Chapter 10 Achieving a sustainable and just society through public procurement? On the limits of relative scoring and of the principles of equal treatment and transparency

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10.1. Introduction

My[1] contribution to the Liber Amicorum for Jan Telgen 'The Art of Public Procurement' aims at a better understanding of the relationship between achieving a sustainable and just society and the need for well-drafted public procurement procedures.[2]

In the last decade two developments seems to impede the achievement of the afore mentioned goals. The first development regards the new objectives in the area of public procurement law for a sustainable, smart and just society, in addition to the old economic objectives as laid down in the old European Treaties.[3] This addition has introduced the potential for conflicting objectives on one hand the fulfilment of the internal market, on the other the achievement of smart, sustainable and social solution.

The second one consists of the addition in the 2014 public procurement directives of new legal grounds, which have further expanded the already existing wide discretionary power of contracting authorities. Both additions have introduced potentials for arbitrary decisions, and thus, for undesirable effects as a result of which the best tender or tenderer may not always win. On top of that, the addition of new competing aims and the expanded room to manoeuvre for contracting public authorities in the public procurement market, can in turn lead to different approaches, opinions, interpretations and an increasing number of court cases, which in the end can also impede the realization of a sustainable and just society.[4]

[1] Professor Dr. Elisabetta Manunza is full professor of Public Procurement Law, Utrecht University, School of Law, Europa Institute and (co-)founding member and (co-)director with Jan Telgen of the Public Procurement Research Centre, an interdisciplinary research centre of Utrecht University and the University of Twente. PPRC operates in the field of contracting and procurement in the public sector. The author would like to thank her research assistant Nathan Meershoek LLM, scholar at the PPRC, Utrecht School of Law, for his assistance to the realization of this contribution.

[2] "Well drafted" procurement law should contain all the elements to guarantee "adequate" procedures, resulting in fair competition, lower costs for the procurer and thus for society, lower costs for consumers, higher quality, protection against corruption and other unhealthy ties and unwelcome relationships between public bodies and service providers. In other words regulation must guarantee a *level playing field* for contracting authorities and market parties by providing conditions and limitations on how public authorities can select enterprises to perform certain services, undertake projects or deliver goods. See E.R. Manunza (2010), Naar een consistente en doelmatige regeling van de markt voor overheidsopdrachten. In: J.M. Hebly, E.R. Manunza, M. Scheltema, (eds) *Beschouwingen naar aanleiding van het wetsvoorstel Aanbestedingswet*, Instituut voor Bouwrecht, The Hague, pp. 49-123, section 2. The historical research contained in this publication reveals that already in the Roman era public procurement was a common method to prevent corruption.

[3] In section 10.4. I will discuss the several major legal reforms introduced with the Treaty of Lisbon (2007).

[4] That's why scholars at the *Public Procurement Research Centre* started working on innovative solutions to tackle the inefficiency and undesirable social consequences of a range of regulatory gaps to prevent the impediments for achieving the EU 2020 and thus for solving global societal challenges. About the EU 2020 strategy goals later more in the following sections.

The requirement for well-drafted public procurement procedures as meant above, should also imply the legal requirement for *objective* award criteria and methods. In spite of that, there are very few if any regulations in place to govern the method(s) that a contracting authority must use to determine whether one bid is better than another; neither the EU legislature nor the Dutch legislature have ventured into this area, although the moment at which the contracting authority evaluates the bids is critical for the result of the public procurement procedure.

In this contribution, I will argue that on the one hand, it is important that contracting authorities have been given more discretionary powers and more options to achieve the new afore mentioned objectives with the latest public procurement directives[5]; while on the other, if this increased discretionary power is not limited by objective review frameworks based on the principles of transparency, equality and proportionality, we will still fail to achieve these objectives.

To carry out this investigation, I will go through the following steps. I will start first of all by discussing shortly in section 2, one of the two fascinations that Jan Telgen and I share, being the effects of a scoring system. In section 2 I will also discuss - also briefly - the second fascination that we share, being the achievement of a just and sustainable society through public procurement. This brief discussion will be followed in section 3 by a description of my new definition of public procurement law. I will discuss that because of the influence Telgens discipline had on its development. It is also a good starting point for the discussion in section 3 of the above mentioned developments that can impede the design of a sustainable and just society through public procurement: the many competing policies and the wider room to manoeuvre for contracting authorities.

To fully understand these arguments, I will discuss in section 4 the role of award criteria and methods to achieve a sustainable and just society by using the results of the research conducted by Telgen as an example of the afore mentioned threat. On the basis of that research, it has become clear how relative scoring can constitute a serious impediment to the achievement of a sustainable and just society. Until now, in The Netherlands knowledge from the decision-making sciences, mathematics and the economic sciences about which methods lead to objective, quantifiable results and which other methods lead to random and even absurd outcomes is thereby being ignored completely by the legislator. In absence of regulation, the safeguard in these situations is left to the fundamental principles of transparency and equal treatment, but as I will show they may fail to deliver. Mentioning this matter is also important to emphasize the urgency to combine insights from the various disciplines mentioned above.
Without having the intention to solve the problem, I will finally draw some general thoughts and conclusions.

10.2. The fruits of joint interdisciplinary research

Common fascination for effects of scoring systems
Jan Telgen and I share a common interest for the (un)intentional effects that scoring systems, which are used to evaluate tenders, may have on the outcomes of public procurement procedures. Our joint scientific work in the context of our collaboration at the Public Procurement Research Centre focusses in the

[5] 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 2014 L 94/243); 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 2014 L 94/65); Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94/1).

first place on this topic. Unlike Jan Telgen, my fascination for the scoring rules began more recently. It started during the execution - in collaboration with Jan - of the first interdisciplinary research commissioned at the Public Procurement Research Centre immediately after its establishment in May 2013.[6] This research project dealt with the effects of scoring methods used by Dutch central and local public authorities for the evaluation of tenders based on the most economically advantageous tender (MEAT)[7] in 22 public procurement procedures for temporary employment. From an economic perspective the research, carried out by Jan Telgen and Wouter Lohman, demonstrated that depending on the selected award method, price may play *de facto* a greater role in the evaluation of the bids than quality, in spite of whatever is stated in the tender documents.[8] For the legal analysis, I tested the award methods used for the evaluation of the tenders, against the rules governing the award criteria as laid down in the EU public procurement directives[9] and against the principles of transparency, proportionality and equal treatment, being the fundamental principles of public procurement law and thus the safeguards of the foundations of the public procurement legal framework. This research demonstrated that, depending on the choice of the award methods, the fundamental principles of transparency and equal treatment may fail to deliver. This can happen unintentionally due to a lack of professionalism without the contracting authority even being aware of it.

The knowledge acquired in this research was made available in the Netherlands by Jan Telgen and I to a wider audience using various forms of education and training for professionals. [10] We further elaborated the insights of the 2013 research and presented the results with the joint paper '*Non intentional price preferences. Legal and economic aspects*' at the Global Revolution VIII Conference organised by the University of Nottingham in June 2017.[11] In this paper and the oral presentation, Jan Telgen investigated frequently used award mechanisms in MEAT procedures that implicitly favour low prices more than indicated in the tender documents. In the same paper and joint oral presentation, I tested them against the principles of equal treatment and transparency being the most frequently invoked principles by parties in court actions in The Netherlands. Jan Telgen showed that this

[6] More information regarding the PPRC will be found below in following sections and footnotes.

[7] See art. 53 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134/114) and art. 67 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 2014 L 94/65).

