also adopts a holistic perspective in the Treaty on European Union. While the ecological dimension is acknowledged as part of the concept of sustainable development, it is treated as one of several equally important elements.

This approach is most clearly reflected in Article 3 (3) of the TEU. First and foremost, it is important to note that the reference to sustainability appears in this provision concerning the internal market – a concept of fundamental significance, primarily from an economic perspective. This fact undoubtedly influences the interpretation of public procurement law provisions, as well as the commentary found in academic literature regarding the aforementioned Treaty provision. According to Cieśliński (2019, p. 23), the structure of the entire current Article 3 of the TEU, which sets out the Union's objectives, is particularly noteworthy. While the promotion of peace and the well-being of nations appears already in paragraph 1, the internal market is mentioned only in paragraph 3, preceded by the regulation of an area of freedom, security, and justice. Moreover, this paragraph, the most extensive of the article, frames the internal market with a wide range of additional objectives and values, including social justice, protection of rights, environmental quality, scientific progress, cohesion and solidarity among Member States, and respect for cultural diversity. This confirms that the internal market ceases to be an end in itself and, within this holistic framework, is meant to serve a much broader vision of development.

[6] One of the author's objectives was to avoid limiting the range of potential readers exclusively to European audiences, instead opting to use terms and sources recognizable on a global scale.

The excerpt cited above is preceded by Cieśliński's (2013) reference to the concept of ordoliberalism as one of the key sources of European integration. Cieśliński's argument that these axiological foundations are indispensable for a proper understanding of the internal market is particularly compelling – even if the doctrine of ordoliberalism 'today seems to have purely historical significance, and EU integration itself is mainly associated with excessive regulation' (p. 16).

The influence of ordoliberalism on the internal market – including on issues of competition protection and non-discrimination, which are crucial in the context of applying LCRs – has already received considerable attention in the academic literature (Behrens, 2015; Cieśliński, 2013, p. 15–21; Szczerba-Zawada & Dahl, 2018). Therefore, further elaboration on the characteristics of this economic doctrine is unwarranted. However, the key observation remains that one of the essential principles of ordoliberalism was to ensure the ability to correct phenomena identified as negative within the current social and economic context.

Explaining the legal framework of the freedoms of the EU internal market, the repeatedly cited Cieśliński (2013) points out that 'ordoliberalism undoubtedly adopts a different approach to the very idea of the free market and economic freedom, despite recognizing its superiority over interventionism and maintaining a liberal perspective' (p. 20). Therefore, the ordoliberal perspective may be referred to as the 'third way'. For further considerations, however, it is crucial to recognize and emphasize its underlying premise: the need for the adaptive creation and application of law in changing socio-economic conditions. The primary goal remains to maintain the market economy at an appropriate distance from both the liberal notion of market self-regulation and the temptation of interventionism. Avoiding the aforementioned orthodoxy and formalism opens the possibility for rethinking and, if necessary, correcting assumptions that are sometimes wrongly perceived as dogmatic.

This does not imply an uncritical invocation of the socio-economic concepts from decades past, nor does it entail blindly applying the prescriptions derived from them in the present without considering the passage of time and changes in the economic and social context. The key is to recognize that:

i. Ordoliberalism (understood as a school of economic and legal thought which holds that the state should refrain from direct interference in market mechanisms, while actively shaping the legal framework necessary to ensure the functioning of a competitive market economy, adaptively responding to prevailing economic and social conditions) is regarded as an axiological foundation of the EU internal market, or more broadly of European economic integration.

ii. Therefore, the very core of the internal market's axiological principles incorporates an ordoliberal commitment to an adaptive approach to shaping economic development.

Thus, what is required is an approach that perceives sustainability holistically – not reducing it merely to ecological aspects but acknowledging the full spectrum of conditions determining economic development. In this view,

sustainable development – elevated by the EU legislator to one of the key determinants of internal market growth – represents a mindset rather than a fixed set of characteristics that can be defined once and for all. As noted in the introduction, today's growing emphasis on social and economic aspects – particularly with regard to issues of security, the breakdown of globalization, and various examples of friend-shoring and reshoring in the economy – should be correspondingly reflected in discussions on sustainable development and in actions carried out within this paradigm.

