Public Procurement Law and In-House Delivery of Public Services

IMPROVING A PARADOX

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Introduction

The theme of this book is to critically discuss the role of private actors in relation to public interests. This chapter considers a situation in which private actors may desire to safeguard public interests through the delivery of services, but are not allowed to contribute to them due to preferred governmental performance. In the Netherlands, this becomes even more relevant due to the fact that public authorities are increasingly internalizing public service delivery. This trend is stimulated by the Dutch government's policy, which strives for a compact administration combined with a diminished belief in competition, but it is also facilitated by the exemptions to public procurement law.[1] From a public procurement law perspective, public authorities can choose between *internal* or *external* performance, a discretion that allows them either to internalize its performance by carrying it out themselves, possibly in collaboration with other public authorities; or, to externalize its performance of a public service by approaching a third party.[2] The internal performance alternatives are legal exceptions to the European public procurement regime and are therefore exempted from a duty to tender, which can be compulsory without such an exemption. European law and the jurisprudence from the Court of Justice of the European Union (ECJ; the Court), thus, facilitate this freedom to choose for the internalization of service delivery (Sections 1-3).

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[1] The relationship between this governmental policy and the internalization of public services appears counter-intuitive at first sight and is discussed in more detail in Section 3.

[2] E.R. Manunza, 'Naar een consistente en doelmatige regeling van de markt voor overheidsopdrachten' [Towards Consistent and Efficient Regulation of the Public Procurement Market], *in* J.M. Hebly, E. Manunza & M. Scheltema (Eds.), *Beschouwingen naar aanleiding van het wetsvoorstel Aanbestedingswet [Reflections on the Proposal for a Public Procurement Act], Preadvies voor de Vereniging van Bouwrecht*, Instituut voor Bouwrecht, The Hague, 2010, pp. 49-123.

In this chapter, this development is contextualized by considering four Dutch sectors in which the state's decision to externalize or internalize public services – or the performance of services of general interest (SGIs) to use the more common terminology on the European level – has become paradoxical.[3] This paradox concerns a situation in which, despite the initial introduction of competition by ways of public procurement procedures, the performance of a public service is internalized by a public authority, or, is excluded by the legislature from competition. To illustrate these developments and this paradox, four sectors are considered in which this paradox occurs. Firstly, waste collection and supportive services such as IT illustrate the state's discretionary power in relation to SGI performance and the consistent application of these exemptions by Dutch courts (Sections 4.1 and 4.2). Secondly, public transport and social support show a situation in which the legislature (partially) reversed its obligatory tendering policy (Sections 4.3 and 4.4).[4]

Based on these sectorial findings, this chapter concludes that decision-making relating to public services often lacks transparency and objectivity, which influences both public authorities and private actors. For this purpose, it discusses three elements that can improve decision-making relating to this paradox and *the choice between internal or external performance*. It considers the European internal market reforms, the Dutch Public Procurement Act 2012 (PPA 2012)[5] and the US Federal Activities Inventory Reform Act of 1998 (US FAIR Act)[6] to further improve decision-making in relation to public service delivery (Sections 5 and 6).

1. The Freedom to Define and Perform SGIs

In order to fully understand this Dutch paradox, it is important to begin by discussing the freedom that EU Member States have to define SGIs. In recent years, the academic debate in Europe has focused on what SGIs are, and to

[3] The term 'state' includes the various levels of government and public authorities. 'SGI' and 'public service' are used interchangeably.

[4] In this contribution, a distinction is made between public procurement procedures and other competitive procedures. The term 'public procurement procedures' refers to the procedures laid down in the EU Public Procurement Directive 2004/18. The term 'competitive procedures' consists of other forms of competitive obligations that lie out outside the scope of this Directive. These obligations have been introduced by the case law of the ECJ. Examples are the award or distribution of service concessions and the award/distribution of limited authorization schemes.

[5] Wet van 1 november 2012, houdende nieuwe regels omtrent aanbestedingen (Aanbestedingswet 2012) [Dutch Public Procurement Act 2012], *St*. 2012, 542.

[6] Federal activities Inventory Reform Act 1998, p. 112, STAT. 2382, Public Law 105-270, 105th Congress.

which kind of services the internal market rules should apply.[7] Despite this extensive debate, the Member States have thus far kept their discretionary power to define their public interests and SGIs. This freedom also allows Member States to decide how these interests should be safeguarded and organized, and if they involve a service, by whom should that service be performed.[8] Article 106(2) Treaty on the Functioning of the European Union (TFEU) depicts this freedom, and the Protocol on Services of General Interest further complements this statement by recognizing:

> '[…] the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users; the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations; [...]'[9]

Despite this distant role of the European Union, the European Commission (Commission) has made many attempts to clarify the various forms of SGIs. The Commission considers SGIs to be 'services that public authorities of the Member States classify as being of general interest and are therefore subject to specific public service obligations'.[10] These services can be divided into two groups; non-economic and economic activities. Services of general economic interest (SGEI) are seen as economic activities which deliver outcomes that benefit the overall public good that would not, or not sufficiently enough, be supplied by the market without public intervention. Such economic activities are subject to specific European legislation and are therefore covered by the internal market rules (i.e. Lisbon Treaty, state aid, competition and public procurement rules). Social services of general interest (SSGI) also can be either economic or not and include 'social security schemes covering the main risks of life, such as those linked to health, ageing and disability, and a range of other essential social

[7] See for instance: Commission, Communication from the Commission, Services of General Interest in Europe, *OJ* 1996 C 281/3; Commission, Communication from the Commission, Services of General Interest in Europe, *OJ* 2001 C 17/4; Commission, Report to the Laeken European Council—Services of General Interest, COM (2001) 598 def, 17 October 2001; Commission, Green Paper on Services of General Interest, COM (2003) 270 final, 21 May 2003; Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Council of the Regions, White Paper on Services of General Interest, COM (2004) 374 final, 12 May 2004; COM (2007) 725 final.

[8] Wetenschappelijke Raad voor het Regeringsbeleid, 'Het borgen van publiek belang' [Safeguarding the Public Interest], *Rapporten aan de regering*, nr. 56.

