

Towards a More Coherent and Effective Legal Framework for Public Procurement

On how the legislator *and* the courts create a layered dynamic legal system based on legal principles

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1. Introduction

1.1 Detrimental fragmentation

The State always retains the prerogative to decide to perform public tasks / services itself or to externalise these and only in the last case public procurement law applies.² All over the world governments struggle to deal with society's most pressing problems, such as those related to social injustice, climate change and national security. It is alarming to see how they often fail to deliver when it comes to transactions with market parties, such as public procurement procedures. Newspapers and academic journals regularly report on problematic procurement procedures in areas such as the social domain, home care services, the collection and disposal of household waste, public transport and the purchase of schoolbooks. The recurring question in these debates is about the advantages (and disadvantages) of having the State³ perform these activities itself instead of outsourcing them to the free market. The question whether such activities should be considered as *economic* or as of *general interest* according to European law has dominated the scientific discussion in the last decades. The debate has *mainly* focussed on how these concepts - activities in the economic sphere or in the general interest - should be defined and under which conditions competition and public procurement regulation should be applied. The general assumption has been that determining whether public procurement law applies or not, depends indeed on the nature of the activities according to (European) competition and internal market law. The same question dominated the wave of privatisation⁴ that has swept Europe in the mid-1980s when a great number of activities that previously were offered by the State were transferred to private parties.

In my view, focussing on the nature of the activities results in an unproductive debate. The discussion has been centred for a (too) long time excessively on the *nature* of the activities, with much less emphasis on how the State uses its wide discretionary power to choose its in- or outsourcing strategy and to

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2 E. Manunza (2001a), *European public procurement law problems in privatisations and in the fight against corruption and organised crime* (diss. VU Amsterdam), Kluwer-Deventer, European Monographs, Volume 68, p. 15-16.

3 Under the concept of 'State' in this contribution fall the local, regional and central government and other public authorities as entitled to conclude contracts, to distribute limited authorisations and to sell public property.

4 In my PhD thesis (2001a, see above footnote 2), Chapter 5 and 6, I made the distinction between *limited* (state owned corporation) and *full* privatisations forms. As I will show in this contribution some of the limited forms of privatisation fall under public procurement law. Some of the full privatisation forms consists in selling State property. The term privatisation is almost disappeared from the annual competition reports of the European Commission during the last decade.

achieve its policy goals. It is indeed the State that determines the nature, scope and purpose of tasks and services our society should take care of and who should take care of their performance: by choosing from a wide range of legal transactional options, such as selling and buying property, choosing between performing tasks by itself (insourcing) or letting the market do its work by contracting market parties or by distributing limited authorization schemes⁵ (outsourcing). These choices significantly affect the functioning of our society in a positive or negative way. The State thereby directly or indirectly designs and influences our society, in a top-down manner stimulating or limiting the quality of the provided services.

As I will discuss, some of these transactional habits of the State fall under the European internal market rules, others fall under the public procurement directives as well, and yet another category is not subject to either. The incoherent and inconsistent rules governing the various transactional habits of the State - or their absence - have fascinated me as long as I have been engaged in European and public procurement law. In various publications I have investigated this detrimental fragmentation aiming at finding a more consistent approach to achieve better outcomes of public procurement procedures.⁶ Achieving positive outcomes, such as those adopted by the United Nations with the sustainability development goals (UN SDGs), indeed depends on the chosen legal instrument: choosing for in-house for example will reduce the possibility to increase social innovation by contracting social enterprises or citizen initiatives. The European law perspective that I have used for my analysis was not chosen to argue for more⁷ competition by opening up more sectors to the internal market. Nor is the formal primacy of EU law over national law the main reason for this perspective - at least not exclusively. Rather, I choose for the EU law perspective mainly on the *raison d'être* of the EU as contained in Article 3(1) TEU: "The Union's aim is to promote peace, its values and the well-being of its peoples." By enunciating the main *goals* of the EU, this provision implicitly clarifies that the fulfilment of the internal market is merely a *means* to that higher end and naturally subordinate to it.

1.2. Striving for better not more competition

This is all the more relevant due to two opposite discussions that are going on in science and society. On the one hand, the call to increase competition as to partly combat the dramatic results of the war in Ukraine and the Covid-19 pandemic that exposed Europe to a new economic crisis. On the other hand the call to strive for 'better' and not for 'more' competition to stimulate our economy and aid the sustainable economic transition. As remarked above, the internal market and thus competition is nothing more than a means to achieve the European Union's goals and thus subordinate to it. There are a lot of entities that can compete in providing services: the State itself, other public authorities, for-profit and non-profit actors. Still it is the State that determines who is allowed to add to what is deemed good in society and who will take care of it by choosing among this variety of providers. Non-profit actors include voluntary organisations, charities and religious institutions, citizen initiatives, social enterprises. For-profit actors also include socially oriented undertakings not primarily aiming at maximising profit but at pursuing a social mission that contributes to societal challenges relating to sustainability and social

⁵ Many but not all limited authorisation can be considered a 'transaction'. This depends on the national legislation.