In considering the concept of sustainable development in EU law – and the ordoliberal foundations upon which it has evolved – it is worth recalling the explanation offered by the Polish Constitutional Tribunal in 2006 concerning Article 5 of the Constitution of the Republic of Poland, which also refers to the principle of sustainable development. Specifically, in its judgment of June 6, 2006, the Tribunal stated: 'Public authorities are, above all, obligated to "pursue policies ensuring ecological security for the present and future generations" …. Environmental protection is one element of ecological security, but the tasks of public authorities are broader – they also include activities aimed at improving the current state of the environment and planning its further development. … Thus, the idea of sustainable development incorporates the need to consider various constitutional values and appropriately balance them.'[7]

Finally, a key point must be underscored, namely that within the framework of public procurement law, this understanding of sustainable development finds particularly strong support. That support stems primarily from the EU legislator itself. Of central importance in this context is Article 18(2) of Directive 2014/24/EU and its counterpart in Directive 2014/25/EU,[8] namely Article 36(2). These provisions state that Member States shall take appropriate measures to ensure that, in the performance of public contracts, economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national legislation, collective agreements, or by international environmental, social and labour law provisions.

Highly pertinent observations in this regard were offered by Carina Risvig Hamer and Marta Andhov (2021), 'The universal application requirement of principles – their status as an interpretative tool for all provisions of the EU public procurement directives, not just for those to which the provision refers directly – raises doubts and controversies as to the possibility to rank Article 18(2) among the general principles of EU procurement law. Nevertheless, when the CJEU had a chance, for the first time, to comment on the nature of Article 18(2), it confirmed that it should be considered as a principle of procurement law' (p. 206).

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[7] Judgment of the Constitutional Tribunal of 6 June 2006, case no. K 23/05.

[8] European Parliament & Council of the European Union. (2014, 26 February). Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, pp. 243–374.

In support of this claim, the cited authors referred to the judgment of the Court of Justice of the European Union (CJEU) *Tim SpA – Direzione e coordinamento Vivendi SA v Consip SpA and Ministero dell'Economia e delle Finanze*.[9] In this judgment, the Court confirmed that the principles expressed in Article 18(2) of Directive 2014/24/EU should be regarded as cardinal values which must be respected and guaranteed by Member States in the same way as the principles of equal treatment, non-discrimination, transparency, proportionality, and the prohibition of artificially narrowing competition.

Thus, the following preliminary conclusions are crucial for further considerations. First, since the EU legislator refers to the principle of sustainable development when regulating the essence of the internal market, provisions aimed at protecting the internal market – such as public procurement law – should be interpreted in accordance with this principle. Second, this principle should be understood in line with the interpretation proposed above, namely, without reducing it exclusively to ecological aspects. Finally, the proper understanding of sustainable development, including recognition of the ordoliberal roots of the internal market, appears to provide sufficient flexibility to ensure that the EU and its Member States can adaptively respond to changing socio-economic conditions. This is of key importance in addressing the permissible scope for applying LCRs.

2. The concept of local content and LCRs

In an analysis of the concept of *local content*, the functions of LCRs may be particularly useful. It is assumed (Borucka-Arctowa, 1982) that the 'function' (e.g. the function of law) denotes the effects achieved by taking certain actions (such as establishing certain legal norms, when speaking of the functions of law). At the same time, however, authors often employ the term 'function' as synonymous with 'purpose'. This is entirely understandable from the perspective of jurisprudence, which as a rule focuses on activities undertaken in a purposeful and deliberate manner (such as in the process of creating and applying law). It would be difficult to analyse the effects of certain actions without reference to the objectives or goals one intends to achieve through such actions.

In particular, the perspective of effect was adopted in the previously mentioned definition of *local content*. Since this dictionary definition has already been used as a starting point for discussion based on a common view – although expressed in a prestigious dictionary, it is worth referring to the same definition in this context. LCRs are defined therein as 'the materials, workers, etc. used to make a product that is from the area where the product is made rather than being imported' (Combley, 2011, p. 501). In contrast, the perspective of purpose is usually adopted in the analyses focusing on the economic aspect. Here, the OECD (2019) studies may be considered representative. In

[9] Judgment of the CJEU of 30 January 2020 in Case C-395/18, *Tim SpA – Direzione e coordinamento Vivendi SA v. Consip SpA and Ministero dell'Economia e delle Finanze*, ECLI:EU:C:2020:58.

one of those, *local content* is conceived as 'part of a broader set of "localization" policies that favour domestic industry over foreign competition, requiring companies and the government to use domestically-produced goods or services as inputs' (p. 1). It is also crucial to note that both purpose- and effect-oriented viewpoints imply a common ground: the implementation of the concept of local content in public procurement involves the deliberate organization of the purchasing processes to maximize the participation of local (especially national) forces and resources in the delivery of public procurement.