[9] Consolidated version of the Treaty on the European Union, Protocol (No. 26) on services of general interest, *OJ* C 115, 9.5.2008, p. 308.

[10] The European Commission has, despite its competence derived from article 14 TFEU, not initiated strict regulation on this latter topic. Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Quality Framework for Services of General Interest in Europe', COM (2011) 900 final, p. 3.

services provided directly to the person, such as occupational training, rehabilitation and language training for immigrants'.[11]

As a consequence of these discretionary powers, Member States have the power to exempt services from the internal market rules by labeling them as a non-economic SGI.[12] Whether this decision is made at national, regional or local level depends on the division of powers in the respective Member State. In the Netherlands, it is left to the democratic processes to decide *what* kind of public interests should be safeguarded, and *how* it intends to promote these interests.[13] In addition, this process decides upon *who* should perform a certain service derived from the public interest. These questions are part of an older and broader debate on the extent of the state's responsibilities, and their relation with the market.[14] It is clear that the influence of EU law is limited to situations in which the market is approached for the delivery of SGIs.

2. The Performance of SGIs: To Internalize or Externalize?

Dutch public authorities have various ways of performing SGIs. European Public procurement law adheres to this discretionary power by providing the

[11] *Ibid*., p. 4.

[12] Judgment of 12 February 2008 in Case 289/03, *British United Provident Association Ltd, BUPA Insurance Ltd*. and *BUPA Ireland Ltd. v Commission of the European Communities (BUPA)* [2008] ECR 81 and Judgment of 22 October 2008 in Case 309/04, *TV 2/Danmark A/S* and *Others v Commission of the European Communities* [2008] ECR II-2935.

[13] Wetenschappelijke Raad voor het Regeringsbeleid, 'Het borgen van publiek belang' [Safeguarding the Public Interest], *Rapporten aan de regering*, nr. 56.

[14] Some argue that certain core activities of the state can be identified. J.W. Sap and others consider safeguarding of (internal) peace and public safety to be public tasks 'par excellence'. Defending a nation's boarders and ensuring the administration of justice, are also seen as 'undisputed' public tasks. J.W. Sap *et al.*, 'De publieke taak: een inleiding' [The Public Task: An Introduction] *in* J.W. Sap *et al*. (Eds.), *De publieke taak [The Public Task], Publikaties van de staatsrechtkring staatsrechtconferentie 7*, Kluwer, Deventer, 2002, p. 4. Hirsch Ballin advocates a wider group of primary tasks. In addition to the structure of the democratic state, namely the police, the administration of justice and defence forces, he also mentions physical infrastructure such as dykes, roads and bridges, and care for cultural infrastructure, such as education. E.M.H. Hirsch Ballin, 'Risico's van een vrome leer' [Risks of the Pious Doctrine] *in* E.M.H. Hirsch Ballin (Ed.), *In ernst. Oriëntaties voor beleid [Orientations for Policy]*, Sdu Juridische & Fiscale Uitgeverij, The Hague, 1994, p. 70. In De Ru's view, primary tasks are tasks that are directly linked to the structure of the state. If the state would have no responsibility for the defence forces, the police, law making and the administration of justice, the state itself would not exist. Thus, these core activities are essential for *a state to be a state*. In addition to primary activities, secondary state activities are activities that are decided upon through democratic decision-making. B.P. Vermeulen, 'De publieke taak: een veel-zijdig begrip' [The public task: a many-sided concept] *in* J.W. Sap *et al*. (Eds.), *De publieke taak [The Public Task], Publikaties van de staatsrechtkring staatsrechtconferentie 7*, Kluwer, Deventer, 2002, p. 24. These approaches are questioned by A. Hallo de Wolf who states that many allegedly 'core' public services have in the past been carried out by private actors and are still carried out by these entities, such as the use of force by private security agencies. A. Hallo de Wolf, *Reconciling Privatization with Human Rights*, Intersentia, Antwerp, 2011, p. 457.

legal basis for these alternative performance options. In recent years, many of these exemptions to public procurement law have been developed by the ECJ. The following provides a brief overview of these alternatives.

1. *In-house performance:* a public authority decides to perform a service by using its own resources, which is thus completely 'internal'.[15] This means, for instance, that it uses one of its own divisions to collect waste.

2. *Quasi in-house performance:* a public authority can entrust the performance of a service to an entity over which it exercises control similar to its own departments, and that entity carries out the essential part of its activities for the controlling public authority or authorities.[16] In the Netherlands, this can be done on the basis either of private law (e.g. a Dutch *B.V.*, *Cooperatie* or *Stichting*[17]) or public law (e.g. a Dutch *Openbaar Lichaam*,[18] provided by the Dutch Inter-municipal Statutory Regulations Act).[19]

3. *Inter-municipal collaboration:* a public authority can arrange the performance of a SGI by cooperating with other public authorities completely within the public domain. Such performance is exempted from public procurement law based on the criteria derived from the *Stadtreinigung Hamburg* jurisprudence.[20]

4. *Exclusive right*: a public authority chooses to grant another public authority an exclusive right, after which that entity decides on questions of performance. Such a right can, for instance, be granted through a Ministerial Regulation, a local bylaw regulation or is included in the statutory documents of a separate entity.[21]

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[15] The entity is part of its own authority structure. E.R. Manunza & W.J Berends, 'Social Services of General Interest and the EU Public Procurement Rules', *in* U. Neergaard *et al.* (Eds.), *Social Services of General Interest in the EU, Legal Issues of Services of General Interest*, T.M.C. Asser Press, The Hague, 2011, p. 365.

[16] Judgment of 18 November 1999 in Case 107/9, *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia (Teckal)* [1999] ECR I-8121; Judgment of 13 November 2008 in Case 324/07, *Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale (Coditel)* [2008] ECR I-8457; Judgment of 19 April 2007 in Case 295/05, *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado (Tragsa)* [2007] ECR I-2999.

[17] A limited liability company, a cooperative and a foundation hold similar characteristics as these Dutch legal entities.

[18] A public form in which public-public collaboration can take place on a municipal level.