⁶ E.g. (2001a, see previous footnote) Chapter 6; (2001b) 'Member States not free in privatisation policy. Is the European Community pursuing a *neutral* or, rather, a *liberal* policy towards privatisations?', *Tijdschrift Privatisering*, vol. 8, no. 4, pp. 4-8; (2002) 'The European's zigzag course in the area of privatisations' in: H.J. de Ru, J.A.F. Peter (Ed.), *Privatisation and free markets. State of affairs and perspectives*, Monographs on Government and Market, no. 1, Sdu Publishers, pp. 109-135; (2010a) 'Towards a Consistent and Efficient Regulation of the Public Procurement Market', pp. 49-123 in J.M. Hebly, E. Manunza and M. Scheltema: *Reflections in response to the legislative proposal Public Procurement Act*, preliminary report containing recommendations for the Association of Construction Law; (2010b) *Crossing borders. From public authorities' obligations to citizens' rights*, inaugural lecture in abridged version pronounced on 29 September 2010 in acceptance of the full professorship International and European public procurement law, Utrecht University.

⁷ I have always been in favour of 'better' - not more - competition as I further explain in this paragraph.

inclusion. Undertakings such as *Tony Chocolonely*,⁸ aimed at making chocolate ‘slave free’ and *Triodos Bank*,⁹ aimed at only investing in projects seeking to resolve societal issues such as sustainability, are good examples of for-profit actors aiming not in the first place at maximizing profit but at using profit to solve societal challenges.¹⁰ Hence, social entrepreneurship, social enterprises and citizens’ initiatives are of growing importance to society, thereby changing the relationship between state and market. In short: the State can choose to create not more but ‘better’ competition by choosing those actors that better suit to achieve the new policy goals.

1.3 Research questions and method

This opens the way to questions of a more fundamental theoretical nature. The first of these questions - which plays a crucial role in discussing this topic - is: what other elements and principles play a role alongside the internal market rules to argue in favour of regulating *competitive* procedures to buy (i) or to sell (ii) public property and to distribute (limited) authorisations (iii) and other public rights (iv)?

The second of these questions is: what developments have these evolving elements and principles undergone?

Investigating these elements and principles and their evolution implicitly gives me the opportunity to investigate the *natural* lines demarking public procurement law from other (related) areas of law; or - put it in other words- to question the current scope of public procurement law.

Answering these questions correctly in my view requires a goal-oriented and coherent interpretation of the ‘whole’ legal system of which public procurement law is a part. This means that the EU Treaties themselves should be considered as a coherent system, and their various components - such as internal market law, public procurement law, etc. - should not be considered as independent pillars but as coherent parts of a single common system and in the light of the overarching objectives set out in Article 3(1) of the TEU.

In the following paragraphs I will elaborate on how public procurement is evolving towards a more *coherent* area of law. To this end the emphasis moves from public procurement law *stricto sensu* to public procurement law in a *broad sense*. I use the term public procurement law *stricto sensu* to refer to the legal system governing exclusively *public procurement competitive procedures* to check how our taxpayers money is spent and to ensure that the society achieves best value for money. The term public procurement law in a *broad sense* is used to refer to the envisaged more coherent legal system governing the transactional state (buying and selling property activities and distributing rights and licenses *through competitive procedures* to ensure fundamental democratic rights of citizens, such as equal treatment and transparency).

Another distinction is made between *public procurement procedures* and other types of *competitive procedures*. The term *public procurement procedures* is used to refer to the procedures laid down in the 2014 EU Public Procurement Directives and the earlier 2009 Directive for the defence- and security sectors. The terms *competitive procedures* or *competitive awards of contracts* or *competitive distribution procedures* are used to refer to other forms of competitive obligations in situations which are outside the scope of the EU Public Procurement Directives and that have been developed in the case law of the European Court of Justice concerning distribution of (limited) authorisations (for example for games of chance or the exploitation of casinos or lotteries).¹¹

⁸ <https://tonyschocolonely.com/uk/en/our-story>.

⁹ <https://www.triodos.nl/over-triodos-bank>.

¹⁰ Manunza & Meershoek, ‘Fostering the social market economy? Legal impediments for new types of economic actors’, *PPLR* Issue 6 2020, p.343-359.

¹¹ As I will further discuss service concessions cases have been subject to the same development before being liberalised by the 2014/23/EU Directive on the award of concession contracts.