In the public procurement market, the concept of local content is implemented through LCRs. The latter are understood to mean all requirements in a public procurement procedure which the contracting authority formulates to increase the participation of local manufacturing in the contract execution process. It is therefore a very broad concept, which encompasses typical institutions of public procurement law, such as conditions for participation in the proceedings or bid assessment criteria, but also more sophisticated solutions, such as formulating specific contractual requirements or setting particular technical specifications for the procurement. This is also evident in the case law of the Court of Justice of the European Union which emphasizes the problematic nature of the local content concept. The Court's judgments in this area have addressed not only strict requirements involving the mandatory employment of local subcontractors – as in *Commission v. Italy*[10] – but also more subtle forms of LCRs, such as the award of additional points to tenders offering products manufactured within a certain distance from the place of delivery, as seen in *Contse*.[11] Still, such measures always stem from the same motivation: to maximize the participation of local (in particular national) forces and resources in the public procurement process, which in this paper is assumed to constitute the essence of the 'local content' concept.

III. CURRENT INTERPRETATIVE CHALLENGES IN THE APPLICATION OF LCRs IN EU PUBLIC PROCUREMENT CASE LAW

As indicated in the introduction, the significance of LCRs in the public procurement law of the EU and its Member States is expected to grow in the near future. This expectation arises not only from the aforementioned political declarations – such as the commitments made by Ursula von der Leyen – but primarily from an analysis of international trends in this area. The scholarly literature (Folliot Lalliot & Yukins, 2024) has already highlighted an increased interest in LCRs, or even in protectionist practices. This phenomenon

[10] The Judgment of the Court of 13 November 1990 in Case C-360/89, *Commission of the European Communities v. Italian Republic* ECLI:EU:C:1992:235.

[11] The Judgment of the Court (Third Chamber) of 27 October 2005 in Case C-234/03 *Contse SA, Vivisol Srl and Oxigen Salud SA v. Instituto Nacional de Gestión Sanitaria (Ingesa)*, ECLI:EU:C:2005:644.

is evident even in countries that have undertaken international commitments to liberalize their public procurement markets under rules similar to those in the EU, particularly under the Agreement on Government Procurement of the World Trade Organization (GPA).

From the EU perspective, the application of LCRs is highly challenging. Although this issue has not been the subject of numerous rulings in EU jurisprudence, the case law of the Court includes decisions that address the matter of LCRs in a distinctly critical manner. The most significant is a judgment of the Court of 22 June 1993 in *Commission v. Denmark*. The judgment concerned a 1987 procedure in which a Danish contracting authority (Aktieselskabet Storebaeltsforbindelsen) published a restricted invitation to tender for the construction of a bridge over the Western Channel in the supplement to the *Official Journal of the European Communities*. The general terms and conditions contained in the relevant contract documents stated as follows: 'The contractor is obliged to use to the greatest possible extent Danish materials, consumer goods, labour and equipment' (p. 4).[12] It was thus alleged that the cited clause violated Community law and the principle of equal treatment of contractors arising thereunder. The allegation of nonconformity with the EEC Treaty was not disputed by the Danish government, yet it contended that the controversial clause had been deleted before the contract was signed and argued that proof of deletion was sufficient to make good the breach of obligations alleged by the Commission. Still, the Court found that 'even though the clause in question was deleted shortly before signature of the contract with ESG and consequently before notification of the reasoned opinion, the fact remains that the tendering procedure was conducted on the basis of a clause which was not in conformity with Community law and which, by its nature, was likely to affect both the composition of the various consortia and the terms of the tenders submitted by the five preselected consortia' (p. 26).

