

Social Commissioning for Inclusive Cities

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1. Introduction

For decades public procurement procedures have been used to achieve certain social policy goals, such as the hiring of long-term unemployed or disabled persons (social return on investment). With the 2014 Directives the possibilities for social policy in public procurement have increased significantly. Social commissioning is, however, limited by the free movement rules of the internal market and the public procurement principles deriving therefrom.

This paper is written as part of a research project largely funded by the municipality of Amsterdam on social commissioning for inclusive cities. It is the ambition of the municipality to build on their experience with social return on investment and to incorporate diversity and inclusion into their public procurement procedures.

This paper is structured as follows. Paragraph 2 deals with the general tension between the free movement rules and the social goals within public procurement. Next, paragraph 3 will consider three examples of instruments used to achieve social goals in public procurement procedures: an exclusion ground, reserved contracts, and social return on investment. Social return on investment as an instrument and how it has developed over the past decades will be studied in paragraph 4 in more detail. Paragraph 5 subsequently examines the tensions between social return on investment and the public procurement principles that follow from the free movement rules of the internal market. Then in paragraph 6 the concepts of diversity and inclusion are discussed as a new form of social commissioning.

2. The tension within public procurement between social goals and the free movement rules of the internal market

Integrating societal values in European public procurement law creates tension with the free movement rules, specifically the free movement of goods and services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, transparency and proportionality.

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This was already apparent in the *Beentjes* judgement, in which the European Court of Justice (hereafter: the Court) decided that the exclusion of a tenderer, on the ground that the tenderer is not in a position to employ long-term unemployed persons, while possible, still needs to comply with all the relevant provisions of Community law (read: Union law), in particular the prohibitions following from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services.² The Court also stated clearly in this case that the condition to employ long-term unemployed persons could infringe on the prohibition of discrimination on grounds of nationality, if it became apparent that tenderers from other Member States would have difficulty in complying with it.³

While social return on investment in the Netherlands, where the *Beentjes* judgement originated, first developed at the municipal level (bottom-up), it became standard policy at the national level in 2011 and all relevant layers of legislation contain provisions that support such action.

At the international level (top-down), the United Nations has established *sustainable development goals* that include: goal 5 (gender equality), goal 8 (decent work and economic growth) and goal 10 (reduced inequality). Social return on investment can contribute to achieving such global social goals.

The tension between the liberalising free movement rules and social goals ought to be viewed in light of the concept of the *social market economy* as well. The Treaty on European Union describes the internal market as “(...) a highly competitive social market economy, aiming at full employment and social progress (...)”.⁴ Since the introduction of the concept of a social market economy in the Treaty of Lisbon, the role of social goals in regulating the internal market has expanded. Furthermore, Article 9 of the Treaty on the Functioning of the European Union (TFEU) was added, which states that the Union shall, in defining and implementing its policies and activities, take into account “requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, [and] the fight against social exclusion (...)”. These Treaty provisions show once more that the constitutional foundations of the EU are dynamic and can evolve corresponding to societal attitudes. Increased attention for societal, and specifically social, goals can also be found in the European public procurement directives. For instance, Article 18(2) of Directive 2014/24 provides 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, which the Court has described as a cardinal value in the general scheme of that Directive.⁵

² ECJ 20 September 1988, C-31/87, ECLI:EU:C:1988:422 (*Beentjes*), §29.

³ ECJ 20 September 1988, C-31/87, ECLI:EU:C:1988:422 (*Beentjes*), §30.

⁴ Treaty on the European Union, Article 3(3).

⁵ ECJ 30 January 2020, C-395/18, ECLI:EU:C:2020:58 (*Tim*), §38.

Furthermore, a provision has been added to the national procurement law of the Netherlands (Aanbestedingswet 2012, Article 1.4 section 2) stating that contracting authorities are obligated to “achieve as much societal value as possible for their public resources”.⁶

The above-mentioned bottom-up and top-down social policy goals do, however, go hand in hand with legal tension with the core provisions of the internal market, as was the case in the *Beentjes* judgement mentioned earlier. This paper will now examine a few examples of instruments used to achieve social goals within public procurement procedures: excluding tenderers, reserving contracts, and in particular setting criteria and conditions regarding social return on investment.