I will further investigate *what* legal reasoning and legal grounds trigger the need to adopt competitive procedures. This means that it is beyond the scope of this contribution to discuss the circumstances and criteria under which licenses (limited authorisations) have to be distributed or State property to be sold or divested.

Detrimental fragmentation, incoherence, inconsistency, wide discretionary power of contracting authorities, unclear demarking lines between legal instruments are discussed as impediments to both the realization of the policy goals (effectiveness) and the protection of the principles which Member States in the framework of the EU pursue (legitimacy).

2. Legislator *and* the Courts create a layered dynamic based on legal principles¹²

2.1 A top down dynamic process

As a relatively new area of law, European public procurement law is characterised by a strong dynamic that has led to its continued expansion over the last 50 years and that also influenced other fields of law by showing the relevance of competitive obligations in situations which are outside the scope of the EU Public Procurement Law such as for the distribution of (limited) authorisations (for example for gambling, games of chance or the exploitation of casinos or lotteries). More and more types of public contracts, concessions, limited administrative authorisations, permits, licenses have gradually become subject to *competitive award* and *competitive distribution* legal obligation. Economically most significant public purchases are subject to the competition obligations under the European internal market *treaty* rules. Soon after the Treaty of Rome came into being, it became clear that the treaty *prohibitions* were not sufficiently effective in the public procurement market to counteract the risks of protectionist behaviour by national governments and thereby those of discriminatory government decisions. The introduction of liberalisation and harmonisation directives became necessary in order to *oblige* the Member States to actively remove existing barriers to trade. Directives successively opened up supplies and works (1970s), services (1980s), utilities (early 1990s) and, in 2009, defence and security procurement to interstate competition. In parallel to this dynamic *legislative process*, the European Commission pursued a policy of expanding the application of European law in this field with a large production of soft-law documents¹³ and infringement proceedings¹⁴.

With the aim of also subjecting contracts below the European thresholds and public service concessions to a minimum of liberalisation, the Commission enforced before the European Court of Justice (CJEU) the effective functioning of the internal market freedoms and of the ‘general principles of Community law applicable to contracts for the provision of such services’, in particular transparency, equality and non-discrimination.¹⁵ After all, applying considerations of economic efficiency, the benefits of this gradual opening-up is quickly proven, given the estimation of the European public procurement market at around €2155 billion (15-18% of the European Union's GNP). This expanding process continued even after the opposition from the national governments who feared ever-increasing curtailment of their

12 On the same topic but in Dutch: E. Manunza ‘Een wat minder incoherent rechtsgebied’, in: A.G. Castermans, M. Ijsebrands, B. Krans, Martijn van Rijen (eds), *Parels aan de kroon. Het bouw- en aanbestedingsrecht en familievermogensrecht op de bogen van het 30-jarige BW*, Liber Amicorum, Wolters Kluwer, 2022, p. 129-139.

¹³ Interpretative Communication EC on contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02).

¹⁴ CJEU, 26 April 2007, case C-195/04, *Commission v Finland*: contract below the EU thresholds / conflict with the free movement of goods; CJEU, 13 November 2007, case C-507/03, *Commission v Ireland*: conflict with the right of establishment, the free movement of services and the general principles of European (Community) law.

¹⁵ CJEU 13 November 2007, Case C-507/03, points 1 and 14.

policy-making powers in many areas.¹⁶

2.2 Consequences of the absence of adequate and coherent legal rules

This development perfectly illustrates how tensions between the European and national spheres of competence in the European legal practice arise not only at the *legislative* level and as a result of infringement proceedings by the European Commission before the Court of Justice. More striking is that they are also determined in the European *courts* as a result of lawsuits brought at the national level by private individuals who could not obtain a contract or a license given the *absence* of adequate and coherent legal rules and consistent policies. Over a period of more than two decades we have seen private individuals going to the courts to claim *competitive awards of contracts* that did not fall within the scope of the public procurement directives or to claim *competitive distributions* of rights / licenses. Unlike lawmakers, courts cannot ignore relevant legal questions concerning such fundamental issues, but must answer them. The Court of Justice of the EU did so by recognising, from 1999 onwards, an increasing number of public procurement obligations for contracts falling outside the scope of the directives, such as public service concessions¹⁷ and certain forms of public-private partnerships (PPP)¹⁸. These types of contracts were very similar to those specifically regulated by the EU but which, due to unconvincing legal arguments, fell outside the liberalisation. The CJEU accepted these obligations on the basis of the Treaty provisions on free movement and the derivative general principles of non-discrimination, equal treatment and transparency.