This judgment is fairly well-known and certainly makes it more difficult to argue in favour of the admissibility of using LCRs, even in their milder forms. However, it is worth asking whether the principles mentioned above, as well as *Commission v. Denmark* case, entirely rule out the 'local content' concept in any form. While this may seem trivial, it is not. Similarly, the idea that some degree of local content is permissible under EU law is not as controversial as it appears. In the literature (Kola, 2023), it is emphasized that since the late 1980s, EU case law – particularly the rulings mentioned earlier – has consistently confirmed that public procurement can serve strategic development policy goals.

What is even more significant is that such an approach has gained normative expression. Of particular relevance here is the fact that the preambles to the currently applicable EU directives governing public procurement explicitly state that public procurement should be regarded as one of the key instruments for achieving the EU's objectives in sustainable development, which

[12] Judgment of the Court of 22 June 1993, Case C-243/89, *Commission of the European Communities v. Kingdom of Denmark*, ECLI:EU:C:1993:257.

is not confined to environmental issues.[13] Notably, the preambles to the EU directives on public procurement underscore at the outset that public procurement plays a pivotal role in the 'Europe 2020, A Strategy for Smart, Sustainable and Inclusive Growth' as a market-based instrument used to achieve smart, sustainable, and inclusive economic growth, while simultaneously ensuring the most efficient use of public funds.

Thus, on the one hand, it has been explicitly confirmed that procurement can and should be utilized to realize sustainable development, with this process being integrated into the achievement of strategic goals related to economic growth. In this context, particular attention should also be paid to Recital 41 of the preamble to Directive 2014/24/EU, as well as the corresponding Recital 59 of the preamble to Directive 2014/23/EU and Recital 56 of the preamble to Directive 2014/25/EU. These recitals clarify that none of the provisions of the directives 'should prevent the adoption or application of measures necessary to protect public policy, public morality, public security, health, the life of humans and animals, the preservation of plants, or other environmental measures, particularly with a view to sustainable development, provided that such measures are consistent with the TFEU.'

Of course, the mere existence of such a provision in the EU directives should not lead to overly far-reaching conclusions. This is because it refers to the general principles governing the functioning of the internal market, which specifically provide for exceptions to the default competition rules by invoking the categories of public order and public security. A useful point of reference is found in Articles 36, 45, 52, and 63 Treaty on the Functioning of the European Union (TFEU),[14] which provide for such exceptions concerning the fundamental freedoms enshrined in the Treaties – the cornerstones of the EU internal market. Clearly, the issue of the conditions under which such analogies may be relevant to considerations regarding LCRs extends beyond the scope of this study. Nevertheless, given the general nature of this analysis, it appears both justified and valuable to formulate a few key conclusions drawn from the extensive case law of the CJEU on the freedoms of the EU internal market.

First and foremost, it should be recalled that both in case law and academic literature, it is generally accepted that derogations from the default rules of the internal market – particularly the infringement of the so-called Treaty freedoms – cannot be justified by purely economic objectives. This has been elaborated in detail by Miłosz Malaga (2019, p. 215) in his analysis of Article 36 TFEU: he highlights a certain evolution in views – both in academic literature and jurisprudence – regarding which measures serve economic purposes, and which may be deemed justifiable. Particularly compelling and accurate is Malaga's concluding observation, which asserts that:

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[13] Recital 2 of the preamble to Directive 2014/24/EU, as well as the corresponding Recital 4 of the preamble to Directive 2014/25/EU.

[14] Treaty establishing the European Economic Community, OJ C 203, 7.6.2016.

> it is unquestionably impermissible to justify a violation of Article 34 TFEU based on a value with a protectionist foundation. This conclusion is supported by the second sentence of Article 35 TFEU, which precludes justification of violations based on the values listed in the first sentence of that provision if the measure in question constitutes arbitrary discrimination or a disguised restriction on trade. In any other situation, the answer to whether a violation can be justified based on a specified value must depend on the analysis of the specific case. Certainly, an economic interest cannot be the sole or even the predominant value that the measure seeks to protect. On the other hand, the protected goal may have a partially economic nature, provided the measure serves the protection of 'higher' goals that are not economic in character. For instance, the need to ensure energy security or continuity of fuel supplies, which, in the longer term, primarily serve the proper functioning of a state or community, could be such examples. It appears neither necessary nor feasible to propose a uniform and universal method for balancing such interests.' (p. 215)