[19] Wet Gemeenschappelijke Regelingen [Intermunicipal Statutory Regulation Act], *Stb*. 1984, 669; see also, Judgment of 9 June 2009 in Case 480/06, *Commission of the European Communities v Federal Republic of Germany (Landkreise)*; Judgment of 29 November 2012 in Joined Cases C-182/11 and C-183/11, *Econord SpA v Comune di Cagno and Comune di Varese and Comune di Solbiate and Comune di Varese (ASL di Lecce)* [2012], not yet published.

[20] Judgment of 9 June 2009 in Case 480/06, *Commission of the European Communities v Federal Republic of Germany* (*Landkreise*) [2009] ECR 4747.

[21] Article 18 Directive 2004/18/EC, *OJ* L 134, 30.4.2004.

5. *Concession:* a public authority can grant a concession for the performance of a service, which is common in the field of public transport or the exploitation of parking garages.[22]

6. *Public contract:* a public authority decides to completely externalize a service to a third party. To achieve the best quality-lowest price ratio, such externalization is often done by granting a contract via a transparent and competitive procedure.

Consequently, public authorities have multiple alternatives to internalize or externalize the delivery of SGIs.[23] This variety of legal alternatives is not problematic as such given that Member States and their public authorities should be able to perform a service themselves in certain policy fields. On the one hand, certain functions, such as the administration of justice or democratic decision-making, may not be externalized. While on the other hand, certain functions such as building maintenance and food services can. More troublesome is to identify the status of services, which are not as 'black and white' as the previous examples. This grey area, which includes healthcare, public transport and the collection of waste, is where decisions on public service delivery causes difficulties, often because of their relation with public interests. In relation to these services, good decision-making is even more important to achieve the best outcome for society.

3. Explaining Internalization of SGI Performance

As stated before, internal performance of services, and especially public-public collaboration, has gained importance in recent times.[24] In the Netherlands, an increase of collaborations between (local) public authorities has occurred, which

[22] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, *OJ* L 94, 28/03/2014, pp. 1-64. See Judgment of the Court of 7 December 2000 in Case 324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG* [2000] ECR 10745.

[23] The Dutch *Wet Markt en Overheid* [Market and Government Act] leaves these options untouched, because it exempts services of general interest. Wijzigingswet Mededingingswet (invoering regels ondernemingen die deel uitmaken van een publiekrechtelijke rechtspersoon of hiermee zijn verbonden), *Stb*. 2010, 208.

[24] See for instance: Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation'), Brussels, 4.10.2011 SEC(2011) 1169 final and Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP), Brussels 2008/C 91/02.

consists of 698 collaborations based on public law, and 1022 collaborations based on private law.[25]

These collaborations within the public domain can, first of all, be explained by a leading vision document of the former Dutch government, which is still being implemented. It demonstrates the thoughts of former Dutch minister, Piet Hein Donner, who advocated a 'compact' government. The role of 'compact' refers to a strong and small government, which is able to swiftly respond to changing circumstances. It focuses on more efficiency and lower administrative burdens by intensifying collaboration amongst public authorities, and not necessarily on, which seems to be a logical consequence of this policy, a more substantial role for private actors.[26] This desire for more collaboration can be explained by the need to spend public funds efficiently. More collaboration amongst public authorities for efficiency gains becomes even more relevant in times of financial crisis.[27] Additionally, the Treaty of Lisbon has increased the role of regional and local self-governance, which enforces this development.[28]

Secondly, a focus on public collaboration and internalization of SGI performance in general is influenced by the current views on the public and private divide. It is fair to say that Member States have become more critical in relation to the role of the market as a performer of SGIs and often only rely on them if the benefits of such performance are clearly present. Introducing competition into markets, for example, is not as commonly accepted, as was the case in the 80s-90s. In those times, liberalization and privatization were introduced in various areas, and public procurement procedures were often introduced if public authorities were to decide to externalize services.[29] Monti described the current situation as 'market fatigue', which represents a loss in confidence in the market and has thus led to lower acceptance of the market and the actors involved.[30] This is, to some extent, caused by the fact that the limi-

[25] Ministerie van Binnenlandse Zaken en Koninkrijksrelaties [Ministery of the Interior and Kingdom Relations], Visiedocument 'Bestuur en bestuurlijke inrichting: tegenstellingen met elkaar verbinden' [Vision document 'Administration and Administrative Design: Connecting Opposites'], 10 October 2011, p. 5.

[26] *Ibid*., p. 5.

[27] Comptabiliteitswet 2001 [Government Accounts Act 2001], *Stb*. 2001, 413.

[28] Article 4 TFEU. See Manunza, *supra* n. 2, p. 76.

[29] Wetenschappelijke Raad voor het Regeringsbeleid, 'Het borgen van publiek belang' [Safeguarding the Public Interest], *Rapporten aan de regering*, nr. 56. Parl. Docs. 2012-2013, C, B, 'Verbinding verbroken? Onderzoek naar de parlementaire besluitvorming over de privatisering en verzelfstandiging van overheidsdiensten' [Connection lost? Research on the Parliamentary Decision-Making Process Relating to Privatizing Governmental Services].

[30] The combination of market fatigue with 'integration fatigue' is considered detrimental for the functioning of the internal market. See, M. Monti, 'A New Strategy for the Single Market; at the Service of Europe's Economy and Society', *Report to the President of the European Commission José Manuel Barroso*, 9 May 2010, p. 12 (Monti Report).

tations of the market, and the services it can provide, have become more visible.[31] In this regard, Monti stated that those who propose, instead of oppose, are forced to defend their views on the liberalization of markets and the introduction of more competition.[32] Such views enhance the idea that government performance is vital in order to safeguard public interests and limits the possibility of private actors to contribute to public interests.

4. Paradoxical Performance Internalization in Four Dutch Markets

The internalization of SGI performance, which has been described in previous paragraphs, and the loss of confidence in market performance which often accompanies it, can be exemplified by assessing the waste collection, supportive services, public transport and social support market. Public procurement law's exemptions play an important role in these markets. Waste collection and supportive services, such as IT, exemplify the government's discretionary power in relation to SGI performance, and the consistent application of these exemptions by Dutch courts. The cases of the public transport and social support consider situations in which the legislature (partially) reversed its tendering policy, after which internal performance can gain importance again. These situations can also be seen as an example of Monti's 'market fatigue'.