3. Instruments for achieving social goals in public procurement procedures

Exclusion grounds for violating obligations of social and labour law

With the introduction of Directive 2014/24, a specific exclusion ground was added for violating obligations of social and labour law (Article 57 section 4a). Using this optional exclusion ground, contracting authorities can exclude economic operators that have violated the obligations of social and labour law referred to in Article 18(2) of the Directive. This exclusion ground was the topic of the ECJ’s judgement in the *Tim* case⁷, in which the Court was asked whether an economic operator can be automatically excluded from the procurement procedure when it is found that this exclusion ground applies to one of their subcontractors.⁸

In answering this question, the Court considered, among other things, that the Union legislature sought to establish that requirement as a principle, like the other principles referred to in Article 18(1), such as equal treatment, transparency and proportionality.⁹ The Court went on to state that the requirement in Article 18(2) constitutes, in the general scheme of that Directive, a cardinal value with which the Member States must ensure compliance.

The Court concluded that the exclusion ground is drafted impersonally, and that the ground can be used to exclude the economic operator who submitted the tender when the ground for exclusion is established with one of the subcontractors.¹⁰ Furthermore, the Court concluded that Article 57 and the proportionality principle preclude national legislation that provides for an automatic exclusion.¹¹

⁶ Janssen, W., & Bouwman, G., ‘Legislating societal value into Dutch public procurement law: from symbolism to substance?’, *PPLR*, 2020/2, p. 91-102.

⁷ ECJ 30 January 2020, C-395/18, ECLI:EU:C:2020:58 (*Tim*).

⁸ *Idem*, §30.

⁹ *Idem*, §38.

¹⁰ *Idem*, §43.

¹¹ *Idem*, §54.

The downsides of the exclusion ground in Article 57(4a) are the repressive nature of the instrument — since it cannot be used to encourage further social behaviour —, the optional nature of the exclusion ground and the difficulty in finding sufficient evidence to use the exclusion ground.

Reserved contracts

Another clear example of an instrument for achieving social goals is the option provided in Article 20 of the Directive that allows contracting authorities to reserve a contract. In contrast to the use of the exclusion ground mentioned above, reserving contracts can have a positive social impact. Specifically, Article 20 allows Member States to reserve the right to participate in public procurement procedures only for sheltered workshops and economic operators whose main aim is to integrate disabled or disadvantaged persons into society through employment, as long as at least 30 percent of their workforce is composed of disabled or disadvantaged workers.

This provision was the topic of a recent judgement by the Court in the *Conacee* case.¹² In short, the Court was asked in *Conacee* to clarify whether all economic operators that meet the requirements in Article 20 have to be permitted to participate in reserved procedures or whether Member States can add further requirements.

The Court clarified that the EU legislature, by lowering the minimum percentage from 50 percent to 30 percent in Directive 2014/24, had not started a ‘race to the bottom’. That would have meant that economic operators with a lower percentage of disabled or disadvantaged workers could have out-competed those that meet the earlier stricter requirements in reserved procedures. In other words, the Member States are allowed to set stricter requirements in their national legislation. The Court also decided that it was up to the national courts to decide whether Member States in doing so comply with the principles of equality and proportionality.

Although reserving contracts in the sense of Article 20 can certainly have a positive social impact, its applicability is quite limited because contracting authorities can practically only reserve those contracts in sectors of the economy where such sheltered workshops actually occur.

Social return on investment

The exact definition of the term ‘social return on investment’ can differ per contracting authority in the Netherlands, but generally the term covers the promotion of employment through purchasing and tendering, for example for the long-term unemployed and people with a mental or physical disability. In addition to employment contracts, this can also include a combination of work with training and internships.

Contracting authorities can choose which contracts will contain a social return criterion or condition. The Municipality of Amsterdam, for example, applies social return to tenders with a

¹² ECJ 6 October 2021, C-598/19, ECLI:EU:C:2021:810 (*Conacee*). See also: Huisjes, T., ‘No race to the bottom for reserved procurement procedures, but where is the top?’ *EU Law Live* (26 October 2021).

value above the European threshold for services for local authorities (€215,000), regardless of whether the contract is for works, supplies or services.¹³