The quoted passage not only provides a concise and accurate description of the existing body of work on the application of the so-called public policy clause established in Article 36 TFEU but also encapsulates conclusions that are central to the considerations undertaken in this text. First, with respect to LCRs, it should similarly be emphasized that organizing the process of awarding a public contract to promote local solutions is impermissible when the motivation for such action is purely protectionist. Second, it would be an abuse to assume that the use of LCRs should always and under all circumstances be automatically deemed inadmissible. Specifically, with respect to LCRs, the cited principle that the assessment of the permissibility of such an instrument 'must depend on the analysis of the specific case' should also apply. It is worth noting that this view is also strongly supported by the case law of the CJEU. Particularly noteworthy in this context are the rulings in already mentioned *Contse SA and Others v. Instituto Nacional de Gestión Sanitaria (Ingesa)*, as well as *Medisanus d.o.o. v. Splošna Bolnišnica Murska Sobota.*[15]

The first of the CJEU's referenced preliminary rulings (*Contse*) addressed whether Community law precludes requiring local offices (situated within 1,000 kilometres of the province where the contracting authority is located) or favouring past providers and nearby facilities in tender criteria for home respiratory health services. To this question, the Court responded in the negative. Referring to its earlier case law, the Court held that, while the security of supply may constitute one of the criteria considered in selecting the most economically advantageous tender for services such as those mentioned above – particularly since such a criterion serves to protect human life and health by requiring diversified local production – these criteria did not, in the specific case, appear tailored to the intended objective. The judgment emphasized that the contracting authority had failed to provide convincing arguments to demonstrate that the measures adopted were proportionate and appropriate to the intended purpose.

Thus, the key point is that the CJEU did not establish a general prohibition on implementing measures promoting local solutions in public procure-

[15] Judgment of the Court (Third Chamber) of 8 June 2017, Case C-296/15, *Medisanus d.o.o. v. Splošna Bolnišnica Murska Sobota*, ECLI:EU:C:2017:431.

ment procedures. Instead, it underscored that such measures must always be justifiable as actions grounded in the objectively justified needs of the contracting authorities and, additionally, must be proportionate.

In the second of the referenced judgments (*Medisanus*), the Court assessed the compatibility with EU law – including Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts – of Slovenian legislation requiring that industrially manufactured medicinal products must be obtained from 'Slovenian plasma.' This requirement was justified with reference to the principle that supplies must, as a matter of priority, come from medicinal products industrially manufactured from plasma collected in Slovenia. In this case, the CJEU observed that EU public procurement law stipulates that a technical specification may not refer to a specific source unless this is justified by the subject matter of the public contract, and that this is permitted on an exceptional basis only. Furthermore, any reference to a technical specification, such as a specific source or origin, must be accompanied by the words 'or equivalent.' The Court also held that the requirement in question undoubtedly constitutes a prohibited restriction under Article 34 TFEU but noted that it required examination as to whether it could be justified on the grounds of public health protection.

Ultimately, the Court determined that the provisions under examination pursue legitimate objectives of public health protection but fail to meet the requirement of proportionality. Specifically, the Court concluded that the material before the Court clearly does not lead to the conclusion that the priority supply principle for medicinal products manufactured industrially from Slovenian plasma collected from Slovenian hospitals contributes decisively to encouraging the Slovenian population to make voluntary unpaid blood donations. This latter objective was the principal justification and argument advanced by Slovenia.

It should be noted that the public procurement procedures addressed in both judgments, the measures applied could arguably be classified as LCRs, though this classification might merit a separate discussion. Certainly, this classification is not as straightforward as in the case of the so-called 'Danish content' clauses discussed in the earlier-referenced judgment in the abovementioned *Commission v. Denmark* case. This does not, however, undermine the earlier hypothesis that LCRs should not be automatically regarded as inherently impermissible. As evidenced particularly by the judgment cited in the previous paragraph, the application of LCRs almost invariably has an economic dimension. However, even this fact does not automatically render such measures impermissible. It is always necessary to assess whether the application of LCRs (i) is grounded in objectively justified needs of the contracting authority, (ii) is particularly linked to the categories specified in Article 36 TFEU, and (iii) ensures that the specific LCRs employed are proportionate to these objectively justified needs.