[8] W. Lohmann, E.R. Manunza, J. Telgen (2013), *Hoe wordt uitzendwerk gegund? Analyse van aanbestedingen, Onderzoek naar gunningsmethodieken voor uitzendwerk: een economische en juridische analyse*, Interdisciplinary Research from the Public Procurement Research Centre (Utrecht/Twente), pp. 40; http://www.pprc.eu/wp-content/uploads/Onderzoek-PPRC-Hoe-wordt-uitzendwerk-gegund-sep-2013.pdf".

[9] See footnote 3, above.

[10] In 2014 Jan Telgen and I started the interdisciplinary post-graduate executive program *Legal and Economic Aspects of Award Criteria and Scoring Rules* at the Utrecht university, that in January 2018 has been renamed *Societal value in competitive procedures*. We lecture this course in collaboration with Daan Versteeg LLM (Rozemond Advocaten Amsterdam). In this post-graduated course a distinction is made between *public procurement procedures* and other *competitive procedures / competitive tendering*. The term *public procurement procedures* is used to refer to the procedures laid down in the EU Public Procurement Directive. The term *competitive procedures* or *competitive tendering* is 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 or by the national courts, such as for service concessions and for the award/distribution of (limited) authorisations (for example for games of chance or the exploitation of casinos or lotteries).

[11] On 12 June, Elisabetta Manunza and Jan Telgen presented two papers at the international conference 'Global Revolution VIII' organised by Nottingham University in the UK on problems related to award methods: "Relative scoring and the danger of rank reversal" and "Non intentional price preferences". http://nottingham.ac.uk/conference/fac-socsci/pprg-global-revolution-conference-vii/programme/index.aspx

outcome is sometimes due to the mathematical characteristics of the formulas used to translate prices to scoring points, but may also be due to characteristics of the non-price criteria. In a recent study conducted by Hoogeveen under the supervision of Telgen, it was found that over 60% of all tenders in the Netherlands do contain non-intentional price preferences.[12] In addition a number of national (Belgium, Sweden) and organizational public procurement manuals (World Bank, UN) require the use of non-intentional price preferences.[13] The problem, therefore, is of a serious magnitude. It was beyond the scope of this research to also investigate the intentional use of scoring methods in order to manipulate the outcome of the public procurement procedure, but it is an interesting issue that should be explored in future research.

Common fascination for solving societal challenges with public procurement procedures and the establishment of the Public Procurement Research Centre

Jan Telgen and I also have another scientific interest in common. It concerns the question how to achieve sustainable social and innovative growth through public procurement. Because large public funds are involved in public procurement contracts, the magnitude of the potential impact they may have on society is obvious. The volume of the public procurement market has recently been estimated at around 14% of the GDP[14] of developed countries and at around 75% of the GDP of underdeveloped countries. In the European internal market, it concerns the largest economic segment. Considering its volume and thus its potential impact on society, it is clear that well-drafted public procurement procedures are an essential requirement for the proper functioning of the national (and European) economy. Against this backdrop, it becomes clear that public procurement plays a fundamental role in achieving sustainable, social and innovative growth as pursued by the EU 2020 strategy.

One of the most interesting questions that the EU and the Netherlands has to answer in the coming years is the question to which extent it is really possible to achieve the EU 2020 strategy goals. Jan Telgen and I also share the common view that answering this question correctly requires interdisciplinary research and joint forces, because if something does not work well, this cannot always be solved by rules, and the rules are not always to blame for the problem.

For this purpose, we founded the interdisciplinary *Public procurement Research Centre* of Utrecht University and the University of Twente in 2013. Bringing our specialties and expertise together (I am trained as a lawyer and Jan Telgen is trained as mathematician and economist) was an opportunity to generate new academic and practical knowledge and to apply this knowledge to improve the innovation, utilization, regulation, promotion and social use of public procurement.[15] In the last five years, research at the PPRC has had a substantial impact in Dutch society and has contributed to bridge the gap in the field of public procurement between the public management, economic and legal disciplines.[16]

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[12] Robbert Hoogeveen, *Some Award Methods are More Prone to Problems than Others.* Masterthesis Twente University, http://essay.utwente.nl/66317/1/Hoogeveen,%20R.J.L.,%20%20faculteit%20Management%20en%20Bestuur.pd

[13] See for the example of the UN: http://www.un.org/en/ethics/pdf/Procurement-Manual-2013-Rev7.pdf

[14] In the EU member states; see COM(2017) 572 final, *Making Public Procurement work in and for Europe*, p. 2.

[15] This is particularly fortuitous because the Faculty of Law, Economics and Governance, Utrecht University, where I work, is devoted to doing groundbreaking research and ensuring that that research has impact and can contribute to solving global problems and I quote directly from our new strategic plan 2016-2020: "in close collaboration with businesses and social organisations, which allows the results of fundamental research to be used in practical applications."

[16] It has led to Parliamentary debates, expert hearings and opinions in Parliament, and various influential publications and leaflets. See: E.R. Manunza, W. Lohmann, G. Bouwman, *Juridisch leaflet Maatschappelijk Aanbesteden. Juridische mogelijkheden om de kracht van de samenleving te benutten bij aanbestedingen,* a research at PPRC commissioned by

It goes beyond the scope of this contribution to mention the many contributions and efforts produced by Jan Telgen in this context. What matters is his influence on the elaboration of the new definition of public procurement *law* that I developed in the last years in order to better understand the exact extent of the relationship between solving global societal challenges and well-drafted public procurement procedures.[17]

10.3. Difficulties for designing a sustainable and just society through public procurement

New definition of public procurement law is needed

Fundamental aspects of our society that directly or indirectly shape the daily lives of citizens, have to be organized by using public procurement procedures. Old and new forms of collaboration between economic operators, citizens, governments, other public authorities, for the organization of healthcare, public transport, waste collection and processing, refugee care, etc. can often be considered as a 'public contract' and can, therefore, fall under the scope of public procurement law, meaning that a tender would be required before bringing these new forms of collaboration into being. For this new view of the function and effects of public procurement,[18] a new definition of public procurement *law* is needed. In this context public procurement law is not considered simply as a collection of procedural rules, but as a powerful tool for designing a sustainable and just society and - as a consequence - as a tool for stimulating and facilitating innovation.[19] A public procurement *procedure* is seen as an instrument to shape and define the needs in society. As soon as those needs are specified, it is about making choices *between* all existing possibilities - which, in today's global world, are increasing - and then about evaluating those possibilities. Public procurement law can, in that regard, be seen as a set of rules governing a method to make objective, efficient and lawful *choices*. Clarity with regard to *how* public authorities take the decision to perform a public contract is, thus, an essential requirement for well-drafted public procurement procedures. That decision should be made on the basis of verifiable and objective criteria and in accordance with the basic principles of (public procurement) law. This lawfulness highly depends on the fundamental principles of transparency, non-discrimination and proportionality which safeguard the legitimacy of the procedure. By creating a *level playing field* these principles also contribute to a system of *effective competition*. Adherence to these principles does, however, not by itself guarantee a successful outcome, in the sense that the most economically advantageous tender, as defined by the authority at the start, will win, as I will discuss in the following sections.

10.4. The first difficulty: striving for many competing goals creates new opportunities but also the potential for undesirable effects

Tensions generate by the legal changes in the EU Treaties

From a public procurement law perspective, the topic of achieving sustainable, social and innovative growth through public procurement is

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the Dutch Ministry of Interiors in 2015 and *Op weg naar maatschappelijke meerwaarde in het sociaal domein. Toepassingen en lessen van maatschappelijk aanbesteden in de gemeentelijke Wmo-aanbestedingen 2015* by Niels Uenk). Extensive references can be found in our annual PPRC reports and academic outputs (see www.pprc.eu).

