



# “Achieving smart, sustainable and inclusive growth through public procurement?”

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# Outline

- I. Europe 2020 framework
- II. Primary Union Law and EU PP Directive(s) 2014/24
- III. Problems / risks of the wide discretionary powers of contracting authorities
- IV. Concluding remarks and outlook



# I. Europe 2020, competition and PP law?

- Ten-year jobs and growth strategy; launched in 2010 to create the conditions for smart, sustainable and inclusive growth
- Major differences in approach
- In PP law a multitude of options to achieve Europe 2020:
  - Options increased and expanded in new PP Directives 2014
  - Addition of (new) non-economic interests:
    - potential for new “conflicting” objectives and (core) values



# Conflicting objectives and *core values*?

**Public procurement has a key role:**

- in single market fulfilment
- in achieving smart, social, sustainable growth

**Real issue:**

**How do we make sure that we can actually achieve Europe 2020 in practice given the many conflicting EU objectives (tensions)?**



# Old and new PP phenomena in The Netherlands

Examples of tensions between non-economic and economic interests:

- circular procurement (circulaire inkoop)
  - social procurement (sociaal opdrachtgeverschap), societal procurement (maatschappelijk aanbesteden)
  - the right to challenge
  - social return on investments
  - functional tendering (functioneel aanbesteden)
- “Profit” to society can be dramatic!
- High risk of abuse and discrimination



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Not every problem can be solved by rules,  
Neither are the rules always to blame for the  
problems:



Multi- / interdisciplinary research method (economy, law, purchase management, mathematics) aims to find *innovative* solutions in the PP field



## II. Primary Union Law and EU PP Directive(s) 2014/24



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# Bottom-up influences

## “Shared regulation” after Lisbon Treaty

- Commission obligation to organise consultations (Art. 4, para. 3, Art. 11 para. 3, Art. 13, para. 2 TEU):
- Influence of lobby of regional and local authorities on final texts three new Directives
- Introducing larger discretionary power in setting up PP procedures





# New Directive 2014/24/EU: larger discretionary power in setting up PP procedures

**A few examples :**

(1) the more flexible use of award criteria (art. 67);

(2) New exclusion grounds

- No compliance with employment regulations; human rights violation, conflicts of interests; et c.

(3) Procurement procedures:

- More negotiation; innovation partnership; et c.

(4) In-house exemptions (art. 12)



# New Directive 2014/24/EU: larger discretionary power in setting up PP procedures

A few examples :

## (1) the more flexible use of award criteria (art. 67);

- Price or cost is the exemption; regular award criterion is ‘price–quality ratio’;
- **New:** competition on quality criteria only! cost elements as fixed price;
- **New:** life–cycle costs aims not only at environmental but also “social” protection!

## (2) New exclusion grounds

- No compliance with employment regulations; human rights violation, conflicts of interests; et c.

## (3) Procurement procedures:

- More negotiation; innovation partnership; et c.

## (4) In–house exemptions (art. 12)



### III. Problems / risks of the wide discretionary powers of contracting authorities



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# “EU anti corruption report 2014”

Widespread corruption among officials awarding public tenders:

The countries where respondents are most likely to think that there is widespread corruption among officials awarding public tenders include the Czech Republic (69 %), **the Netherlands (64 %)**, Greece (55 %), Slovenia (60 %), Croatia (58 %) and Italy (55 %).



# “EU anti corruption report 2014”

## Range of (widespread) illegal practices:

- specifications tailor-made for specific companies (57 %),
- conflict of interest in bid evaluation (54 %),
- unclear selection or evaluation criteria (51 %),
- involvement of bidders in the design of specifications (48 %),
- Abuse of emergency grounds to justify the use of non-competitive or fast-track procedure (46 %),
- amendments to the contract terms after conclusion of the contract (44 %),
- Et cetera, et cetera ...

**Larger discretionary power = reason for corruption**



# (Re)defining Public Procurement

1. *shaping and defining* the needs in society (or contracting authorities)
2. *Making choices between* all existing possibilities
3. and then: *evaluating those possibilities.*



# Public Procurement is

Objective method to make  
efficient and legally correct choices



# Do we take into account insights from other disciplines in the regulatory process?

- *Decision making sciences?*

- **Other disciplines?**

Making the “best” choice is made more complicated by informal mechanisms

- **Choosing “rationally” is not easy**





# Incorrect consideration and application of the principle of subsidiarity?

Which is the best level to make choices?

- Legislator?
- Contracting authority / the buyer?
  
- Dutch legislator omitted to introduce:
  - A specific (but simple) procedure for the procurement of social services
  - An objective evaluation framework for insourcing
  - More transparent, competitive rules and better legal protection for procurement below the EU-threshold
  - An explicit requirement for objective award methods



# Do not confuse with each other!

## Award criteria:

- Is the criterion objective?
- Some criteria are by definition “subjective”? Like aesthetic characteristics?

## Award *methods (scoring rules)*:

- Is the weighting method objective? Is the scoring rule objective?

A scoring rule is a function that is used to assign a numerical value to different levels of performance on a criterion offered by the bids.



# IV. Concluding remarks and outlook

- Transparency and equality principles not always adequate to resolve certain problems in practice
- Europe 2020 entails a range of objectives that (at the level of implementation) can be conflicting.
- Essential:
  - to create legal, objective frameworks to make the range of options and broad discretionary powers of the contracting authorities subject to review;
  - to provide affected parties with the possibility to review the limits of the broad discretionary power of a contracting authority in the Courts.





**Grazie! Domande?**

**Dank! Vragen?**

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