Social return is usually applied as a special condition relating to the performance of a contract, stating that a percentage of the contracted sum has to be used for wages to persons at a distance from the labour market. The standard percentage in the Netherlands is 5 percent of the contracted sum, but this varies per contracting authority and per specific contract. The economic operator must comply with the condition, as this special condition relating to the performance of the contract is a mandatory part of the contract, similar to the technical specifications. If the economic operator ultimately does not meet the requirement, the contracting authority can impose a fine.¹⁴ Social return on investment can also occur as an award criterion, which usually happens in combination with a special condition relating to the performance of the contract. The added value of such a combination is that the minimum percentage in the special condition relating to the performance of the contract prevents situations where no social return is achieved at all, while the award criterion still stimulates the market to achieve more social return. This gives tenderers the opportunity to distinguish themselves from each other by committing themselves to a higher percentage of social return, for which they are then rewarded in the award phase. In addition to awarding more points for a higher percentage of social return than the mandatory minimum, it is also possible to award more or fewer points based on the quality of the submitted plan, which describes how the tenderer will approach the implementation of the social return obligation.

For many years it was uncertain how social return could fit in the scheme of the public procurement directives, since the directives originally lacked a clear basis for social return obligations. The following paragraph will outline how social return on investment developed in the case law of the Court and in the public procurement directives.

4. Social return on investment: an evolution in case law and legislation

Social return on investment has been applied for many decades in the Netherlands, but it has long been unclear how the practice could fit within the framework of the procurement directives. The Court first ruled on this in the *Beentjes* case in 1988,¹⁵ before the procurement directives contained any specific provisions regarding social conditions or criteria. The tender of the economic operator *Beentjes* was rejected because it did not fulfil the requirement that 70 percent of the employees who would carry out the assignment must have been long-term unemployed. In the preliminary ruling on

¹³ Municipality of Amsterdam, Bureau Social Return, ‘Leidraad sociaal opdrachtgeverschap’ (*Guideline on social commissioning*) (2021), p. 20-21.

¹⁴ Municipality of Amsterdam, Bureau Social Return, ‘Leidraad sociaal opdrachtgeverschap’ (*Guideline on social commissioning*) (2021), p. 31.

¹⁵ ECJ 20 September 1988, C-31/87, ECLI:EU:C:1988:422 (*Beentjes*).

this case, the Court assessed, among other things, whether this requirement was in line with (the then applicable) Directive 71/305.

In this judgment, the Court first clarified the distinction between the suitability of contractors to carry out the contracts to be awarded and the actual awarding of the contract (§15). Regarding the suitability of contractors, the tenderer could only be assessed on the basis of criteria related to their economic and financial capacity and technical competence (§17). Award criteria, on the other hand, relate to the tender, but these could only relate to criteria for determining the ‘economically most advantageous tender’ (§19). The Court did, however, allow for a social return requirement as the Directive did not lay down ‘a uniform and exhaustive body of Community rules’ and Member States remain free to maintain or adopt substantive and procedural rules on the condition that they comply with all the relevant provisions of Community law and specifically the right of establishment and the freedom to provide services (§20). The Court therefore concluded that an obligation to employ long-term unemployed persons is an additional specific condition that may not infringe the prohibition of discrimination on grounds of nationality (§30 and 36). It is for the national court to determine whether the social return condition is either directly or indirectly discriminatory.

Despite the judgement in *Beentjes* the Directives still lacked an explicit basis for the application of social return on investment and the nature of the special condition remained unclear.¹⁶ The European legislature provided the much-needed clarity in Article 26 of Directive 2004/18/EC, which contained an explicit basis for special conditions for the performance of the contract that can in particular concern social and environmental considerations.

Social characteristics, as opposed to environmental characteristics, were not yet mentioned explicitly as part of the award criteria in Article 53(1a) of the 2004 Directive. However, the Court did make clear that the list in Article 53(1a) was not exhaustive and that social characteristics could also be included in award criteria.¹⁷ The Court did so in the *Max Havelaar* case, which concerned a tender for the supply and management of coffee machines (§ 84-85).¹⁸ In order to use social award criteria, it is necessary for there to be a link to the subject-matter of the public contract. This concept was interpreted broadly by the Court in the *Max Havelaar* case, but at the same time made more explicit. For there to be a link to the subject-matter of the contract, the award criterion does not have to relate to the material substance thereof (§91). For example, if electricity is purchased, criteria and conditions can be set regarding the sustainable production of electricity, despite the fact that this does not concern the material basis of the product. In the *Max Havelaar* case, however, the

¹⁶ ECJ 26 September 2000, C-225/98, ECLI:EU:C:2000:494 (*Nord-pas-de-Calais*), §51-53.