[17] See footnote 2, above.

[18] See my contribution 'In hoeverre draagt het wetsvoorstel bij aan een oplossing van de uitdagingen en problemen waar de inkoop- en aanbestedingspraktijk voor staat' to the Dutch Public Procurement Conference 2016, organized by C.E.C. Jansen (VU Amstedam) and E.R. Manunza (Utrecht University); see also E.R. Manunza, 'De Kunst van het Kiezen' (The art of choosing), *Ars Aequi* 2017, pp. 962-964.

[19] It must be noticed that the European Commission one year later made a switch, from focusing on the market-integration purpose of public procurement rules towards promoting a more strategic use of the rules in place. See: COM(2017) 572 final, *Making Public Procurement work in and for Europe*, page 2.L.c..

not new and has been the subject of much discussion in recent years.[20] EU public procurement law gives the impression to offer a multitude of options to achieve these objectives, while in practice it has become clear that it creates legal tensions and even the opposite effect. Achieving these objectives often requests to prefer domestic suppliers and products over those from other EU Member States, which means that they can be in conflict with one of the main goals of the European Union: the fulfilment of the internal market. On the one hand, we want all EU citizens to have the opportunity to drink the very best water in Europe[21] coming from abroad, as the internal market requires; on the other, we want to make sure that everyone drinks their own local water, so the bottles don't have to travel as far, in order to reduce the amount of CO2 emissions. The latter seems to be the most effective solution in terms of striving for sustainability. Taking into account the fulfilment of the EU internal market, the legal question is, however, which of these two objectives takes precedence over the other: the implementation of the internal market allowing the bottles of water to travel back-and-forth all over the world, with all the environmental impact that it entails, or the preservation of our environment by allowing everyone to drink their own local water. In this specific example, the contracting authority cannot limit itself to the procurement of bottled water for the individual restaurant network. To comply with sustainability objectives, it should have suppliers develop smart solutions to allow to achieve both objectives at the same time, e.i. for transporting the water with a minimum of environmental impact.

But coming up with sustainable solutions is not something that is easily done, and it can generally result in additional costs. Lack of professionalism on the part of contracting authorities and smaller budgets can also create additional pressure on the aim of sustainability.

This explains why regulating public procurement is a challenge for both the national and the European legislator: it is necessary to carefully and continuously weigh all involved interests as well as European and national interests, whilst trying to achieve an acceptable balance of the resulting tension.[22]

It took the European Union a long time to establish a new legal framework, which is now laid down in the Treaty of Lisbon.[23] This Treaty (2007) introduced several major legal reforms to further develop the EU 2020 goals and which can have therefore important consequences to achieve a sustainable and just society through public procurement. It has become clear that the EU wants to show more of a social face to its citizens,[24] being one way to reduce the

[20] See: F. Pennings and E.R. Manunza, 'The room for social policy conditions in public procurement law', in: A. van den Brink, M.J.J.P. Luchtman and M. Scholten (eds.), *Sovereignty in the shared legal order of the EU*, Antwerp: Intersentia 2015, pp. 173-196, p. 173 and E.R. Manunza and W.J. Berends, 'Social services of General Interest and the Public Procurement Rules', in: U. Neergaard, M. Krajewski , E.M. Szyszczak; J.W. van de Gronden (eds), *The Role of SSGIs in EU Law: New Challenges and Tensions*, The Hague, The Netherlands: T.M.C. Asser 2012, pp. 347-384. See also: D. Damjanovic, 'The EU Market Rules as Social Market Rules: Why the EU can be a Social Market Economy', *Common Market Law Review* 2013, pp. 1698-1703, P. Kunzlik, 'Neoliberalism and the European Public Procurement Regime', *Cambridge Yearbook of European Legal Studies* 2012-2013, pp. 283-356, S. Arrowsmith, 'The Purpose of the EU Procurement Directives; Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies', *Cambridge Yearbook of European Legal Studies* 2011-2012, pp. 1-47 S. Arrowsmith, 'Horizontal policies in public procurement: a taxonomy', *Journal of Public Procurement* 2010, pp. 149-186.

[21] For clear reasons I will avoid to mention (national) labels.

[22] See also F. Pennings and E.R. Manunza, l.c. 2015, p. 173, section 1 Íntroduction'.

[23] The consolidated versions of the Treaty on European Union (*OJ* 2008 C 115/13) and the Treaty on the Functioning of the European Union (*OJ* 2008 C 115/47) constitute the current legal basis of the European Union.

[24] Somewhere the awareness grew (both bottom-up but certainly also top-down) that wealth is not the same as well-being; that being wealthy does not mean that there must be continuously economic growth based on competition.

dissatisfaction concerning the pursuit of the EU's hard economic objectives.

The first important change concerns the 'internal market' concept**.** Under the old EC Treaty the internal market had to be accomplished through the guiding principle of an open market economy with free competition (Art. 4 EC). Departing from a purely market-oriented integration process towards a broader concept of the common market, the Lisbon Treaty replaced this guiding principle by Article 3(3) TEU prolonging a 'highly competitive *social* market economy', aiming at full employment and social progress.

An accompanying development of the entry into force of this new Treaty, is that it has been questioned how far the EU is real willing to take these policies and to what extent the economic aspects weigh up against the other objectives in order to create a sustainable and just society, and how to resolve these considerations in public procurement law.[25]

Thereby, the strengthening of the principle of subsidiarity[26] and the recognition of regional and local self-government[27] envisions a more decentralized Union. Most of all, these changes were intended to clarify that the Union is not only focusing on the free market, but it is also aware of its social dimension, [28] which often maybe can only better be effectuated on the national, local and regional level. It is unavoidable that for realizing some social (and environmental) purposes local and regional candidates are more suitable. However, it is complex to reconcile this with the fundamental principles of transparency and of non-discrimination.

The specific Treaty articles on the internal market, such as the freedom to provide services (article 56 TFEU), which the EU public procurement rules are a specification of, were not changed during this process. All these provisions must, however, be considered against their - varying - constitutional settings. Moreover, article 114 TFEU (Treaty on the Functioning of the European Union), the legal basis for the public procurement directives, requires such directives, now, to take as a base a high level of protection concerning health, safety, environmental- and consumer protection. This is not surprising, considering that the Union, according to article 7 TFEU, should ensure consistency throughout its different policies. Environmental protection, for instance, should be ensured in all Union policies anyway, following article 11 TFEU. It was therefore, perhaps, inevitable for the 2014 public procurement directives to incorporate these 'renewed'[29] social policies within its legal frameworks. Obviously, it is no coincidence that the first consideration of Directive 2014/24 concerns the fundamental principles and points of departure, while the second concerns this strategy for growth, in particular efficiency and societal goals.[30]

Tensions generated by the EU 2020 strategy policy

Awarding public contracts is a complex affair, because in the first place both *public* and *private* interests are involved and the interests aimed at

[25] See for example: D. Damjanovic 2013 and P. Kunzlik 2012-2013 (Footnote 20, above).
[26] Article 5 Treaty on the Functioning of the European Union (TFEU).
[27] Article 4, paragraph 2, TEU.
[28] E.R. Manunza and W.J. Berends 2012, p. 352 (Footnote 20, above).