3. Impact on related areas of law

In public economic law - where European public procurement law belongs - the dynamic is by definition strong. However, the aforementioned expansion is only partly the result of the regulatory activities of the European and national legislators. What is striking is the *impact* on other transactional activities of the State falling at the national level under public and increasingly also civil law, which strictly speaking are not covered by public procurement law because there is simply no question of public *procurement*.¹⁹ In many cases rights to provide activities are distributed by the state between market parties in the form of (limited) authorisations or awarded to them as a service concession. Until 2014, for different reasons, both (limited) authorisations and service concessions fell outside the scope of the public procurement directives. There were no obligations to follow one of the competitive public procurement procedures laid down therein. Before being regulated by directive 2014/23/EU, in the past, the choice to explicitly exclude the award of service concessions from the scope of the directives was based on political reasons.²⁰ The distribution of (limited) authorisations is still outside the scope of the directives, perhaps for a different reason. However, as will be explained below, it follows from the case law of the European Court of Justice that the award of such public contracts by public authorities to third parties is also subject to some form of *competitive procedures*.

In legal proceedings, market participants demanded a competitive distribution of games of chance,

¹⁶ E.g. Court of First Instance, 20 May 2010 (T-258/06), Germany (supported by the Netherlands, France, Poland, Greece and Austria, United Kingdom of Great Britain and Northern Ireland) against the Communication mentioned in note 13.

¹⁷ CJEU 18 November 1999, *Unitron Scandinavia A/S*, Case C-275/98, ECR 1999, p. I-8291 first application of the principle of transparency in supply concessions. CJEU 7 December 2000, case C-324/98, *Telaustria*, ECR I-10745. CJEU 21 July 2005, case C-231/03, *Coname*, NJ 2006, 171, m.n.. EC 13 October 2005, case C-458/03, *Parking Brixen*, NJ 2006, 226, M.R. Mok. CJEU 13 November 2007, case C-507-03, *An Post*. CJEU 15 May 2008, joined cases C-147/06 and C-148/06, *SECAP*; CJEU 6 October 2016, C-318/15, *Tecnoedi Costruzioni Srl v. Comune di Fossano*.

¹⁸ CJEU of 15 October 2009, *Acoset SpA v. Fourteen Authorities*, C-196/08.

¹⁹ Cfr. Rob J.G.M. Widdershoven, <https://www.uu.nl/opinie/de-olievlekwerking-van-het-aanbestedingsrecht>.

²⁰ Manunza 2001a, para 4.3

lotteries and slot machines²¹ as well as a competitive procedure for the sale of government property,²² also in the form of a partial sale of shares and even in the case of the sale of a television network, as in the *Coditel* case²³. What all these situations have in common is that they cannot be considered as a purchasing activity from a legal perspective. Indeed, the authority in question does not purchase anything nor does it spend tax money. Instead, it 'encumbers' its own rights or sells governments property and receives remuneration in exchange, at least in some cases. This development revealed that the need to expand the legal obligations to set up competitive award and distributing procedures in the aforementioned cases, is determined by reasons other than the original ones. The emphasis moves from the fulfilment of the internal market to ensuring the effectiveness of fundamental principles and thus equal opportunities to every single citizen in our society.

Reasons which allow for a legally more consistent and systematic legal approach. However, it is still by no means a coherent system yet, as I will show below.

4. First line of development: competitive distribution of games of chance and slot machines is based on the internal market rules

In the cases concerning games of chance and slot machines, injured market participants who also wanted to provide games of chance in other Member States²⁴ demanded before the national court a competitive *distribution* of the limited licences by invoking, among other things, violation of the free movement of services and the right of establishment from the TFEU, and violation of the principle of non-discrimination and derivative principles, such as the principle of transparency.

Where market participants were demanding increasingly far-reaching liberalisation, Member States generally argued that the fundamental objectives pursued by the national regulation (preventing addiction to games of chance, achieving consumer protection and combating fraud and other crimes) should be safeguarded by invoking the exceptions grounds provided by the Treaty (Articles 36, 51, 62 TFEU) and by the *rule of reason*. In these cases, the Court of Justice of the EU clarified that national regulation of games of chance in principle fall under the internal market rules invoked by the parties.