4.1. The Waste Sector: Courts Uphold Internal Performance Exemptions

In the Netherlands, municipalities have been granted the responsibility to perform the collection of household waste.[33] In order to fulfill this duty, municipalities have, as previously described, various performance alternatives. In the last decade, the Dutch government has attempted to introduce, or further expand, competition in the waste management sector. It aimed at full liberalization of this market by 2050.[34] The introduction of more competition is desired in order to maximize the positive effects for the environment at the lowest cost.[35] The 'Classic Directive' on public procurement law facilitates such a goal by placing this sector under its scope.[36] Despite the fact that a greater part

[31] For instance, see Parl. Docs. 2012-2013, C, B, 'Verbinding verbroken? Onderzoek naar de parlementaire besluitvorming over de privatisering en verzelfstandiging van overheidsdiensten' [Connection Lost? Research on the Parliamentary Decision-Making Process Relating to Privatizing Governmental Services] pp. 27-40.
[32] Monti Report, *supra* n. 30, p. 24.
[33] Article 10.21(1) Wet Milieubeheer [Environmental Protection Act], *Stb*. 1979, 442.
[34] VROM-rapport, Toekomstig afvalbeleid: Een eerste stap naar een nieuwe lange termijnvisie voor het afval beleid [Future Waste Policy: A First Step towards a Long-Term Vision for Waste Policy], The Hague, 2003, p. 5
[35] F.J. van Ommeren & J. Vermont, 'Uit- aan- en inbesteden in het publiek- en privaatrecht?' [In- and Externalizing in Public- and Private Law?], *De Gemeentestem*, No. 7266, 2007, p. 1.
[36] Directive 2004/18/EC, *OJ* L 134, 30.4.2004.

of the market is now in the hands of third parties, it can be argued that in recent years public authorities have limited their contribution to this liberalization.[37] The collection of waste is historically performed by using the recourses of public authorities, which in 2007 accounted for 25% of all cases. It is performed in alternative ways in 75% of the Dutch municipalities. From this part, 35% of these municipalities leave performance up to market parties.[38] The remainder is performed through a collaboration of public authorities. More recent studies suggest a similar situation in other European Member States.[39] Internal performance is, thus, substantially present in the waste collection market, which is intended to be entirely liberalized.

Market parties in this sector have not hesitated to file court proceedings against these internal performance alternatives by claiming that these contracts should have been tendered under European public procurement law. Two cases before Dutch courts illustrate such actions. In the first case, *AVR/Westland*, the High Court confirmed the Court of Appeal's ruling by granting the municipality of The Hague permission to join in the public collaboration of local public authorities. This entity, called 'HVC', was established to collect and dispose of household waste.[40] In the years before this, appellant *AVR* had been contracted for the waste disposal via a public procurement procedure. After the expiry of the contract, the government was allowed to not externalize performance, based on the exclusive right exception.[41] The second case involved a situation whereby the public authority of Friesland contracted *Afvalsturing Friesland N.V.* for their waste collection and disposal services. This local government was exempted from using a public procurement procedure for a different reason as it could rightfully rely on the in-house exception.[42] This in-house exception also led to proceedings before the Court of 's-Hertogenbosch, which rejected the claims of appellant *Shanks*, relying on the fact that this exception was no longer rightful due to a substantial change in supervision of *Attero-Zuid*.[43] Shanks was unable

[37] Manunza, *supra* n. 2, p. 113.
[38] Van Ommeren, *supra* n. 35, p. 2. Recent data confirms these statistics. See *Jaarboek Afval! Editie 2013 [Yearbook Waste! Edition 2013]*, Uitgeverij Noordhoek, 2013, Para. 3.2.
[39] R. Hulst & A. van Montfort, 'The Netherlands: Cooperation as the Only Viable Strategy', *in* R. Hulst & A. van Montfort (Eds.), *Inter-municipal cooperation in Europe*, Springer, Dordrecht, 2007, pp. 139-168; and E. Dijkgraaf & R. Radius, *The Waste Market: Institutional developments in Europe*, Springer, Dordrecht, 2008.
[40] Hof 's-Gravenhage, 15 December 2009, ECLI:NL:GHSGRL2009:BK6928.
[41] Article 18 Directive 2004/18/EC, which is implemented by Article 18 Besluit van 16 juli 2005, houdende regels betreffende de procedures voor het gunnen van overheidsopdrachten voor werken, leveringen en diensten (Bao) *Stb*. 2005, 408.
[42] Hof Arnhem-Leeuwarden, 9 September 2013, ECLI:NL:GHARL:2013:6675.
[43] Attero-Zuid was established solely for the purpose of collecting and disposing waste in a specific region.

to sufficiently prove this, which resulted in this collaboration between municipalities being allowed to continue.[44]

Despite intended liberalization, many municipalities in previous cases chose to perform the collection of waste entirely within the public domain. Market parties tried, but were unsuccessful in their attempt, to break open these internal performance structures, because the Dutch courts have been consistent in their assessment of these legal exemptions to public procurement law. It also shows that due to the legal alternatives similar services are performed in different ways.

4.2. Supportive Services: Internal Performance Outside the Public Interest

Services that *support* the performance of SGIs, such as IT, can also be performed entirely within the public domain. Briefly noting them is thus justified in this context. In addition to IT, transport, graphic design, and educational services that support the functioning of the state, are also increasingly internalized and are thus also part of the public debate.[45] From a public procurement law point of view, the legality of such a legal construction was confirmed by the Court of Utrecht in relation to IT.[46] In this case, Amsterdam, Rotterdam, The Hague and Utrecht were able to rely on the quasi in-house exemption. This allowed them to continue their collaboration in the form of 'Wigo4it', because it met the criteria of being 'closely connected' and had proper 'supervision'. For that reason, the application of public procurement law exemptions must be seen in a broader sense. Services, in and outside, the public interest can be exempted from public procurement obligations.[47]

4.3. Public Transport: Inconsistent Obligatory Tendering

The case of public transport exemplifies a partial drawback of competition. Public transport is regulated through concessions as opposed to public contracts. These concessions grant a party the right to perform a mode of public transport for a specific route. Service concessions fall outside the scope of EU public procurement law, but their award or distribution is nonetheless subject to principles of transparency and equality.[48] A competitive tendering procedure is

[44] Rb. 's-Hertogenbosch, 24 October 2012, ECLI:NL:RBSHE:2012:BY1110.