[29] By indicating these social policies as 'renewed' I want to remark they always existed. Governments and local authorities designed such policies to protect domestic industry or to have this as a result; to create jobs for the local workforce; and to support employment in declining industries or in areas suffering from underemployment or lack of development.
[30] Incidentally, the old directives and certainly the Dutch Public Procurement Act already contained ample legal opportunities for pursuing the Europe 2020 strategy, as we at the PPRC demonstrated at the request of the Ministry of the Interior in the *Juridisch Leaflet Maatschappelijk Aanbesteden* (Legal Leaflet Societal Contracting), already mentioned in footnote 16. In this legal Leaflet the authors discussed 14 possibilities laid down in the 'old' public procurement

on the *European* level differ from those on the *national level*. This complexity is further enhanced by governments and other national public authorities that do not merely seek to purchase goods or services at the – commercially speaking - best terms possible, but take into account *secondary policy objectives*, which are not directly connected with the actual purchase. Secondary policy objectives have in common that they often prefer domestic suppliers and products over those from other EU Member States. The list of interests involved is long, highly varied and dynamic. If, for example, a municipality needs to ensure a high level of employment, it would feel counterproductive to award the contract to build a new city hall to a company that only employs foreign workers. This means that this national policy can be in conflict with one of the main goals of the European Union: the fulfilment of the internal market.[31] For these reasons and in order to prevent these negative consequences, the European legislator introduced rules in the early 1970s to obligate public contracting authorities to take steps to identify and to remove all forms of discrimination in procurement procedures by introducing common transparent, objective, proportionate and non-discriminatory rules. In EU context this means that candidates established in a Member State other than that of the tendering public authority must have an equal opportunity to obtain contracts.[32] For this purpose, the EC directives on public procurement were adopted in the 1970s. The 1990s[33] directives had the same objectives and were replaced by directives in 2004.[34] The latter directives were again succeeded by the most recent directives in 2014.[35] An integrated EU market could not exist if such an important market segment remained local.

Despite the need of safeguarding fundamental principles and the four Treaty freedoms, the 2014s directives have given more discretionary power to public authorities. This wider room of manoeuvre has been increased also in order to better achieve the EU 2020 strategy goals.

The EU 2020 strategy is the European Union's ten-year jobs and growth strategy launched in 2010 to create the conditions for smart, sustainable and inclusive growth, aimed at shaping Europe's - highly competitive - social

directives 2004/18/EC which enable public authorities to achieve social and sustainability policies.

[31] See F. Pennings and E.R. Manunza, l.c. 2015, p. 173, section 1 Íntroduction'.

[32] This in the light of the four Treaty freedoms. See E.R. Manunza, *EG-aanbestedingsrechtelijke problemen bij privatiseringen en bij de bestrijding van corruptie en georganiseerde criminaliteit, Een beschouwing over de vraag of privatiseringsoperaties en de bestrijding van corruptie en georganiseerde criminaliteit een belemmering vormen voor de voltooiing van de Europese markt voor overheidsopdrachten* (diss. Amsterdam VU, Europese Monografieën, deel 68), Deventer: Kluwer 2001, pp.1-4.

[33] Directives: 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209/1); 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199/1); 93/37/EEC of 14 June 1993 coordinating procedures for the award of public works contracts (OJ 1993 L 199/54); 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199/84).

[34] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134/114) and Directive 2004/17/EC of the European Parliament and the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134/1).

[35] 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 2014 L 94/243); 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 2014 L 94/65); Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94/1). See also Directive 2007/66/EC of the European Parliament and the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335/31).

market economy for the 21st century.[36] The Commission, as the main EU governor, gives further expression to the constitutional goals of the Treaties in its policy papers. Apart from its legislative tasks, it has always been leading in defining the direction which the internal market is going to. For the achievement of the EU 2020 goals, public procurement can play a significant role, according to the Commission.[37] The strategy mentions, several times, that public procurement, as a market-based instrument, should be used to stimulate innovation, become more 'resource efficient' and improve the business environment for SMEs.
However, options to achieve the EU 2020 strategy goals were also present under the old EU Public Procurement directives,[38] but after the launch of Europe 2020 the options in the new 2014 public procurement directives were increased and expanded.[39] More recently, the Commission clarified its approach by encouraging Member States to use procurement as a strategic tool, it being '*a crucial instrument of policy delivery*'.[40]

This is one of the reasons why legal scholars should not always be concerned with the question of whether the Europe 2020 strategy can be achieved on the basis of the public procurement rules, but more with the question *how* to make sure that we can actually achieve Europe 2020 in practice given the many conflicting objectives and the many choices that the EU has set with the legal reforms introduced since the Treaty of Lisbon in 2009.

In principle, there is no objection to this increase in aims and in discretionary power for local and regional authorities. However, tensions and their possible undesirable effects must be pointed out. Familiar examples of new phenomena in the Dutch procurement world where these types of tensions - as found in Europe 2020 - emerge in practice include circular procurement, social or societal contracting[41], the right to challenge[42] social return on investments[43], performance based contracting (in the Netherlands better known as functional contracting).[44]

In societal contracting, individual members of the public do not always maintain the green spaces in their neighborhoods qualitatively better and cheaper than a specialised company, but the benefits to society can be dramatic: maintaining green spaces by involving children and the elderly has been shown to help promote more respect for the community among problem youth.

[36] COM(2010) 2020 final, *EUROPE 2020: A strategy for smart, sustainable and inclusive growth*, para.2.
[37] Just like the Commission, in 1985 with the White Paper, attached a great role to public procurement to complete the internal market by removing its 'last' barriers. COM(85) 310, White Paper: *Completing the Internal market*, para. 85.
[38] See for example the *Beentjes* judgment: ECJ 20 September 1988, Case 31/87, [1988] *ECR*, p. I 4635.
[39] For example art. 67 Directive 2014/24/EU on life cycle costs.
[40] COM(2017) 572 final, *Making Public Procurement work in and for Europe*, para. 5. Compare my own definition from 2016 described in section 2 as 'a powerful tool for designing a sustainable and just society' and which is similar to that of the European Commission.

[41] *Maatschappelijk aanbesteden* is a type of public procurement in which citizens are given the opportunity to be involved in the set up and / or the performance of the project. See: *Juridisch leaflet Maatschappelijk Aanbesteden. Juridische mogelijkheden om de kracht van de samenleving te benutten bij aanbestedingen,* already mentioned in footnote 16, p. 26.
[42] In the context of *the right to challenge*, local citizens are given priority above economic operators from outside, if they themselves are prepared to perform tasks or services for the community in the area where they live.
[43] *Social return on investments* is an old contracting system used in the Netherlands since the eighties in which the contractor is required to invest a certain percentage of the contract amount in long-term unemployed people or in traineeships or study opportunities, etc.
[44] In the context of *Performance Based Contracting* the contracting authority asks for a certain result to be achieved without prescribing to the contractor how that result must be brought about. For example, in order to promote innovation, the public authority will not prescribe the use of a specific insulation material in constructing one building but it will request that the inside temperature be maintained at 20 degrees Celsius all year round.

Social return (by the contractor) on investments (by the tenderer) has no fixed definition, and the contents of the term vary somewhat from one contracting authority to another. It is a term to describe the combination of procurement and the requirement to engage disadvantaged. In this type of procurement contract, part of the procurement conditions is that persons with difficulties on the labour market have to be involved. These are procurement methods that have produced good results for society in the Netherlands. They have produced a type of good results that cannot be expressed in short-term, financial metrics, but it is a 'profit' that can make the risks of abuse and discrimination high. The latter, in particular, is aggravated by the fact that the award methods[45] that the contracting authority uses to determine whether a bid is qualitatively 'better'- by virtue of being more sustainable, innovative or social - than a competing bid, will not always be objective. This means they can have a discriminatory effect, with the result that the winner of a procurement procedure will not always be the tenderer submitting the 'best' bid.[46]

While this issue seems to relate most strongly to the formulation of the *award criteria*, call it the substance, it is self-evident that the *award method* in combination with the *scoring graph* actually designates the winning tender. Different methods result in different outcomes while keeping the same award criteria with their relative weightings.