¹⁷ Recital 92 of Directive 2014/24/EU stresses that award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective and fair competition.

¹⁸ ECJ 10 May 2012, C-368/10, ECLI:EU:C:2012:284 (*Max Havelaar*). See also: Fisscher Braams A, (2013), ‘De koffie is klaar! De Koffiezaak van het Hof van Justitie nader belicht’, *Nederlands tijdschrift voor Europees recht*, nr. 3, p. 69-76.

Court ruled that the inclusion of specific fair-trade labels in the award criteria was not possible as such, because the underlying criteria were not stated and other suitable means of proof were not accepted (§97).¹⁹ Not including the underlying criteria and not accepting other appropriate means of evidence namely means that the criterion is not sufficiently specific, resulting in the risk of favouritism and arbitrariness.²⁰

The case law of the Court has been further codified with the latest generation of procurement directives.²¹ Recitals 93 and 99 of the Directive emphasise that both award criteria and special conditions for the performance of the contract may include promoting the social integration of disadvantaged persons or members of vulnerable groups among the persons assigned to perform the contract.²²

Social conditions for the performance of the contract and social award criteria have to be linked to the subject-matter of the contract though. In line with the *Max Havelaar* judgment, the Directive provides that there is a link to the subject-matter of the contract where they relate to the works, supplies or services “in any respect and at any stage of their life cycle, including factors involved in: a.) the specific process of production, provision or trading of those works, supplies or services; or b.) a specific process for another stage of their life cycle, even where such factors do not form part of their material substance.”²³

Recitals 97 and 104 of the Directive clarify that the subject-matter requirement thus excludes criteria and conditions related to general corporate policy. Setting criteria and conditions regarding a certain corporate social or environmental responsibility policy is therefore not allowed.

5. Remaining tensions between social return and the principles of public procurement

Although through the years social return has acquired a clear basis within public procurement directives, this does not take away from the fact that the implementation of social conditions in procurement procedures can cause tension with public procurement principles and for national companies to have an unfair advantage over companies from other EU member states. Social return causes more such tensions than other social considerations, such as occur in for example the use of exclusion grounds to exclude those tenderers and candidates who discriminate on the labour market.

¹⁹ The current rules for the application of labels is laid down in Article 43 of Directive 2014/24/EU.

²⁰ ECJ 29 April 2004, C-496/99, ECLI:EU:C:2004:236 (*Succhi di Frutta*), §111.

²¹ Directive 2014/24/EU, Articles 67 and 70 as implemented in the Dutch Public Procurement Act (Aanbestedingswet 2012) in Articles 2.80 and 2.114-115.

²² See also: Parl docs. (*Kamerstukken II* 2009/10, 32440, nr. 3 (MvT), p. 76).

²³ Article 67(3) and Article 70 of Directive 2014/24/EU and Article 2.80(2) and 2.115(3) of the Dutch Procurement Act (Aanbestedingswet 2012).

Principle of equality

The equality principle obstructs contracting authorities when connecting the hiring of long-term unemployed people and people with disabilities as part of a social return requirement to the national or local labour market. While people from the target group hired as part of a social return requirement will usually reside within the region of the contracting authority, making local hiring a requirement would discriminate against foreign companies.²⁴ While this wish on the part of contracting authorities is understandable – seeing their (financial) responsibilities towards these local target groups –, it is at odds with the principles of equality and non-discrimination. This tension can be mitigated by developing a (for example multilingual) system that makes it easy for foreign and other non-local economic operators to hire unemployed people and people with a disability on the national or local labour market. Therefore, while social return cannot – at least not in a straightforward manner – explicitly be aimed at local hiring, the requirement does, in practice, benefit the local target group, because the execution of the contract will often necessarily take place locally, as for example in the cleaning sector.

Principle of transparency

It is of great importance that all conditions for a public procurement procedure be determined and clearly described in advance due to the principles of equality and transparency. The Court has ruled on this in the *Succhi di Frutta* judgement²⁵, in which the Court stated that the equality principle aims to develop a healthy and effective competition between undertakings taking part in a public procurement procedure (§110) and that the purpose of the transparency principle is to preclude any risk of favouritism or arbitrariness on the part of the contracting authority (§111). This means that all the conditions of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that ‘all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way’ (§111).