[45] R. de Lange, 'Bedrijfsleven boos over valse concurrentie door bijklussende overheid' [Businessworld Angry about False Competition of Double Dipping Government], *Het Financieele Dagblad*, 4 April 2013, pp. 1-3.

[46] Rb. Utrecht, 14 January 2009, ECLI:NL:RBUTR:2009:BG9524.

[47] Defining the scope of the public interest, and its implications is an onerous and difficult task. This contribution does not consider it as such, but does recognize its importance. See Wetenschappelijke Raad voor het Regeringsbeleid, 'Het borgen van publiek belang' [Safeguarding the Public Interest], *Rapporten aan de regering*, nr. 56.

[48] On 15 January 2014, the European Parliament cast its vote on a New Directive regulating service concessions. Upon publication, Member States have two years to implement this Directive. See:

thus required, which differs from a public procurement procedure.[49] Such competition allows third parties, as a rule of thumb, to compete for public transport concessions in the Netherlands.

The Dutch regulatory framework of this sector consists of the Passenger Transport Act 2000 (PTA), which was introduced to stimulate the use of public transport and to efficiently utilize public funds.[50] In addition, the European PSO-regulation is in place and provides guidance on how decentralized governments ensure the quantity, quality and safety of public transport for a reasonable price. The Dutch Public Transport Decree 2000 further explicates the obligations of such a competitive procedure.[51] Under the PSO-regulation, local governments are still allowed to apply the in-house exemption to national public procurement rules.[52] However, whilst reforming the PTA in 2010, the legislature decided that local public authorities in the Netherlands will be not be able to apply this exemption. Hence, public transport concessions had to be distributed by using a transparent and objective competitive procedure, and internalization was excluded as a performance alternative.

Despite these reforms, another amendment of the PTA was passed by the Dutch parliament in October 2012.[53] This amendment exempted the four major cities in the Netherlands (Amsterdam, The Hague, Utrecht and Rotterdam) from the obligation to follow a competitive procedure whilst distributing public transport concessions. The discussion in the Dutch Senate clarified that it was intended to provide freedom of choice and local autonomy.[54] This amendment that allows these cities to apply the in-house exception, has led to the fact that state owned companies, such as HTM in The Hague, RET in Rotterdam, GVB in Amsterdam

Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts ('Concessions' Directive) (First reading), 2011/0437 (COD), Brussel 12 July 2013. Previous case law consisted of: Judgment of 7 December 2000 in Case 324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG (Telaustria)* [2000] ECR I-10745, Judgment of 18 July 2007 in Case 231/03, *Consorzi Aziende Metano v Comune di Cingia de' Botti (Coname)* [2007] ECR I-060373 and Judgment of October 2005 in Case *458/03, Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG (Parking Brixen)* [2005] ECR I-08585.

[49] See *cit. op. supra* n. 5.

[50] Wet Personenvervoer 2000 [Public Transport Act 2000], *Stb*. 2000, 314.

[51] Besluit van 14 december 2000, houdende vaststelling van een algemene maatregel van bestuur ter uitvoering van de Wet personenvervoer 2000 (Bp 2000) [Public Transport Decree 2000], *Stb*. 2000, 563.

[52] Regulation (EC) No. 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road, and repealing Council Regulations (EEC) No. 1191/69 and (EEC) No. 1107/70.

[53] Wet van 5 november 2012 tot wijziging van de Wet personenvervoer 2000 teneinde inbesteding van openbaar vervoer mogelijk te maken in een plusregio die de gemeente Amsterdam, 's-Gravenhage, Rotterdam of Utrecht omvat (Wet aanbestedingsvrijheid OV grote steden) [Act Altering the Public Transport Act 2000 to Allow Public Transport Internalization of Amsterdam, The Hague, Rotterdam and Utrecht], *Stb*. 2012, 556.

[54] *Parliamentary Papers II* 2011/12, 32 845, No. 3.

and GVU in Utrecht, can often continue to operate their services without being influenced by competition. In this regard, it is of interest to consider that the utilization of these concessions is often not economically viable and market parties are compensated by the government. Despite this exemption, the milestone ruling of *Altmark* in which the Court ruled that subsidies granted to an undertaking providing public transport can be identified as state aid if the price is not the result of a competitive procedure or if the *Altmark* criteria are fulfilled, is still applicable.[55] An extensive analysis of this situation goes beyond the scope of this contribution, but it does show that state aid rules must nonetheless be complied with. To conclude, this change of legislation in the Netherlands has led to inconsistent obligatory tendering, to say the least, and exemplifies a call from the major cities to keep a broad discretionary power while deciding upon public service delivery.

4.4. Social Support: Obligatory Tendering Pulled Back Entirely

In relation to the healthcare market, a similar situation occurred regarding the performance of the Social Support Act.[56] This Act incorporates a compensation duty, which means that local authorities have to compensate citizens for the provision of equipment or services in various areas related to the consequences of their impairments. Examples of possible compensation are, 'assistance with running a household' and 'means of transportation'. The Act obliges local governments to externalize the performance of these services via public procurement procedures.[57] It is important to note that such a duty to tender is derived from EU public procurement law, which identifies two types of services: IIA and IIB services.[58] For IIA services, a strict public procurement regime applies, and for the second, no specific duty to use public procurement procedures exists. The Dutch government stated that assistance with running a household was to be predominantly classified as 'cleaning services', which led to a classification under IIA-services. Others claimed the contrary, that it should have been classified as an IIB-service.

[55] Judgment of 24 July 2003 in Case *280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH (Altmark)* [2003] ECR I-07747. E.R. Manunza, 'Enkele problemen bij de toepassing van het Europees aanbestedingsrecht in de Nederlandse (rechts)praktijk' [Some Issues with Applying European Public Procurement Law in the Dutch Jurisdisction], *SEW*, 2004, p. 72.