This contribution attempts also to give insight in the discrepancies between the objectives at the EU level, the EU Treaties and the public procurement directives, and the reluctance to regulate award methods. From a legal perspective, it will become clear that over-fixating on the principles of equal treatment and transparency distorts the overall coherency of the public procurement rules and principles. More practically, it hampers the effective use of public procurement where it hinders *truly effective* competition to arise. Through the example of relative scoring methods it will become clear that a legal possibility to compel contracting authorities to adhere to objectivity and effective competition is needed to ensure the effectiveness of the Directive and of the EU 2020 strategy goals. I will return to this in section 10.6.

10.5. The second difficulty: the risk deriving from the wider legal room for manoeuvre

Bottom-up influences on the post-Lisbon regulation processes

European citizens frequently hear about what a major influence the EU has on national policy and regulation. This claim is no doubt correct, but requires some explanation. Next to the above mentioned subsidiarity principle and recognition of regional and local self-government, institutional and material changes to the EU Treaties have created a 'bottom-up' influence from the Member States.[47] The same bottom-up influence is becoming more and more visible in the outcomes of the post-Lisbon regulation processes concerning internal market affairs. The field of public procurement law is an excellent example of this. The obligation for the European Commission to organise consultations introduced by the Lisbon Treaty,[48] empowered the lobby of regional and local authorities to have influence during the legislative process and on the final wordings of the three new directives, introducing an even larger

[45] It is important to remember to the reader who is trained as a lawyer, that I am talking about the award *methods*, not the award *criteria*. An award method is a mathematical calculation used to assign points to the various components of a bid.

[46] Like the citizens in the example of societal contracting given above who want to maintain the green spaces in their neighbourhood.

[47] Although policy and regulation concerning internal market affairs developed in the Member States do not always run parallel to the plans about the same issues on the EU level, there is a clear reciprocal influence, both top-down and bottom-up. A form of 'shared' regulation is visible, in which sub-central layers of government also participate.

[48] Art. 11 para. 3 TEU. Art. 4, para. 3 TEU, art. 13, para. 2 TEU.

discretionary power in setting up public procurement procedures than initially proposed by the European Commission. The Commission has in recent years underlined the importance of the free market and therefore the use of public procurement to approach that market, which it presented as an instrument to get out of the economic crisis. The final versions of the directives, therefore, impose higher discretionary power in setting up public procurement procedures than initially proposed by the Commission.[49]

Examples of the expanded discretionary power in the 2014 public procurement directives

An example of larger discretionary power for contracting authorities can be found in article 67 Directive 2014/24/EU, providing a more flexible use of award criteria. Very significant is the new provision which clarifies that competition conducted under fixed-price conditions must be exclusively based on quality. This provision also contains options that enable contractors to assess the entire life cycle of a product, a service, or a work within the price-costs analysis, and which even make it possible to review the employment conditions of those who make the product and to internalize external environmental costs. This brings options not only for environmental protection but for *social* protection as well.

Furthermore, new grounds for the exclusion of economic operators have been introduced in the event that they do not comply with employment regulations, violate human rights, expose themselves to conflicts of interests, etc.[50] A broader range of different procedures have been introduced which give contracting authorities more options for negotiations between contracting authorities and contractors[51] and a wider applicability of the exemptions for public contracts between entities within the public sector, the so-called 'in-house exceptions'.[52]

Since the above mentioned ample opportunities for introducing sustainable, social and innovative policies in public procurement procedures are all self-evident improvements and therefore less interesting from a legal perspective, I will discuss the legal issues on which we could take a step forward. I will consider this issue by discussing the contracting authority's behavior and not the tenderer's.

Nonetheless, the EU public procurement rules are still market-oriented. Because Union legislation leaves the eventual decision of 'what to buy' open to the Member States or the contracting authorities themselves its rules should be considered *market-making*. Choices about how to shape these markets can still be made on the national level. The Commission, in line with its Europe 2020 strategy, is in its policymaking, obviously, hinting in certain directions with regards to the 'what to buy' decisions. It is a matter of national legislation to specify the way in which procurement procedures should be organised or left at the discretion of the purchasing authorities.[53] Because of the increased possibilities of including 'secondary policy objectives' into the specifications or award criteria of a public tender, the risks of favouritism in violation of the principle of equal treatment under EU law are higher where more discretion is being left to public authorities.[54] In the new 2014 directives, the European legislature has granted the

[49] COM(2011) 896 final, Proposal for a Directive of the European Parliament and of the Council on public procurement.

[50] Article 57 Directive 2014/24/EU.

[51] The Competitive dialogue as regulated in Article 30 Directive 2014/24/EU and the Innovation partnership as regulated in Article 31 Directive 2014/24/EU. The last procedure has been introduced to facilitate the development of innovative products, services and works that do not yet exist.

[52] Article 12 Directive 2014/24/EU.

[53] See for the example of the Netherlands: E.R. Manunza, 'De kunst van het kiezen', *Ars Aequi* 2017, pp. 962-964.

[54] Preventing such violations while using procurement strategically, call it a balanced approach, then indeed requires well trained buyers. Next to the term 'secondary policy objectives', scholars use the term 'horizontal policies'; see: S. Arrowsmith, 'Horizontal policies in public procurement: a taxonomy', 10 (2) *Journal of Public Procurement* 2010, pp. 149-186.

Member States broader options in many areas, as I have shown. In implementing the directives, the Dutch legislature seems to have made few if any choices, which means these choices remain at the discretion of the contracting authority. Examples of possible implementations of Directive 2014/24/EU's provisions on the national level could be (i) a specific – but simple - procedure for the procurement of social services,[55] (ii) an objective evaluation framework for insourcing and (iii) more transparent, competitive rules and better legal protection for below-threshold contracts enhancing competitiveness[56], an explicit requirement for objective award methods (I will return to this in the following after later in this contribution). Better regulation on these issues can make a strong contribution towards implementing Europe 2020.

The question is whether by doing so the Dutch legislature has incorrectly considered and applied the subsidiarity principle[57]: shouldn't the legislature take up its regulatory role where Europe cannot, does not wish to or would prefer not to fulfill that role, out of considerations of efficiency? This question should be object of further investigation, but it is beyond the scope of this contribution.

Relationship between discretionary power and corruption

Public procurement procedures worldwide have received a lot of negative attention in the media and politics. In the Netherlands, we have seen during the last decade, public procurement procedures frequently being the subject of negative media coverage. They were described as disasters or near-disasters in which the contracting public authority broke the public procurement rules. This is not particularly surprising, considering that according to the rankings of Transparency International[58], the Netherlands is one of the least corrupt countries in the world, and has even improved in recent years - albeit slightly, climbing from 9th to 8th place on the list. But the 2014 *EU anti-corruption report* shows another situation: 64% of Dutch respondents believe that there is widespread corruption among officials in public procurement projects, a percentage much higher than in countries like Greece (55%), Slovenia (60%), Croatia (58%), and Italy (55%). This raises the question how to interpret this statistics data.[59] A more in depth observation shows the report identifies forms of corruption like specifications tailor-made for specific companies (57%), conflict of interest in bid evaluation (54%), unclear selection or evaluation criteria (51%), involvement of bidders in the design of specifications (48%), abuse of emergency grounds to justify the use of non-competitive or fast-track procedure (46%), amendments to the contract terms after conclusion of the contract (44 %). On 24 March of this year, the Rand Corporation, an American organisation, published a report for the European Parliament entitled *The Costs of Non-Europe in the area of Organised Crime and Corruption*.[60] This report also shows (see slide) that the risk of this type of corruption occurring in the Netherlands is not being effectively addressed. This risk of arbitrariness or (in non-Dutch eyes) corruption is, in my view, one of the biggest potential impediments to Europe 2020, because the conduct of the contracting authority

[55] The Dutch legislator did not implement Articles 74 and 75 Directive 2014/24/EU.