With the resurgence of populism, protectionism and nationalism in Europe²⁵, questions such as why European (primary) law applies to the provision of gambling services, while the EU has no sector-specific legislative competence to liberalise the gambling sector through secondary regulation - directives or regulations -,²⁶ become more important and need further explanation. There is indeed no

21 See e.g. CJEU 3 June 2010, C-203/08, ECLI:EU:C:2010:307 (*Sporting Exchange*); CJEU 24 March 1994, C-275/92 (*Schindler*); CJEU 13 September 2007, C-260/04, ECLI:EU:C:2007:508 (*Commission v. Italy*). See E. Manunza, S. De Vries, W. Janssen, A. Van der Veer, "The legal lotteries system in the Netherlands: EU-proof? An investigation into the conformity of the regulation of lotteries in the Netherlands with European law", 9 July 2021, [file:///C:/Users/Downloads/tk-annex-2-legal-analysis-netherlands-lottery-system%20\(1\).pdf](file:///C:/Users/Downloads/tk-annex-2-legal-analysis-netherlands-lottery-system%20(1).pdf) presented to the House of Representatives <https://zoek.officielebekendmakingen.nl/kst-24557-173.html>

22 See, for example, in the Netherlands: Court of Appeal The Hague 19 May 2009, ECLI:NL:GHSGR:2009:BI4344, District Court Almelo 15 February 2008, ECLI:NL:RBALM:2008:BC8034, District Court Zutphen 22 May 2012, ECLI:NL:RBZUT:2012:BW6294 and District Court Amsterdam 19 December 2014, ECLI:NL:RBAMS:2014:9336.

23 CJEU of 13 November 2008, case C-324/07, *Coditel*.

24 Such as the Netherlands: see, for example, Administrative Law Division of the Council of State 23 March 2011, ECLI:NL:RVS:2011:BP8768; Administrative Law Division of the Council of State 2 May 2018, ECLI:NL:RVS:2018:1467; Administrative Law Division of the Council of State 10 March 2021, ECLI:NL:RVS:2021:470 (NOGA) and Administrative Law Division of the Council of State 10 March 2021, ECLI:NL:RVS:2021:468 (*Sporting Exchange*).

25 M. Viroli distinguishes between patriotism and nationalism; being the first one the positive, and the second one the negative expression of For Love of Country: An Essay on Patriotism and Nationalism, Oxford University Press 1995, Chapter 3. In this essay the Italian philosopher Viroli attaches a more negative connotation to the first concept: it forms an inward-looking concept that leads to exclusion. To the second, patriotism, Viroli attaches a more positive connotation. It concerns a more open concept as patriotism strives to defend fundamental values (eg equality and inclusion). For example, 'patriots' fought against fascism and Nazism during WWII.

26 See consideration 25 of Services Directives 2006/123/EC, 12 December 2006: Gambling activities, including lottery and

sector specific EU legislation in this field.

Although that question is not explicitly the subject of these court cases, an answer can be formulated analysing them. Member states are and remain indeed autonomous in the way they organise their gambling services because the EU lacks specific legislative competence in this field. But when the public authority chooses to outsource these activities to the *market* instead of organising services *itself*, or - as occurred in those cases - regulates the different types of games of chance - lotteries, slot machines and the like - in an *incoherent* and *inconsistent* manner, European law limits its discretionary power. Indeed, the Court of Justice, in its interpretation of European Union law, mainly uses the goal-oriented (teleological) and systematic methods of interpretation.²⁷ The underlying purpose and broader system of which specific Treaty provisions such as those relating to the internal market form part serve as the primary means of guidance on how these provisions should be interpreted. The second method is rooted in the ideal of coherence and non-contradiction of law and policy and expresses the basic requirement of consistency, namely that concepts are used consistently and standards are compatible not only with the regulations of which they form part but also with other relevant components of the law and of the legal system in general, including general principles of law.²⁸

5. Second line of development: competitive distribution of public property is based on general principles

5.1 Distinguishing between two groups of public property sale

5.1.1 The first group: State owned corporation

The second line of development, that of the sale of public property, is more complex and requires a further distinction between the following two groups of situations.

The first group includes the foundation of a private company charged with carrying out a task - for example, by municipalities to collect and process household waste or to provide services in the social domain (*state-owned corporation*). Often the entire share package remains in the hands of the founding public authority or other participating public authorities. In other case the authority places only a part of the share package with a private investor. Such processes raise the question of whether the performance of the package of *tasks* and whether the partial placement of the *share* package on the market are subject to the obligation to invite tenders.²⁹ The answer to the question of which law is applicable to each of these two situations varies considerably. As a rule, the package of tasks fall under public procurement law and must be put out to tender. After all, it may concern a public works, service or supply contract which, as such, is covered by the EU public procurement Directives. A partial placement of shares, on the other hand, is covered by the free movement of capital and is therefore neither a service nor a supply contract and hence not covered by the EU public procurement Directives. Still, in the *Acoset* case of 15 October 2009, the Court of Justice of the EU ruled that the *selection of* a private investor to become shareholder, should be opened up to review in to a public procurement procedure.³⁰ Thus, some of these

betting transactions, should be excluded from the scope of this Directive in view of the specific nature of these activities, which entail implementation by Member States of policies relating to public policy and consumer protection.