[56] Wet van 29 juni 2006, houdende nieuwe regels betreffende maatschappelijke ondersteuning [Social Support Act], *Stb*. 2006, 351.

[57] Article 10 Social Support Act.

[58] The lists of services are provided by Annex IIA (advertising services, computer and related services, financial services etc.) and IIB (legal services, health and social services etc.) of Directive 2004/18/EC.

In 2010, the Dutch parliament adopted three proposals to change the Social Support Act.[59] The most important amendment abolished the duty for municipalities to use public procurement procedures. As a consequence, assistance with running a household is now classified as an IIB-service. The legality of this amendment can be questioned in light of European law. In this regard, the Commission responded to questions posed by the Dutch government and stated that most of these services should be performed by market parties after the use of public procurement procedures.[60]

In the overall assessment of this sector, it is of importance to consider whether the healthcare market in general, and this sector in specific, can benefit from competition. The need to safeguard the basic principles of this market, namely quality, accessibility and affordability, ensures continuous attention for this topic.[61] The vehement discussions in the European Council and Parliament involving the reforms of the Public Procurement Directives exemplify this. It is clear that the healthcare market is a special market, whereby the clash of safeguarding public interests and competition is very much present.[62] Such a debate appears to be less clear for contractible cleaning services, which appear to benefit from competition.

5. Towards a New approach for SGI Delivery Decisions

As stated before, the public debate in relation to competition and the Dutch government's compact government policy influences the decision to externalize or internalize the performance of SGIs.[63] Despite the possible advantages of external performance, public authorities and the legislature have discretionary power to decide upon such performance questions and can go against initial or intended liberalization. The previously described markets have shown that the relation between public procurement law and public service delivery is affected

[59] Wijziging van de i.v.m. de kwaliteit van de huishoudelijke verzorging, de kwaliteit van de maatschappelijke ondersteuning en i.v.m bekostiging van het gemeentelijk beleid [Alteration of the Social Support Act], *Stb*. 2012, 310.

[60] *Parliamentary Papers II* 2009/10, 31 353, No. 10.

[61] See for instance: UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4.

[62] M. Canoy, 'Marktwerking in de zorg; ondernemende zorg of zorgende ondernemers?' [Competition in the Healthcare Sector; Entrepreneurial Care of Caring Entrepreneurs?], Inaugural lecture University of Tilburg, 6 February 2009.

[63] Manunza & Berends, *supra* n. 15, p. 377: B. Baarsma, 'Moeilijke marktwerking en meedogenloze mededinging; een welvaartseconomisch perspectief' [Free Market Difficulties and Ruthless Competition: a Welfare Economics Approach], Inaugural lecture University of Amsterdam, 12 February 2010, p. 8.

and makes a new approach to the public procurement framework worth considering.

In response to these developments, it has been suggested to introduce a transparent and objective legal framework that governs this 'internal vs. external' decision.[64] The introduction of such a test can result in an improved provision of public services, as it answers the question of *who is most suitable to perform a service* instead of relying on classifications of services as SGI and SGEI. Manunza suggested to take an approach in which 'social welfare' is the key criterion to analyze whether the market or the government should perform an SGI.[65] Sanchez adds to such considerations that the legal dimension of public procurement law is often not aligned with the economic restrictive approach 'towards public make-or-buy decisions'.[66] A thorough discussion relating to the scope and content of this framework lies beyond the scope of this contribution.[67] The following aims to consider institutional elements that could benefit such an approach on a national or EU level.[68] For this purpose, the internal market reforms, the Dutch PPA 2012 and the US FAIR Act can contribute to constructing an more transparent and efficient framework for public procurement whilst deciding upon public service delivery.

5.1. Internal Market Reforms = Internal Performance Reforms?

The internal market, based on principles that aim to open up Europe by removing internal barriers and enforcing cross-border competition, finds itself at a turning point and is currently being restructured and reformed. For the purpose of this contribution, it is important to describe the relevant recent European developments, because internal performance alternatives as exemptions to public procurement law are also under scrutiny.

Monti initiated these reforms via his report 'A New Strategy for the Single Market' (Monti report), which strived to initiate a re-claiming process of the internal market; a new start. The Monti report identified the internal market's achievements, but mostly notes its future challenges, and subsequently proposed

[64] Manunza, *supra* n. 2, p. 115.
[65] Manunza, *supra* n. 2, p. 117; Baarsma, *supra* n. 63, p. 10.
[66] A. Sánchez Graells, *Public Procurement and the EU Competition Rules*, Hart Publishing, Oxford, 2011, p. 232.
[67] For this purpose, it is also of interest to consider the Impact assessment of the Commission, the Dutch *Maatschappelijke kosten-batenanalyse* [Cost-Benefit Analyses] and the *Markteffectentoets* [Market Effect-Test] in this respect. See Sociaal economisch raad, 'Overheid én markt: Het resultaat telt! Voorbereiding bepalend voor succes' [Government ánd Market: The Result Counts! Preparation Decisive for Success], Advies nr. 1 - March 2010.
[68] M. Krajewski, 'Providing Legal Clarity and Securing Policy Space for Public Services through a Legal Framework for Services of General Economic Interest: Squaring the Circle?', *European Public Law*, Vol. 14, No. 3, Kluwer, 2008, pp. 377-397.

possible actions in numerous areas of the European Union, such as the free movement principles, public procurement, SSGIs, regional and industrial policy, and coordination of taxation policies. The report identifies that these areas are the 'building blocks for reconciliation between the single market and the social and citizens' dimension in the Treaty logic of a highly competitive social market economy'.[69] Monti's opening statement, in relation to the internal market, is strikingly clear by claiming that it is less popular than ever, but, at the same time, more needed than ever.[70]

In his search for solutions, public procurement finds itself in the spotlight of Monti's report. The vision brought forward by Monti in relation to public procurement clearly shows its importance; 'EU public procurement law plays a key role in the creation and maintenance of the single market.'[71] This statement is underpinned by a twofold reasoning. Firstly, the procurement of goods, works and services by public authorities, make up 17-18% of the European GDP. All public procurement in Europe amounted to approximately 2155 billion Euro in 2008, out of which 389 billion Euro fell under the ambit of the EU Directives on public procurement. Hence, there is a powerful economic drive that goes hand in hand with public procurement. Secondly, it stimulates and allows suppliers and service providers to compete in all Member States, which only enhances the strength of the internal market.[72]