IV. SUSTAINABLE DEVELOPMENT AS A DETERMINANT OF CONTRACTING AUTHORITIES' NEEDS

The considerations presented in this paper have reached their culmination in the preceding paragraph. Therefore, as we move toward the conclusion, it is appropriate to draw together the preceding arguments and highlight the role that the principle of sustainable development can play in justifying the admissibility of using LCRs in public procurement. Consequently, it must be emphasized that answering the question of whether specific LCRs are proportional and adequate in relation to the needs they aim to address is impossible in the abstract and always requires reference to the specific factual context. This context primarily requires an assessment of the contracting authority's interest, which the specific procurement is intended to fulfil.

As already indicated in the literature (Kola, 2024, p. 267) the contracting authority's interest should be understood as its need to achieve a state of affairs deemed beneficial (either as an end in itself or as a means to an end) in light of the values, needs, or objectives that it is legally obligated to pursue under the applicable legal framework.

As previously mentioned, one of the key determinants of the functioning of contracting authorities – according to the TFEU – is the principle of sustainable development. First, there is no doubt that the EU legislator intended the internal market to operate and develop in compliance with this principle. Moreover, under EU Directives 2014/24/EU and 2014/25/EU, contracting authorities are explicitly encouraged to shape their procurement policies with a view to achieving sustainable development. Finally, many legal systems of the Member States have also been structured in a manner that obliges public authorities to organize their activities in all areas of governance within the paradigm of sustainable development. By way of example, constitutional provisions in Belgium, Bulgaria, France, Greece, Spain, Lithuania, Poland, Portugal, Romania, and Sweden expressly declare the commitment to ensuring sustainable development.[16]

Thus, it can be concluded that both from the perspective of EU law (including, in particular, Article 18(2) of Directive 2014/24/EU and Article 36(2) of Directive 2014/25/EU, as well as the scholarly views developed in relation to these provisions, as cited above) and in the context of constitutional legislation – which defines the foundations of state functioning – the principle of sus-

[16] See, e.g. Article 7bis of the Constitution of the Kingdom of Belgium of 7 February 1831; Article 20 of the Constitution of the Republic of Bulgaria of 12 July 1991; Article 1 of the Charter for the Environment of 2004, which forms part of the Constitution of the French Republic of 4 October 1958; Article 24 of the Constitution of Greece of 9 June 1975; the explanatory memorandum to the Act amending Article 135 of the Constitution of Spain of 27 September 2011; Article 54 of the Constitution of the Republic of Lithuania of 25 October 1992; Article 5 of the Constitution of the Republic of Poland of 2 April 1997; Article 66 of the Constitution of the Portuguese Republic of 2 April 1976; Article 35 of the Constitution of Romania of 21 November 1991; and Section 2 of the Instrument of Government of 28 February 1974, which forms part of Sweden's constitutional law.

tainable development can and should serve as a determinant and justification for actions undertaken by organizational units of public authority or entities that, while not part of the administration, remain under its control, which are most commonly contracting authorities.

As emphasized by the Polish Constitutional Tribunal in the previously cited judgment (case no. K 23/05), the principle of sustainable development should not be reduced to ecological concerns but requires a holistic approach that takes into account the social and economic aspects of a state's development. It is worth noting that this broader understanding is not unique to Poland. A particularly telling example can be found in the regulations of the Belgian Constitution, where it is even more explicitly and emphatically stated: 'In the exercise of their respective competences, the Federal State, the Communities and the Regions pursue the objectives of sustainable development in its social, economic and environmental aspects, taking into account the solidarity between the generations' (Article 7bis).

The mere existence of general constitutional norms or even EU legal provisions affirming sustainable development cannot in itself be regarded as sufficient justification for the application of LCRs. However, it can provide strong legitimacy for the actions of contracting authorities that, in awarding public contracts, do not limit their needs solely to immediate economic benefits but also seek to achieve strategic objectives. This brings us to the core of the matter – LCRs can be considered permissible procurement instruments, provided that they are implemented to achieve strategic goals, particularly those related to sustainable development. At the same time, it can be argued that the concept of sustainable development has significant potential in providing justification for actions aimed at promoting local solutions.