[56] According to R. van Weert e.a., *Het inkoopvolume van de Nederlandse overheid. Een macronalyse*, Barneveld: Significant 2016, by far the most tenders in the Netherlands do not involve European public procurement procedures but concern small contracts to which the EU directives are not applicable. This means that in order to achieve the Europe 2020 objectives effective regulation for contracts below the EU thresholds is required.

[57] Article 5 TEU.

[58] Transparency International, 'Corruption perception index 2017'. See:https://www.transparency.org/news/feature/corruption_perceptions_index_2017

[59] COM(2014) 38 final, 'Report from the Commission to the Council and the European Parliament: EU Anti-Corruption Report', February 2014.

[60] European Parliamentary Research Service (EPRS) PE 579.319, 'The Cost of Non- Europe in the area of Organised Crime and Corruption: Annex II - Corruption', March 2016 (study commissioned by RAND Europe).

impacts on the conduct of the bidders, including aspects such as bid-rigging, strategic or manipulative bids, and much more.[61]

As already mentioned above, the magnitude of the potential impact should be clear just from the economic size of this sector: the public contracts market in the EU Member States represents over 14% of GDP (the total within the EU is estimated at €2.55 trillion annually; in the Netherlands, according to OECD figures, €120 billion. Moreover, observing these procedures, it becomes clear how essential the principles of transparency, objectivity and proportionality are for competitive - non-corrupt - national economies. Although preventing corruption has been a national objective since centuries, it gained importance in the European context since the start of the Economic and Monetary Union and especially the 2008 financial crisis.[62]

10.6. Relative scoring and the limits of the principles of transparency and equal treatment

In 2017 during the presentation at the Global Revolution VIII conference, Telgen has argued in favour of introducing the obligation to always - without exception - communicate the scoring rules, per award criterion, to all tenderers.[63] In that context he discussed the case of *TNS Dimarso*,[64] in which the Belgian Council of State asked the EU Court of Justice whether the principles of equal treatment and transparency require the contracting authority in MEAT procedures to always communicate the scoring rules and if there is no such general obligation, whether there are circumstances in which this obligation does apply as yet. The Court of Justice answered this question in the negative. It found that, from the viewpoint of transparency and equal treatment, there is no general obligation to communicate the scoring rules in advance and I quote: '*Article 53(2) of Directive 2004/18/EC (...), read in the light of the principle of equal treatment and of the consequent obligation of transparency, must be interpreted as meaning that, in the case of a public service contract to be awarded pursuant to the criterion of the EMAT, the contracting authority is not required to bring to the attention of potential tenderers, in the contract notice or the tender specifications relating to the contract at issue, the method of evaluation it will use to specifically evaluate and rank the tenders.'* The Court found that the contracting authority should be able to adapt the award method according to the circumstances of the specific case as they present themselves during the procedure, as long as this does not '*have the effect of altering the actual award criteria or their relative weighting*'. In his opinion on this case, Advocate-General (A-G) Mengozzi argued in favour of applying the approach of the Court in *Evropaïki Dynamiki* with regard to the – meaningless or not - three conditions for not communicating the weighting factors of the sub-criteria, [65] also to the award method. The Court, surprisingly, only considered the first – most general - condition to be relevant. Even though award methods are crucial, it seems hard to prove that a certain unidentifiable choice alters the actual award criteria, given the absence of a transparency obligation.[66]

[61] NB: Incidentally, the bidders in public procurement procedures are not always enterprises; they can also be other public authorities, state enterprises, citizen initiatives or collectives, or individuals.

[62] During the European Semester the economies of the Member States are scrutinized. The improvement of public procurement systems often plays a significant part in the country specific recommendations. See for example: Council Recommendation (2017/ C 261/02), *Recommendation on the National Reform Programme of Bulgaria*, para. 16.

[63] See footnote 11, above. For the presentations, see: http://www.pprc.eu/elisabetta-manunza-jan-telgen-presenteren-op-global-revolution-viii-2/

[64] Case C-6/15, *TNS Dimarso v Vlaams Gewest* [2016] ECLI:EU:C:2016:555, para. 27. More recently, this case was referred to in: Case C-298/15, *Borta UAB* [2017] ECLI:EU:C:2017:266, para. 69 and Case C-677/15 P, *EUIPO v European Dynamics* [2017] ECLI:EU:C:2017:998, para. 33.

[65] Opinion of A-G Mengozzi in Case C-6/15, *TNS Dimarso v Vlaams Gewest* [2016] ECLI:EU:C:2016:160, paras. 46-47.

[66] In the case of *TNS Dimarso*, the award method, however, did alter the expected effects of the *actual*

A major principle in procurement law is that the relative weight of each of the award criteria remains fixed during the entire procedure. There is an exception to this rule, which the Court of Justice formulated in 2011 in *Dynamiki*[67] and which it repeated in *TNS Dimarso*. The exception is that the weighting factors for sub-criteria may also be determined after the time limit for submitting tenders has expired (paragraph 26, *TNS Dimarso*) if the following three conditions are met. Firstly, that these subsequently-determined weighting factors do not alter the criteria for the award of the contract set out in the tender specifications or contract notice. Secondly, that they do not contain elements which, if they had been known at the time the tenders were prepared, could have affected their preparation, and thirdly, that they were not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers. During his presentation Telgen called this decision in *TNS Dimarso* 'nonsense' because, as he explained, the situation in 2) always occurs in practice, meaning that, *de facto*, the exception can never be invoked.[68]

In this contribution I will take it one step further than Telgen. Some scoring rules used to evaluate tenders may produce results different from what one would expect, meaning that the contracting authority would not achieve the intended goal. This can be the case regardless of whether the scoring rules were communicated and the principle of transparency has thus been satisfied. This often happens without the parties being aware of it. Like in *TNS Dimarso*, price will often be assessed in an absolute manner while quality aspects will be –more artificially- put in scale. In this light, it is difficult to make sense of the decision that the Court set in its judgment in *TNS Dimarso* for requiring transparency on this aspect. Do the different award methods not, if known beforehand, automatically affect the preparation of a tender? And why would this only be relevant in relation to the weighting of sub-criteria and not the crucial moment of evaluation? It is, after all, the scoring method that gives meaning to the award criteria. As a result, it occurs on a regular basis that in tender procedures wrong choices are made and that the best tenderer is not selected for the contract.