The Monti report proposes a number of recommendations to reclaim the internal market. Firstly, it proposes to simplify public procurement policy and to make it more effective and less onerous for the authorities involved. In this respect, it notes the need to clarify the rules applicable to 'in-house' procurement and to make public procurement more accessible for SME's. Secondly, Monti expresses the idea of putting public procurement to work for innovation, green growth and social inclusion. Since its publication, the Monti report has been a catalyst of change and many initiatives to 'reclaim' the internal market have unfolded. Following these European developments, new proposals for Directives on public procurement have been published.[73] On the one hand, these Directives intend to increase the efficiency of public spending to ensure the best possible procurement outcome in terms of value for money. The Commission claims that this is best achieved by modernizing the existing public procurement

[69] Monti Report, p. 68.
[70] *Ibid*., p. 12.
[71] *Ibid*., p. 76.
[72] *Ibid.*, pp. 76-78.
[73] Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors COM(2011) 895 final, 20.12.2011, Proposal for Directive 896, 20.12.2011 and Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts COM(2011) 897 final, 20.12.2011.

rules. This modernization aims to simplify rules and to provide further flexibility in applying these rules. On the other hand, it enables public authorities to put public procurement to better use and to thus achieve societal goals such as, the protection of the environment, stimulation of innovation and the betterment of social inclusion.[74]

Following the example of Monti, the Commission also chose to include rules in relation to in-house and public collaboration exemptions.[75] The new Directives have been published in April 2014 and still include these exemptions after the European regulatory process.[76] Such rules predominantly codify the existing exemptions based on case law of the ECJ. The codification itself exemplifies the importance of these exemptions to public procurement law.[77] Article 12 of the recently adopted Classic Directive codifies the jurisprudence line of *Teckal* and *Commission/Hamburg*, but restrained itself from going the extra mile and clarifying them further.[78] It did clarify the percentage of commercial activities that a separate – *Teckal*-like – entity is allowed to perform, which is set at 20%.[79] Also, contracts awarded to a controlling 'mother' entity or a controlled 'sister' entity are included in this doctrine.[80] The new Directive also confirms that collaboration between public authorities does not necessarily have to involve services derived from the public interest, also supportive services can be included. Its scope seems to have been broadened extensively by allowing private capital under certain circumstances.[81] In addition, the Commission's initiative to abolish the exclusive right exemption was taken out on initiative of the Council, leaving a commonly used exemption in place.[82] No further guid-

[74] Explanatory Memorandum, Proposal for Directive 896, p. 2.

[75] On 15 Januari 2014, the European Parliament cast its vote on the renewed Directive regulating public contracts. Upon publication, Member States have two years to implement this Directive. Article 11 Proposal for a Directive of the European Parliament and of the Council on public procurement (Classical Directive) (First reading), 2011/0438 (COD) Brussels, 12 July 2013.

[76] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, *OJ* L 94, 28/03/2014, pp. 65-242. Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, *OJ* L 94, 28/03/2014, pp. 243-374. Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, *OJ* L 94, 28/03/2014, pp. 1-64.

[77] E.R. Manunza & R.G.T. Bleeker, 'De invloed van het Europees recht op het Nederlandse aanbestedingsrecht' [The Influence of European Law on Dutch Public Procurement Law], *in* A. Hartkamp, *et al*. (Eds.), *De invloed van het Europese recht op het Nederlandse privaatrecht [The Influence of European Law on Dutch Private Law]*, Kluwer, Deventer, 2014, pp. 543-600.

[78] Institutional (*Teckal*) and non-institutional collaboration, previously mentioned as an exemption to public procurement law, have thus transformed into EU secondary law.

[79] The Directive sets a larger percentage (80%) than the initial proposal of the Commission (90%) in December 2011.

[80] Article 12(2) Directive 2014/24/EU.

[81] Article 12(1c) and (2c) 2014/24/EU.

[82] Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on public procurement: Presidency compromise text, 2011/0438 (COD).

ance is provided on what can be identified as SGIs or their relation with public procurement law. Therefore, a standard European approach to this subject will also remain absent in the future.[83]

5.2. Dutch PPA 2012: Motivating Public Procurement Choices

Due to the lack of European improvement on this matter, the following considers the importance of the Dutch Public Procurement Act 2012 (PPA 2012), which has introduced a further emphasis on motivating procurement choices for contracting authorities. This can be necessary in the call for tenders, the relevant documents or the proposed contract.[84] However, two choices made *before* the start of a procedure can also possibly impact the need to motivate the decision to internalize or externalize performance.

According to Article 1.4 PPA 2012, contracting authorities must base the choice for the type of procedure, and the choice for tenderers or candidates in this procedure on objective criteria.[85] Such a motivation must be provided by the contracting authority upon the request of undertakings.[86] This *duty to motivate* has the potential to improve the choice between internal or external performance, because it could force contracting authorities to examine which performance alternative is most suitable for the performance of their public tasks. In addition, Article 1.4 PPA 2012 proposes to improve the decision-making process of contracting authorities by focussing on the 'societal value' of tenders.[87] Societal value is described as the proper allocation and possible saving of public funds in an economic sense.[88] It is unclear what the exact meaning of this term is. The Dutch term 'maatschappelijk' indicates a 'social' notion in the Dutch language. However, the achievement of societal goals, such as social inclusion and sustainability, are seemingly not necessarily intended by this Article. If a market party would decide to contest the internal performance of a service before a Dutch court in the future, the assessment of the court may be different than the cases previously described in which the courts upheld internal performance arrangements. Hence, due to this duty to motivate, not only legal considerations, but also economic considerations can potentially play a role in the court's assessment. As a result, private actors can gain insight into considerations on which decisions relating to public service delivery are made

[83] Preamble No. 11 Proposal for Directive 896.
[84] Article 1.5 PPA 2012.
[85] Article 1.4 PPA 2012.
[86] Article 1.4 a and b PPA 2012.
[87] In Dutch: Maatschappelijke waarde. The notion of 'societal value' was introduced by an Amendment of MP Koppejan. *Parliamentary Papers II* 2010/11, 32 440, No. 46. See W.A. Janssen, 'Maatschappelijk Verantwoord Aanbesteden' [Societally Responsible Public Procurement], *Tijdschrift Aanbestedingsrecht*, 2012, pp. 7-17.
[88] *Parliamentary Papers II* 2010/11, 32 440, No. 46.

and public authorities are, in return, forced to make professional procurement decisions.