²⁷ Paragraph 2.2 of E. Manunza, N. Meershoek & L. Senden, 'The Ecosystem for Military-Logistic Capabilities of the Adaptive Armed Forces: In the Light of NATO Treaty, EU Treaties and National Procurement and Competition Law', *Utrecht University Centre for Public Procurement & RENFORCE* 2020: <https://www.uu.nl/sites/default/files/UU%20Rapport%20juli%202020-%20Defensie%20Ecosysteem%20Logistiek%20.pdf>

²⁸ G. Beck, *The Legal Reasoning of the Court of Justice of the EU*, Hart Publishing, Oxford, 2012, p. 161.

²⁹ Manunza 2001a, chapter 5.

³⁰ *Acoset* concerned a service concession. As such, at that time, a service concession was not covered by the EU public procurement; however, national (Italian) law did provide for the obligation to follow a competitive public procurement

types of transactional activities of the State fall under the public procurement directives (package of *tasks* in State owned corporations) and others do not (*share* package), but the latter *are* subject to a competitive procedure.

5.1.2 The second group is formed by three forms of public property sale: divestment of a state-owned company (i), company sale (ii), sale of immovable property such as land and buildings (iii)

The second group includes the sale of public property, which can take three forms. The first is the *divestment of a state-owned company*, which takes place by way of the *total* sale of shares on the stock exchange;³¹ the second is the *company sale*, which takes place by way of the (total) sale of the (state-owned) company as a whole or in parts to other companies. In addition, the government can sell real estate such as *land and buildings*,³² and movable property. All these forms are subject to different rules. Below, I will only discuss the third form – the sale of immovable property such as *land and buildings*³³ – because it gives me the opportunity to draw attention to a fundamental tension that strongly influences the development of public procurement law, namely the tension between two basic European principles: the internal market as the basis of the European economy and the freedom of Member States and their public authorities to determine their internal public organisation themselves as they see fit.

5.1.2.1 Preventing market distortion instead of protecting individual rights?

When the European Community was founded in 1957, the participating Member States chose to leave the regulation of property ownership in the Member States outside the scope of European interference. Thanks to Article 345 TFEU, 'the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership', Member States retained primary responsibility for their policy in this area. Neither primary nor secondary EU law contains rules on the sale of government property. The question then is how far the property ownership *right* extends.

Art. 17, EU Charter of Fundamental Rights, clarifies that the right to property as a fundamental right is limited. It only protects the right of everyone to *own, use, dispose of and bequeath* his or her lawfully acquired possessions. The provision is silent on acquisition and disposal as such.³⁴ This limitation possibly explains why Europe didn't introduce specific rules governing the sale of public property but instead clarified through *soft-law* a number of strict conditions on sales processes that prevent the government from selling its property directly - without any form of competitive procedure - to the buyer of its choice. A sale of land and buildings following a sufficiently well-publicized, open and unconditional bidding procedure, comparable to an *auction*, accepting the best or only bid is by definition at market value and consequently does not contain State aid.³⁵ If the sale is not conducted through such an open and unconditional bidding procedure (an *auction* similar to a public tender), the Commission may examine whether there is a conflict with Article 107 TFEU³⁶: it is through State aid

procedure.

³¹ In the case of partial divestment, some form of public-private partnership will always remain. With total divestments, the situation may be different. It depends on who acquires the divested entity. See for the differences between partial and total divestment

³² Cfr. the reports on the Commission's competition policy in the first decade of this century (downloadable on the EC website) with those of the last decade where information on sales (then called "privatisations") is increasingly scarce or non-existent. See Communication on State aid elements in sales of land and buildings by public authorities, 10 July 1997, *OJ* 1997 C 209/3, as replaced by that on the concept of State aid 19 July 2016, *OJ* 2016 C262/1.

³³ E. Manunza, 2010a (from para 3.3.2), see above footnote 6.

³⁴ Art. 17 EUCFR reads: 1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected.

³⁵ According to Communication on State aid elements in sales of land and buildings by public authorities, 10 July 1997, *OJ* 1997 C 209/3, as replaced by that on the concept of State aid 19 July 2016, *OJ* 2016 C262/1.

³⁶ See the Communication mentioned in note 21.

control that the EU requires the sales process to aim at a fair market result.

However, this European system is not always satisfactory where the protection of the rights of potential buyers is concerned. After all, a sale without competition can also lead to a fair market outcome. State aid rules are preoccupied with preventing market distortion by the state and not with individual rights. If public authorities intend not to use an unconditional bidding procedure, an independent evaluation should be carried out by one or more independent asset valuers prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The market price thus established is the minimum purchase price that can be agreed without granting State aid.

The question then is on what legal ground(s) potential buyers can rely on in court. Where do they stand at the national level? Member States retain primary responsibility for their policy in this field of law.