Evaluating the tenders is thus the crucial moment in a public procurement procedure. In preparing a bid, a tenderer wants to know how much it needs to invest in quality-aspects – while increasing the price – to come to the most economically efficient bid, in the sense of meeting the demands of the contractor most perfectly. The tenderer can, however, only do so if the formula which calculates the score is disclosed. Then, the tenderer can compare all its possible bids, and subsequently choose the best one. Contracting authorities would make it possible for tenderers to effectively compete – because they then know what is demanded - when the score graph of the formula is made public with the call for tender as well. Only then they can put their finger on the most efficient allocation of their resources in the light of the buyer's preferences.

award criteria. The price-quality ratio in this case was supposed to be 50/100 for each aspect. Whereas the scale for the quality assessment used a range from 'high' to 'low' through 'satisfactory', the price was evaluated without a scale. Subsequently, all tenderers with the quality score 'high' were considered equal with regards to this aspect. Hereby, price became the decisive factor in a way that did not comply with the contractor's starting point that quality and price were of equal importance. Although the Court did refer the case back to the national court it appeared to be open to the possibility that in this case the choose of award method altered the award criteria.[66] But how should a court rule when the quality scale ranges from 1-5 or from 1-10? This could still result in price being the decisive factor. Or what would it have done if for the ranking the contractor would have used a relative scoring method? As the next paragraph will point out, the latter actually makes it impossible for tenderers to know the effects of the *actual award criteria* before the evaluation, when not being aware of the bids of the other tenderers. Taking the discussed case law in mind, problems arise when quality aspects must be evaluated alongside the price.

[67] Case C-252/10 P, *Evropaiki Dynamiki/EMSA* [2011] ECLI:EU:C:2011:512, para. 33 and case law cited there.

[68] See footnote 63, above.

These principles, however, tend to focus on the procedural handling of the award criteria instead of the calculations of the award method itself. For the award methods, these two principles offer the aggrieved party, when confronted with arbitrary use of scoring methods, no tangible legal protection in front of a court.

Although there are no concrete rules to resolve the issue, it should always be asked whether specific usage of scoring methods fits within the public procurement legal system that the Directive establishes. Recital 90 requires that the whole assessment takes place on the basis of '*an objective comparison of the relative value of the tenders*'. According to the Court, when imposing objective award criteria, only one tender can have the best price-quality ratio, which is also implied by article 67(1) of the Directive.[69] When tenderers do not know before submitting a bid how the criteria will be scored, they are unable to calculate which of their possible bids would be most efficient; and receive the highest score. Subsequently, the outcome of a tender procedure depends on coincidence; wherefore the contracting authority fails to ensure the possibility of effective competition if it does not disclose the scoring methods before the tenderers submit their bids.

The Court, apparently, considers that a tendering process, regardless of how the award criteria are formulated, leads to one *absolute* winner, in the sense of giving the best value (as defined by the buyer) for money.

In the Netherlands, and other Member States, a frequently used awarding method is *relative scoring*. An example of such a method is one where the best submission is granted the maximum amount of points after which the points for the other tenders are distracted from this number one. This makes it impossible to evaluate a tender without having knowledge of the other tenders. From studies in decision-making science as well as legal practice it is well-known that such scoring rules may lead to *rank reversal*, meaning the participation (or non-participation) of an additional tender changes the rank-order of the other tenders, possibly also the winner. In other words: the ranking between two suppliers depends on the submission of a third supplier. Especially when there are unexpected differences in quality on a certain facet the balance within the mechanism will be distorted. In economical sciences, relative scoring is therefore considered absolutely unsuitable to decide which tender is the most economically advantageous.[70] In Portugal, relative scoring methods are for that reason actually prohibited by law.[71]

The use of relative scoring by a contracting authority is unprofessional because it shows that the authority actually does not know how important it considers (certain) differences in performance. Instead, it leaves it to the coincidental differences among the different tenders. But only one submission – especially an uncompetitive, thus irrelevant, one – could disturb the balance, subsequently change the winner; reverse the ranking. But even if all bids are competitive, it should be clear that the use of relative scoring shows a lack of understanding of the core task of a contracting authority; to define and describe its needs.

The use of relative scoring is, then, also problematic when considering the recent urge of the Commission to *professionalize* public buyers. Secondly, as argued by several economists, such a mechanism stimulates collusion.[72] If a tenderer

[69] Case T-402/06, *Spain v Commission* [2013], para. 76: the Court of First Instance here considers that the 'most economically advantageous tender' is 'the one which offers the best value for money'.

[70] See for example: J. Telgen and J. Timmer, *Conditions for rank reversal in supplier selection*, Enschede: University of Twente, Department of Applied Mathematics, 2016. 18 p. (Memoranda; 2055).

[71] See: R. Mateus, J. Ferreira and J. Carreira, *Full disclosure of tender evaluation models: Background and application in Portuguese public procurement*, Journal of Purchasing & Supply Management 16 (2010), page 208.

[72] See for an example relating to average scoring: Albano, Buccirossi, Spagnolo and Matteo, *Preventing*

knows that the actual evaluation depends on the scores of other participants, it might try to move other economic operators to submit a particular bid, which would positively influence the relative score of its own. An extra tender with a relatively – possibly unrealistic - high price will have as a consequence that, in the overall price-quality ratio, price will play a greater role.

Well-drafted tendering procedures requires a legal framework that is both effective and coherent

As stated above, well-drafted tendering procedures can be set up only by making efficient choices within lawful frameworks, based on the fundamental principles of non-discrimination, transparency and proportionality, as further developed in the European and national case law. However, sometimes these principles fail to deliver, as I will show below.

As a lawyer, I will depart from the abstraction that the set-up of professional tendering procedures requires a legal framework that is both effective and coherent.

Effectiveness can be evaluated in my view *ex post* empirically by questioning the compliance of the regulations in practice. It can also be evaluated *in advance*, *ex ante*, by testing the procurement rules against the basic principles of our democratic and open societies, being the general principles of procurement law: non-discrimination, proportionality, equal treatment, transparency.[73] Since the Treaty of Lisbon, Union law also makes demands of the coherence of legal systems.[74] That same treaty also places demands to increase citizens' involvement in the regulatory process (Art. 4(3) TEU, Art. 11(3) TEU, Art. 13(2) TEU). However, this has also increased the risk of incoherent regulation, as I previously discussed in section 3 above, 'Bottom-up influences on the post-Lisbon regulation processes'. The lack of interdisciplinary knowledge, or disregarding it, is another cause of incoherent regulation as well.

The issue of the scoring mechanisms and of the relative scoring is an important one in this regard. It is common knowledge that the point in time at which the contracting authority evaluates the tenders is one of the most crucial moments in a tendering procedure. As already mentioned above, there is fairly little regulation of scoring mechanisms - both at the European level and the national level. This is all the more poignant as the questions 'which results will the use of a given scoring mechanism have' and 'which methods are not suitable for determining the economically most advantageous tender' have been answered long ago in the economic and procurement sciences and in decision making science. Remarkably, during the review process of the public procurement directives, the European legislature did not seize the opportunity to pay more attention to this pervasive problem. This, while the entire award system in the new Art. 67 of the current European Directive 2014/24/EU *was* revised drastically, for example by introducing a new MEAT concept. For award criteria, article 67 provides three options. They can entirely be based on price (including cost-effectiveness), they can be based on a price-quality ratio or the contracting authority sets a fixed price after which the economic operators will only compete on quality.[75] Section 5 of Art. 67 contains the

Collusion in Procurement, In Dimitri, Piga and Spagnolo, *Handbook of Procurement*, Cambridge University Press 2006, page. 363. J. Telgen, E.R. Manunza and W. Lohmann, *Hoe wordt uitzendwerk gegund? Analyse van aanbestedingen*, Public Procurement Research Centre, 2013, page 21.

[73] E.R. Manunza, 'Een drietal beschouwingen over het nieuwe regelgevende packet overheidsopdrachten', Europa Institute Working Paper 01/12.