However, this does not necessarily imply a contradiction with the TFEU principles governing the functioning of the EU internal market, including the fundamental principle of equal treatment of economic operators, which is central to EU public procurement law. To clarify this distinction, consider the following reasoning: if a contracting authority requires that the subject matter of the contract be produced within its region or country and justifies this solely by the objective of supporting the local economy, such a requirement appears to be a difficult-to-justify manifestation of protectionism. This motivation is primarily aimed at providing economic protection to local suppliers, shielding them from the necessity of competing within the internal market. Such an approach is incompatible with the aforementioned fundamental principles that govern the functioning of the EU internal market (Arrowsmith, 2015, pp. 307–365).

However, if a contracting authority were to decide that, in awarding a public contract for supplies, it would favour (for example, through award criteria) goods delivered from a final processing location situated close to the place of delivery – aiming to reduce the carbon footprint of transportation and its negative environmental impact – such an approach should be assessed differently from the situation described above. Naturally, the contracting authority

would still bear the burden of demonstrating that the application of LCRs, consisting of a preference for locally produced goods, is proportionate and appropriate to the objective of environmental protection. Nevertheless, it would be difficult to challenge such a measure on the grounds that it imposes an economically motivated restriction on the free movement of goods – or, more plainly, as a protectionist measure.

It should be clearly stated that the above examples are not a cynical suggestion to manipulate legal concepts in order to justify actions that are, in essence, protectionist. Resorting to the principle of sustainable development merely as a facade to 'mask' protectionist motivations cannot be accepted. Moreover, identifying and challenging such practices would likely be relatively straightforward, as they would presumably fail the proportionality test.[17] If, however, a potentially controversial LCR were to prove proportionate, this would lend credibility to the contracting authority's actions and reinforce the legitimacy of its primary objective, as determined by the concept of sustainable development.

The example underpinning the above reasoning is, of course, artificial and appropriately simplified to highlight the key conclusions presented above. However, it is worth finally considering a less abstract example – one that has been the subject of an ongoing debate within the EU and beyond regarding not only the admissibility but even the desirability of promoting local products. This concerns public procurement for food supply.

It must be noted at the outset that, both from the EU perspective and in a global context, procurement of meals and food supplies is treated in a specific manner. According to Article 74 of Directive 2014/24/EU and Article 91 of Directive 2014/25/EU, meal supply contracts fall under the category of 'Social and other specific services' which, 'by their very nature, have a limited cross-border dimension,' and are therefore subject to more liberal and flexible rules. From a global perspective, it is worth noting that procurement of agricultural products intended for agricultural support programs and food aid programs has been explicitly excluded from the rules of the GPA.

In some countries that are not signatories to the GPA, various legal regulations impose more or less restrictive LCRs on food supply contracts. For example, in Angola, national companies in the oil sector are required to procure catering services and food transportation exclusively from Angolan business initiatives. South Africa, in turn, has a long tradition of enacting LCR regulations in public procurement. Although current regulations do not directly address food supply contracts, discussions on this issue remain active. Crucially, debates on LCRs in food procurement often emphasize social benefits rather than economic arguments (Mensah & Karriem, 2021).

Even with such arguments, however, doubts remain as to whether, for example, establishing a mandatory requirement to purchase local food products

[17] See Judgment of the Court of 10 May 2012, Case C-368/10, *European Commission v. Kingdom of the Netherlands*, ECLI:EU:C:2012:284.

in South Africa constitutes an act of protectionism, or rather a social policy measure aimed at reducing inequalities. The questions of proportionality and adequacy of specific LCRs in relation to their intended objectives remain relevant. Yet South Africa serves as a particularly instructive example in this context. Due to its historical background and the negative consequences of apartheid, socially oriented LCRs have constitutional backing. Specifically, Article 217 of the Constitution of the Republic of South Africa (1996) states that contracting authorities must act in a manner that is fair, equitable, transparent, competitive, and cost-effective, but at the same time this does not preclude the implementation of 'a procurement policy providing for categories of preference in the allocation of contracts; and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination'.