The introduction of the *Commissie van Aanbestedingsexperts* ('Committee of Public Procurement Experts') can in the future play a role in the adoption of interpretations relating to Article 1.4 PPA 2012.[89] Even though their advice is not binding, the Committee aims to provide an alternative to costly litigation by providing advice and mediation for disputes between contracting authorities and applicants. Because the Committee consists of lawyers and economists, their advice might contain a more economic approach instead of a purely legal perspective.

5.3. US FAIR Act: Transparency and Economic Elements

In addition to this duty to motivate public procurement choices, regulation from the United States can prove to be an inspiring example.[90] In the U.S., a different approach is taken by which the decision to externalize or internalize on a federal level is extensively regulated by the US FAIR Act. It is best described as a, *'may the best man win'* approach. It introduces the obligation to publish a list of all federal governmental activities.[91] This list divides services into 'inherently governmental functions' or 'commercial services'. Inherently governmental functions are those functions that are so intimately related to the public interest that they mandate performance by government employees.[92] As a rule, these functions are performed by government officials and the performance of commercial services is externalized. This categorization is naturally influenced by the constitutional and legal culture of the United States. However, its framework approach, which includes the right to object and appeal, can still be of interest for EU Member States.

The inherently governmental functions, according to the U.S. FAIR Act, fall into two categories. The first being the act of governing, i.e. the discretionary exercise of government authority; and the second being monetary transactions and entitlements.[93] In general, agencies have considerable discretion in determining whether particular functions are inherently governmental. Factors that should at least play a role in this analysis are listed as well. These factors contribute to the decision of governmental agencies to claim a function as

[89] Besluit van de Minister van Economische Zaken van 4 maart 2013, nr. WJZ / 3008668, tot instelling van de Commissie van Aanbestedingsexperts [Committee of Public Procurement Experts Decree] See: <http://www.commissievanaanbestedingsexperts.nl>.
[90] Manunza, *supra* n. 2, pp. 116-118.
[91] US FAIR Act Section 2: Annual lists of government activities not inherently governmental in nature (a).
[92] US FAIR Act Section 5: Definitions (2) (A).
[93] US FAIR Act Section 5: Definitions (2) (B).

'inherently governmental'. They include, amongst other things; if an activity is already performed on the market, the degree to which official discretion would be limited and if a statutory restriction that defines an activity as inherently governmental is in place. Federal agencies are also required by law to give 'special consideration' to the performance of functions 'closely associated with the performance of inherently governmental functions'. However, they are not prohibited from contracting out such functions.

If a service is considered to be of commercial nature, a streamlined or standard competitive procedure must be followed.[94] In the streamlined competitive procedure, the governmental agency calculates, compares and certifies costs based on the scope and requirements of the activity, in order to determine whether government agency performance or private sector performance is most efficient and suitable.[95] In the standard competition process, tenderers compete against one another based on objective and transparent criteria such as, a demonstrated understanding of the government's requirements, costs, technical approach, management capabilities or personnel qualifications.[96] Interestingly, the government agency itself can also submit a tender, which truly allows for comparison of public and private performing actors.[97]

Challenge and review processes are also in place to give the market a role in this decision-making process.[98] 'Interested parties' are, according to Section 3 of the Act, allowed to submit a challenge of an omission of a particular activity, or an inclusion of a particular activity on the published list. The scope of this article is broad as it allows private parties and unions to object to the classification of the list.[99] Such procedures can be of interest to the waste sector previously described, as it allows private actors to join the decision-making process of the respective governments.

[94] US FAIR Act Section 2: Annual lists of government activities not inherently governmental in nature (d).
[95] Circular No. A-76 Attachment B. Public-private competition, C. Streamlined competition procedures.
[96] Circular No. A-76 Attachment B. Public-private competition, D. Standard competition procedures.
[97] Circular No. A-76 Attachment B. Public-private competition, A. Preliminary planning 8.a.
[98] US FAIR Act, Section 3: Challenges to the list.
[99] An interested party is defined in Sec. 3 Challenges to the list (b) as (1) A private sector source that: (a) is an actual or prospective offeror for any contract, or other form of agreement, to perform the activity; and (b) has a direct economic interest in performing the activity that would be adversely affected by a determination not to procure the performance of the activity from a private sector source. (2) A representative of any business or professional association that includes within its membership private sector sources referred to in Paragraph (1). (3) An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity. (4) The head of any labor organization referred to in Section 7103(a)(4) of Title 5, United States Code, that includes within its membership officers or employees of an organization referred to in Paragraph (3).

6. Concluding Remarks and Stabilizing the Balance

To conclude, Dutch public authorities have various alternatives for the performance of SGIs and supportive services. The sectors discussed have exemplified the paradox in which, despite the initial introduction of competition by ways of public procurement procedures, the performance of a public service is internalized by a public authority, or, further exempted by the legislature from competition. The European reforms in relation to the internal market will not change the discretionary power that public authorities have for this purpose. Nor will the new public procurement directives sufficiently clarify the exemptions to European public procurement law in relation to internal performance.

The hesitation of public authorities to externalize services can be seen in strong contrast with the previous period of extensive market performance. Finding *the right balance* between the two should be the goal of public authorities in order to secure the best performance of a public service. The legality of the performance alternatives in public procurement law, combined with the discretionary power of governments, can lead to unnecessary internalization of publics service delivery. To improve the democratic decision-making relating to public service delivery, elements of the Dutch PPA 2012 and the US FAIR Act have briefly been touched upon. Integrating these latter two elements in a framework approach, can result in more transparency and objectivity which would benefit both private actors and public authorities. The goal of such a coherent legal framework should be to objectively identify the advantages of various performance modalities and to come to the *best performance of a public service*.