Public Procurement as an Expression of the Rule of Law

Prof. mr. Elisabetta Manunza

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PIANOo Congres “Met elkaar het verschil maken”

- Full Professor of International and European Public Procurement Law
- Co-Head of the Utrecht University Centre for Public Procurement
- Co-Head of the Platform ‘The Transactional State as an Institution for Good,’ (Institution for Open Societies, Utrecht University)
- Co-Head of the Building Block ‘Conceptual, Constitutional, Theoretical Foundations of Shared Regulation and Enforcement for a Stronger Europe’ (Centre for Regulation and Enforcement Utrecht University)
Balancing legitimacy with efficiency?
No! Both crucial but they both pursue different goals

Legitimacy

Efficiency / effectiveness
Democratically well-developed countries ensure Public Procurement Legal Systems based on the fundamental principles of law: non-discrimination, proportionality, objectivity and transparency.

1st mindset shift: changing how we estimate cost-effectiveness (!)

It’s not about the price of a product, work, service but about the price of Liberty!

The Rule of Law
EU Goals

to promote PEACE, its values and the well-being of its peoples

(Art. 3[1] TEU)

Means:

Internal Market

Competition

Public procurement Rules
3rd mindset shift: Means and Goals?
Striving for Better not More Competition

Social market economy

For profit/commercial entrepreneurship

For profit - Social entrepreneurship: but aiming at solving societal problems

Social enterprises

Voluntary organisations

Charities, religious institutions

Citizens initiatives

The State

(External) public authority

Triodos Bank

Tony's Chocolonely
3rd mind-set shift:
Stop looking at public procurement as contracts between two parties...

The State in all its forms  
Economic operators
3rd mind-set shift:
...and start looking at public procurement as Responsible Commissioning
Public Procurement Law in stricto sensu

The Transactional State as An Institution For Good

Buying property

Outsourcing

Contract for pecuniary interest?

YES

Cross-border interest?

YES

Application of primary EU law: Treaties and general principles as interpreted by the CJEU

NO

National dimension: (National law)

Choice between operators and value above EU thresholds?

The execution of a work, the supply of a product or the provision of a service?

Public contract: Directive 2004/18/EC applicable, as implemented in national law

Legend:

Insourcing: legal options; choice based on the discretionary power of public authorities

Outsourcing: legal options; national laws are applicable

Outsourcing: legal options for situations with a cross-border interest: EU primary law applicable (national law complementary);

Outsourcing: legal options on which EU primary and secondary law is applicable, as implemented in national law
Public procurement in a broad view

The Transactional State as An Institution For Good

Buying Property

Insourcing

Outsourcing

The execution of a work, the supply of a product or the provision of a service?

Public contract: Directive 2014/24/EU and 2009/81 applicable, as implemented in national law

Concession: Directive 2014/23/EU applicable, as implemented in national law

Application of primary EU - law: Treaties and general principles as interpreted by the CJEU

Choice between operators and value above EU thresholds?

Exploitation right and transfer of risks?

National dimension: (National law)

No award criteria for comparing or classifying bids?

Closed (licensing) scheme

Open (licensing) scheme

NO

Cross-border interest?

Application of primary EU - law: Treaties and general principles as interpreted by the CJEU

NO

SUBSIDY (National administrative law*)

Authorisation scheme / permits (National administrative law*)

In-house provision

Third party involvement through public law

NO

Contract for pecuniary interest?

YES

CJEU, C-97/17, Falk Pharma (2016)
CJEU, C-410/14, Tirkkonen (2018)

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CJEU, C-221/12, Belgacom (2013)

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Legend:

Insourcing: legal options; choice based on the discretionary power of public authorities; condition to apply in EU PP Directives

Outsourcing: legal options; national laws are applicable *secondary law (e.g. Services Directive) can be applicable;

Legal options on which EU primary and secondary law is applicable, as implemented in national law

EU State aid rules: not to protect individual rights but to prevent distortion; #f.m.c.;

Legal options for situations with a cross-border interest: EU primary law applicable (national law complementary); # free movement of capital (f.m.c.)

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Public procurement in a broad view
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Layered dynamic legal system.
Triggered by who? Legislator? In Courts by Individuals? By European Commission?

Top down (legislator and EC) and Bottom up (litigations in courts)

Legend:
- National legislator introduces competitive obligations
- European legislator introduces competitive obligations based on the free movement
- Demanding competitive obligations with Infringement procedures (free movement); accepted only for concession contracts
- Individuals challenge in National and European Courts competitive award based on principles and free movement (in case of insourcing without a positive result)
- National Courts recognises competitive obligations based on principles; EU only preventing market distortion perspective
Public Procurement as an Expression of the Rule of Law

Thank you for your attention!