5.1.2.1 An unregulated area of law: how the national courts fill the gap when the Dutch legislator is lacking

When we start 70 years ago, according to Article 1 of the Act of 24 January 1952, Dutch Government Gazette 37, in the Netherlands the State was required to sell movable and immovable property in public following a sufficiently well-publicized, open and unconditional bidding procedure.

The underlying principle was that public property had to be acquired as cheaply as possible and to be sold as expensively as possible. Not all were convinced by the effectiveness of the legal system. The Dutch State attorney Droogleever Fortuijn argued that “the legal obligation for the State to buy or to sell property following a sufficiently well-publicized, open and unconditional bidding (procurement) procedure ensures the effectiveness of fundamental democratic rights because it ensures that all eligible private individuals have equal opportunities to conclude a contract with the State”, but expressed severe doubts that the provision’s goal could be achieved due to the severe “incoherencies contained in the legal system”.³⁷

Somewhat visionary was his conclusion that “the European Economic Community will draw the attention - and hopefully will further elaborate - on the fundamental rights of individuals to conclude a contract on equal terms with the State by *submitting their bids* under an unconditional buying or selling procedure (...). We are certainly awaiting Community regulations in this regard. (Italics added).”³⁸

As we know, the EEC adopted the first liberalization directive in the field of public supply contracts only five years after the above statement but it did not stop there.

In The Netherlands the area remained unregulated when decades ago, for obscure reasons (!), the Act was repealed. Unlike in other EU Member States where sales are subject to regulation,³⁹ in the Netherlands in the last decades complainants went to court demanding that the sale of land and buildings should take place following a sufficiently well-publicized, open and unconditional bidding procedure. In the absence of regulation these complainants invoked either (i) the Dutch private-law principle of *reasonableness and fairness*⁴⁰ and/or (ii) the principle of equal treatment as safeguarded by Dutch

³⁷ E. Droogleever Fortuijn, Should the legislator regulate all contracts concluded by the State? (original title in Dutch: Dient de wetgever regelen te geven met betrekking tot overeenkomsten met de overheid?), preliminary recommendations to the Dutch Lawyers Association, 1965, p. 163.

³⁸ Idem to previous footnote.

³⁹ See Art. 822-831 Italian Civil Code. Furthermore, the subject-matter - based on the principle of public auction - was brought under the Government Accounts Act in that country from the 1920s onwards (R.D. 2440/1923) and has been amended again and again until the more recent D.L. 98/2011. See <http://venditaimmobili.agenziademanio.it/AsteDemanio/sito/php>

⁴⁰ Art. 6:2 of the Dutch Civil Code provides that parties to an obligation should behave according to what is reasonable and fair. Furthermore this article states that a rule binding upon such party by virtue of law, usage or a legal act does not apply in so far as this would be unacceptable according to the standards of reasonableness and fairness. According to Dutch contract law all contracts must be interpreted in line with these principles.

administrative-law, the derivative principle of transparency, the principle of due care and the prohibition of arbitrariness, and/or (iii) principles of European origin such as the fundamental public procurement principles, in particular the principles of equality and transparency.

What emerges is the following picture. The Dutch courts seem to colour the Dutch private-law principle of reasonableness and fairness in the light of the principle of equality. The courts use this principle as a collective term to refer to various principles of national as well as European origin, such as the public procurement principles as derived from the 'parent' principle of non-discrimination.

In some cases, general principles of good administration are mentioned additionally. The first cases in which the Dutch Supreme Court uses this principle in these matters refer to this. For example, since the Dutch Supreme Court's judgment in the case of *Amsterdam v. IKON* of 27 March 1987 (NJ 1987, 727), we know that the government, when allocating land, is also bound by the principle of equality. However, that case dealt with *compliance* with the leasehold conditions, rather than with the acquisition of the leasehold right itself.

In *Province of Zeeland*, the Dutch Supreme Court ruled in 1992 that for a judicial review of the general principles of good administration, as partly laid down in the General Administrative Law Act, "only a marginal review" does not suffice.⁴¹ Consequently, these principles also apply to private-law transactions by (the State and its) administrative bodies. For example, according to Dutch private law when choosing contracting parties, administrative bodies must adhere to the principles of due care and legitimate expectations. With the introduction of Book 3 of the new Dutch Civil Code in 1992, this Supreme Court's decision was codified in Article 3:14 DCC.⁴²

In subsequent cases⁴³ the courts expressed, each time in different ways, how the principles of public procurement law *and* the principles of administrative law or the principles of fairness and reasonableness can play a role in the context of concluding a contract for the sale of land or buildings; however, there was no obligation to organise a competitive procedure if the choice for - or rejection of - a certain contractual party could be properly justified.