It is important to place this ‘healthy and effective competition’ in the context of the social market economy (Article 3(3) TEU), in which competition does not only cover for example economic savings, but also social objectives such as full employment. This way, tenderers for public contracts can compete with each other for the most social tender. While there is no tension as such between healthy and effective competition and social objectives, the way in which social criteria and conditions are set can in fact obstruct healthy and effective competition.

Due to the nature of social return as a special condition for the performance of a contract, upon the conclusion of the public procurement procedure a consultation between the winner(s) of the procedure and the contracting authority takes place to discuss the manner in which the special condition will be performed in practice. This consultation cannot lead to any substantive changes to

²⁴ The Committee of Public Procurement Experts, Advisory Opinion no. 480, para. 5.4.17. ECJ 20 September 1988, C-31/87, ECLI:EU:C:1988:422 (*Beentjes*).

²⁵ ECJ 29 April 2004, C-496/99, ECLI:EU:C:2004:236 (*Succhi di Frutta*).

the prior demands and conditions, as this would be a violation of the previously discussed principles of equality and transparency. This also applies to action plans in the context of an award criterion concerning social return, because the economic operator has already been judged based on this plan, and is therefore, upon completion of the public procurement procedure, held to executing the plan concerning social return as described in the tender.

Principle of proportionality

One further legal tension concerning social return policy lies in the necessity for any award criterion or special condition for the performance of a contract to relate to the subject-matter of the contract.²⁶ The social return requirement must therefore not consist of criteria or conditions concerning general corporate policy. In the context of social return, this would for example have meant that the contractor fulfils the social return criterion by employing people from the social return target group, but not having them perform tasks related to the contract. The individual circumstances of an economic operator determine which employees are actually performing tasks relating to the contract, but employees who are not involved in the public contract can thus not be counted towards the fulfilment of a social return requirement.²⁷

The principle of proportionality also has other implications for the application of social return on investment, such as regarding the height of the percentage of social return. Contracting authorities should consider what percentage is proportionate to the specific contract and are therefore feasible for the contractor, because high percentages can result in potential bidders such as small and medium-sized enterprises choosing not to participate in the tender, resulting in less competition. While social entrepreneurship is quite common among small and medium-sized enterprises, social return obligations do not take into account how social the company is, as happens with reserved contracts under Article 20 of the Directive, but rather how much extra social value will be created in the performance of the specific public contract.

In determining the percentage of social return on investment it is also important whether the percentage is calculated as part of the total sum of the contract or as part of the total salary payments. Generally the amount of social return is calculated as a percentage of the total sum of the contract, but if wages only form a small part of the total sum of the contract it can be more proportionate to set a percentage relating to the total salary payments.²⁸ Given the importance of

²⁶ Dutch Procurement Act (Aanbestedingswet 2012), art. 2.80(2) and 2.115(3); Parl. Docs (*Kamerstukken II* 2014/15, 30545, nr. 161 (Uitvoering Wet Werk en Bijstand)).

²⁷ The Committee of Public Procurement Experts, Advisory Opinion no. 375, para. 5.6.10-5.6.14.

²⁸ The Committee of Public Procurement Experts, Advisory Opinion no. 98, para. 6.3.12. Parl. Docs (*Kamerstukken II* 2014/15, 34252, nr. 1 (Kamerbrief 8 juli 2015, 'Uitkomsten van de evaluatie van de Aanbestedingswet 2012'), punt 2.4). See also: M.C.J. den Hoedt, K. Schofaerts & D. Turmel, 'Evaluatie implementatie social return Rijksoverheid' (2014), p. 36.

labour as part of the contract, it is generally not advisable to set a social return obligation for supplies contracts.²⁹

Contracting authorities should consider the proportionality of the percentage of social return especially when the concerned contract covers specialist activities, such as accountancy or consultancy services, for which it is difficult to find suitable candidates in the social return target group. In such cases contracting authorities can either choose to set a low percentage of, for instance, 2 percent or choose to further other social goals, such as diversity and inclusion policies that are mentioned in paragraph 6 of this paper.

When using an award criterion for social return on investment, tenderers sometimes claim that they will meet unrealistically high percentages of social return so as to earn as many points, while already accepting the eventual fine for not meeting the high percentage.³⁰ In order to prevent such behaviour contracting authorities can also set a maximum percentage and further demand that the tenderers also submit a detailed plan stating how they will meet the percentage of social return as mentioned in their tender.