This provision at the very least requires consideration of the specific social and legal context in which LCRs are applied to food supply contracts in South Africa. Furthermore, it strengthens the argument that, despite their economic implications, such measures are primarily driven by social policy and sustainable development goals. This perspective appears to be underrepresented in EU discussions on the subject. However, the South African example demonstrates that LCRs, even if they have certain economic effects, should not be automatically and universally deemed inadmissible. Rather, they may serve as a response to strategic – or even existential – challenges.

The basis for incorporating such broader considerations is found not only in the concept of sustainable development and the EU's axiological and ordoliberal foundations but also in the provisions of the TFEU governing the functioning of the internal market. In particular, Article 27 of the TFEU – primarily addressed to the European Commission – requires consideration of the economic disparities between different Member States. Of course, this provision does not provide grounds for undermining the fundamental principles of the internal market, such as the prohibition of discrimination based on origin. However, it once again underscores the need for a more nuanced approach to LCRs implemented in individual EU Member States.

Concluding this discussion on food supply procurement, it should be noted that both academic research and policy initiatives in various EU Member States already reflect elements of this broader perspective. A notable example in academic discourse is the study by Andhov et al. (2024). Their research conclusions highlight several important findings, emphasizing that 'Sustainable Food Procurement within the EU represents a critical field for advancing sustainable development goals and integrating principles of Green Public Procurement and Socially Responsible Public Procurement' (p. 90).

At the same time, the report also draws attention to the necessity of amending EU public procurement law to adapt it to contemporary challenges. It even puts forward a far-reaching proposal to exclude food procurement from the scope of EU public procurement regulations, arguing that 'such an exemption would not automatically enhance the application of solutions that promote values and objectives related to food. Hence, a more valuable strategy

may lie in further professionalizing the public procurement sector, informed by the existing legal frameworks' (Andhov et al., 2024, p. 115).

It is, therefore, clear that this is a proposal requiring an out-of-the-box approach compared to existing frameworks, whose implementation would enable the use of LCRs and undoubtedly have an economic impact. At the same time, the proposal is evidently not protectionist in character. Instead, it finds strong justification in the previously analysed provisions of EU law and, most importantly, explicitly refers to the concept of sustainable development.

To complement the analysis with a practical perspective, it is worth noting that political initiatives within this paradigm are already emerging. A particularly instructive example – though not without controversy – is a proposal submitted to the Polish Parliament.[18] This proposal suggests that public food procurement should include mandatory award criteria that grant additional points to offers featuring organic products (as defined by Regulation (EU) 2018/848) as well as local products. It is therefore clear that the described challenges are not only relevant to academic research and legal theory, but also have significant practical importance.

V. CONCLUSIONS

The practical significance of the considerations undertaken has been formulated in the context of food supply contracts, where reflections on a sustainable approach are relatively well-developed. Nevertheless, this example may be treated *pars pro toto* as indicative of a broader phenomenon, namely the growing interest of the EU and its Member States in LCRs as an instrument for achieving strategic objectives.

In seeking a conclusion that is both scientifically intriguing and practically useful, I propose the following summary:

– The application of LCRs in public procurement is not always and automatically impermissible.

– The admissibility of a specific measure classified as an LCR depends on demonstrating its proportionality and adequacy in relation to the objectives it is intended to serve.

– Consequently, the contracting authority is obliged to conduct a thorough and comprehensive assessment of its own needs to determine whether they necessitate the application of LCRs.

– In identifying and defining their needs, contracting authorities should not limit their perspective solely to economic considerations but should examine the full range of legal circumstances determining their functioning.

– Contracting authorities should also bear in mind that one of the key determinants of their activities is the principle of sustainable development,

[18] Draft bill amending the Public Procurement Law, SH-020-153/24, Sejm of the Republic of Poland, 10th term.

which is particularly relevant for public procurers that are public administration bodies.

– The principle of sustainable development requires a holistic approach that takes into account not only environmental aspects but also social factors, including those arising from the historical conditions of a given national community.

– The obligation to adopt such an approach also derives from the legal framework of the EU – not only from its axiological foundations, with ordoliberalism at the forefront, but also from the EU legal provisions that define the foundations of the internal market.

– Therefore, the concept of sustainable development demonstrates particular potential in assessing the proportionality of specific LCR measures. If their proportionality and adequacy are confirmed, the concept of sustainability can and should be more widely employed as justification for their application.

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