Similarly, the Supreme Court ruled in 2002 that when the public authority has chosen for such a competitive procedure, this choice entails application of the principles of equal treatment and transparency.⁴⁴ These principles require that selection and award criteria and the scope of the contract be clear and made known in advance.⁴⁵ This is linked to "the expectations that (potential) tenderers could reasonably have on that basis".⁴⁶

Reasonableness and fairness are thus leading for the expectations that are raised with market participants as regards the kind of procedure that will be followed.

In the recent *Didam* case of 26 November 2021, the Dutch Supreme Court went a considerable step further.⁴⁷ The obligation of a public body, when selling land, to comply with the general principles of

41 Supreme Court 24 April 1992, *Province of Zeeland*, ECLI:NL:HR:1992:ZC0852.

42 Article 3:14 "No violation of public law" reads: "A right or power that someone has by virtue of civil law may not be exercised in defiance of written or unwritten rules of public law".

43 See also Presiding Judge District Court Den Haag 27 February 2007, LJN: BB3794 and District Court Amsterdam 19 December 2014, ECLI:NL:RBAMS:2014:9336. Court of Appeal in The Hague 26 October 2010, *Municipality of Noordwijk*, ECLI:NL:GHSGR:2010:BO2080. Arnhem Court of Appeal 26 April 2011, ECLI:NL:GHARN:2011. District Court of 's-Hertogenbosch, 10 September 2012, ECLI:NL:RBSHE:2012:BX7223, point 4.6.

44 Supreme Court 4 April 2003, *RZG/ConforMed*, ECLI:NL:HR:2003:AF2830.

45 Same as previous note 3.4.4 and 3.5.2.

46 Supreme Court 3 May 2013, *KLM*, ECLI:NL:HR:2013:BZ2900, point 3.7. In the same sense District Court Zutphen 22 May 2012, ECLI:NL:RBZUT:2012:BW6294, point 4.2.

47 Supreme Court 26-11-2021, ECLI:NL:HR:2021:1778, *BR 2022/7* (Supreme Court *Didam*); Court of Appeal Arnhem-Leeuwarden 19 November 2019, ECLI:NL:GHARL:2019:9911/ District Court Gelderland 8 January 2019, ECLI:NL:RBGEL:2019:46.

good administration, specifically the principle of equality (Article 3:14 of the Dutch Civil Code), entails an obligation to provide room for competition and transparency. The Supreme Court identified the equality principle in this context as the principle "*to provide equal opportunities*". These opportunities must not only be offered "*if there are multiple candidates for the purchase of the immovable property in question*" but also "*if it can be reasonably expected that there will be multiple candidates*". With this last expansion, the Supreme Court introduced a general 'public procurement' obligation in cases that do not strictly speaking fall within the scope of public procurement law and in the absence of other regulation on the subject. This is because the Supreme Court added that "*the public body must, with due observance of the room it is afforded to make policy, establish criteria on the basis of which the buyer is selected. These criteria must be objective, verifiable and reasonable*" (point 3.1.4.). I would add "and sufficiently well-publicized in advance".

6. Concluding remarks

The expansion of public procurement law insofar as it was triggered by litigation has led to a more coherent, consistent and equitable legal system of distribution and award.

There are many types of transactions to which the procurement directives do not apply but the basic principles of the Treaty do, such as Article 34 etc., Article 56 etc. TFEU, and the derivative principles of equal treatment, transparency and non-discrimination or Article 63 etc. Not so, however, where it involves the sale of government property which is exclusively subject to a number of strict conditions on sales processes as laid down in *soft-law* regulation with the only aim to prevent the government from selling its property in conflict with the State aid rules. These last rules - as known - aims at preventing market distortion by the state and not at protecting individual rights.

As far as the Dutch courts are concerned, inconsistencies are reduced by applying one of the oldest legal concepts: the principle of equality.⁴⁸ In fact, the same applies at the European level. All these courts do the same thing within different legal frameworks. They ensure that citizens and businesses are treated equally by the government as far as possible, or at least are given equal opportunities.

The legislature should take more initiative to safeguard that principle by a consistent and fair regulation of the public 'allocation' of land and buildings and other forms of market approach not covered by the procurement directives, such on the basis of objective, transparent and non-discriminatory criteria, rather than to wait for citizens (and companies) to claim their right to equal treatment in court.⁴⁹

⁴⁸ Aristotle was the first to give the principle of equality a central place in law. See *Ethica Nicomachea*: V. 14, 1137a-32 to 1138a in the beautiful Dutch translation of the *Ethica Nicomachea* by Historische Uitgeverij in Groningen.

⁴⁹ The Italian legislature was there first: see supra note no. 39.