Some contracting authorities also choose to allow contractors to fulfil the social return obligation in an alternative way by contributing to the social goals of the contracting authority in another way. Essentially this comes down to a broader social award criterion or special condition for the performance of the contract. Although this practice is not necessarily problematic, it is essential that the public procurement principles are still abided by. Using a label that measures the social nature of the entire enterprise, rather than the social impact that the enterprise creates as part of the specific contract, to fulfil the social return obligation is therefore not in line with the proportionality principle.

6. Moving beyond social return: diversity and inclusion

Using the instrument of social return on investment overlaps to an extent with attempts to implement goals relating to diversity and inclusion in public procurement procedures. While social return has been used for many decades and over the years increasingly so, the themes of diversity and inclusion are a relatively new type of social goal in public procurement. Whereas social return focuses on the hiring of people for whom it is difficult to find employment themselves, diversity and inclusion refer to the presence of different minority groups as they occur in society on the one hand, and creating a culture in which employees feel valued and respected on the other. Setting criteria and conditions regarding diversity and inclusion can therefore be seen as an addition to social return on investment.

²⁹ The Committee of Public Procurement Experts, Advisory Opinion no. 166, para. 6.5-6.9. See also Parl. Docs (*Kamerstukken I* 2011/12, 32 440, nr. E, p. 1) and TNO, 'Social return bij het Rijk' (2010), p. 29.

³⁰ Association of Dutch Municipalities (VNG), 'Handreiking social return' (2018), §4.3, p. 18-19.

One example of inclusive commissioning that is already explicitly mentioned in the 2014 Directive is the accessibility for persons with a disability. The Directive states that for all procurement that is “intended for use by natural persons, whether general public or staff of the contracting authority, the technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria (...)”.³¹ This is relevant for the procurement of, for example, buildings, public transport and general facilities, such as municipal playgrounds. Furthermore, contracting authorities can set criteria or conditions regarding the accessibility of the communication methods that will be used during the execution of the contract. This can include using multiple languages, providing visual or auditory support, and using simple language for people with low literacy that will make use of the product or service.

Inclusivity can also concern diverse recruitment and selection of the staff as part of the contract. This can be achieved through, for instance, the use of multiple recruitment channels, gender-neutral language and an objective methodology for the assessment of candidates. Further inclusive policies regarding the personnel executing the contract can, for instance, relate to the availability of gender-neutral toilets or flexibility regarding cultural holidays. Such flexibility on cultural holidays can be achieved by allowing staff to substitute official holidays for other days that are important to them or by giving all employees one or more extra paid days off to celebrate a holiday of their choosing.³² Further inclusive criteria and conditions can cover safety in the workplace and relate to such topics as the existence of a confidential counselor or the ability to report transgressive behaviour like discrimination, sexual intimidation and bullying.

By building on the experience with integrating social policy in public procurement through social return, contracting authorities can now effectively focus their attention to criteria and conditions relating to diversity and inclusion. This way public procurement procedures can have a positive impact on society, for instance when trying to achieve gender equality as part of the United Nations Sustainable Development Goals.³³

However, when setting such inclusive criteria and conditions, it remains essential that the procurement principles are abided by. Especially the need for there to be a link to the subject-matter of the contract limits some of the above-mentioned social policies that are staff related to the staff actually executing the contract, because the criteria and conditions relating to diversity and inclusion cannot relate to general corporate policy.

³¹ Directive 2014/24/EU, Article 42(1), as implemented in Article 2.75(4) of the Dutch Procurement Act (Aanbestedingswet 2012).

³² Letting employees substitute official holidays or giving all staff an extra *floating holiday* respects the right to equal treatment which entails that all employees should have the same number of holidays. See ECJ 22 January 2019, C-193/17, ECLI:EU:C:2019:43 (*Cresco Investigation*).

³³ United Nations Sustainable Development Goals, no. 5: Achieve gender equality and empower all women and girls.

7. Conclusion

European public procurement law increasingly offers contracting authorities possibilities for setting criteria and conditions relating to social policy goals. Setting social criteria and conditions, however, goes hand in hand with tensions between the liberalising free movement rules and these social goals, meaning that the possibilities for instruments such as social return on investment are not unlimited.

Now that contracting authorities, such as the municipality of Amsterdam, are starting to adopt diversity and inclusion criteria and conditions as part of public procurement procedures, knowledge of the legal tensions that arise with other social instruments, particularly social return on investment, ought to guide the development of such diversity and inclusion criteria and conditions.