[74] Art. 11, 3 [TEU]: (…) in order to ensure *coherent* EU actions.(...)"; Art. 13, 1 [TEU]: 'The Union shall (…) ensure the *consistency*, effectiveness and continuity of its policies and actions'. Art. 7 [TFEU]: "The Union shall ensure *consistency* between its policies and activities (…)".

[75] The Directive does not preclude Member States from prohibiting assessments solely based on price nor quality. In any case, choosing for a price-quality ratio seems logical because it will - at least in a competitive market - let the market set the price as low as possible while demanding the highest quality possible loose from the specifications. Quality, in the

general principle that the contracting authority shall specify, in the announcement or in the procurements documents, *the relative weighting to each of the criteria chosen by it* to determine the economically most advantageous tender (italics EM). The old, summary regulation of the contract award criteria laid down in Art. 53 of the old Directive 2004/18/EC was left unchanged in the new Art. 67 of Directive 2014/24/EU.[76] So, from a legal point of view, it is mainly the procurement principles and the decisions of the European and national courts that patrol the borders when it comes to answering the question of whether a certain scoring mechanism is, or is not, to be deemed legally permissible. An analysis of the decisions of the national and European courts shows that the litigation is concentrated on a test against the principles of transparency and equal treatment.[77] It also shows that the courts most frequently test against the principles of transparency and equal treatment. The question is whether these two principles can offer the injured party sufficient protection. I will come back to this question below.

Relative scoring systems in European and national case law

According to a survey conducted by University of Twente, supervised by Telgen, at least 60% of the tendering procedures in the Netherlands use a relative scoring mechanism.[78] And yet, there is not much national case law about relative scoring mechanisms in The Netherlands.[79]

Several times, the civil court has rejected reliance on the shortcomings of relative scoring on procedural grounds. In 2007, the Court of Appeal of The Hague rejected the argument of a tenderer that a relative scoring method is impermissible where it leaves space for a contracting authority to specify and complement sub-criteria based on the submissions during the awarding-phase. The Court reasoned that because the authority was transparent about the use of relative scoring from the start of the procedure this was no just foundation for a complaint.[80] It concluded that the method itself was not contrary to the principles of equality or transparency. The method was, however, not assessed in the light of objectivity or the obligation of authorities to ensure the possibility of effective competition. The latter judicial approach - so, the test against the transparency principle - is seriously flawed in any event. After all, when relative scoring is used, tenderers cannot possibly know in advance how their tender will be evaluated. This is not because a contract award criterion was added at a later stage; it is because of how the other tenders are structured.

In other cases the Court held that the transparency principle was satisfied as long as the scoring rules had been communicated in advance.[81] In conclusion, in the lower case law the relative scoring problem has not been resolved.

The Dutch Supreme Court (Hoge Raad) had an occasion to comment on the matter in *Ricoh NL*

sense of the Directive, may include criteria which measure societal benefits. Compared to a price-only situation – where the quality is solely determined by the specifications of the tender – a price-quality ratio maximizes competition in the sense that operators compete on as many as possible different facets.

[76] Art. 67(5) Directive 2014/24/EU read: The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone. Those weightings may be expressed by providing for a range with an appropriate maximum spread. Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

[77] See the Dutch case law discussed below.

[78] See footnote 12, above.

[79] In the Netherlands, legal protection goes through the civil courts.

[80] Civil Court of Appeal, The Hague, Case 07/602 KG [2007] ECLI:NL:GHSGR:2007:BC1279, paras. 4.1-4.3.

[81] See: Civil Court Rotterdam 7 juni 2011, LJN:BR2793 and Civil Court of Appeal The Hague 13 september 2007, LJNBC1279, Civil Court The Hague 29 november 2006, LJN:AZ5047.

BV v. Municipality of Utrecht of 9 May 2015.[82] The Municipality of Utrecht had awarded a master agreement for the supply of printers by evaluating the tenders based on relative scoring in which the discussed phenomenon of rank reversal occurred. In the documents, the contractor established that the contract would be granted to the economically most advantageous tender. There were several award criteria, each with their own weighting. The extent to which a tender satisfied a certain criterion was measured on a scale from 1 to 10, for which the best bid received 10 points and the worst bid only 1, hence: relative scoring. In the documents the contractor had stated that if the winner would fall out after being awarded because of giving wrongful information, either the party which ended as second would be invited or the whole procedure should be done again.[83] So, the contractor left its options open. This was exactly what happened. The winning tender did not comply with the specifications and was later declared invalid, and the Municipality of Utrecht automatically awarded the contract to the second-best tenderer. Subsequently, the municipality decided not to invite the second-best tender, but to re-evaluate the two remaining tenders, without the relative weight of the rejected one. Only the two tenders remaining, the former number three won the bid. The former number two went to court, demanding negotiations with the municipality, while withholding the municipality from awarding the contract to the new winner; asking to the courts whether the relative scoring nature of the scoring system was a violation of the principle of equal treatment and/or transparency. At first the complaint was rejected, but in appeal the Court ruled that because the municipality did not explicitly, beforehand, stated that it would re-evaluate the remaining tenders loose from a possible rejected winner it had to invite the second-best tenderer. Apparently, the principle of transparency entails that, if not specifically stated otherwise, the second place is entitled to negotiations when the first place falls out, based on the original ranking. According to the Court, this does not conflict with the principle of equality, since that does not require invalid tenders not to play a role in the evaluation.[84]

The Supreme Court followed the judgment of the Court of Appeal. While, in general terms, relative scoring is not, by its nature, contrary to the principles of transparency and equality, the principle of transparency entails that the second-best tender had to be invited by the municipality. Again, this does not conflict with the equality principle, since the first ranking was based on a scoring method which was equally applied to both participants.[85] After the winning tender was excluded, it did, however, seem to be random which tender the contract was going to be awarded to.

The Supreme Court was *not* asked whether relative scoring is impermissible based on other rules, that can*not* be traced back to those two principles. For example, whether a relative scoring mechanism must be deemed impermissible at law because it cannot be used to determine the economically most advantageous tender. On the whole, the Supreme Court sufficed with a reasoning that comprises the usual abstractions; it addressed the principles of equal treatment and transparency; and it introduced the notion that the relative scoring method is not impermissible 'merely on the basis of the relative nature', but that it depends 'on the manner in which a certain scoring system has been structured or applied in the specific case'. And yet, European procurement law is based on the idea that contracts must be awarded on the basis of objective criteria, that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the tenders, in order to determine, in conditions of effective competition, as set out in recital no. 90

[82] Supreme Court, *Ricoh NL BV v. Municipality of Utrecht*, 9 May 2014, ECLI:NL:HR:2014:1078.
[83] L.c., para. 3.1.
[84] L.c., paras. 3.2.1-3.2.2.

of Directive 2014/24/EU, which tender is the most economically advantageous tender.
Incidentally, in the Netherlands this requirement has been incorporated in Art. 1.4 of the Public Procurement Act 2012, which reads that a contracting authority (…) shall determine on the basis of objective criteria the choice for the manner in which (it…) intends to bring about the agreement; and the choice for the business or businesses admitted to the tendering procedure. So far, Article 1.4 of the Public Procurement Act has not yet been invoked in the Netherlands to challenge the objectivity of a relative scoring mechanism in court. It is regrettable that, in this case, the Dutch Supreme Court failed to present a question for a preliminary ruling to the European Court of Justice. But it is even more regrettable that no-one has yet explored other legal bases in court to challenge the impermissibility of the relative scoring mechanisms - in particular because they can never be used to determine the economically most advantageous tender.[86]

For example, it could be argued in court that only one tender can be considered MEAT. In *Concordia Bus Finland* the CJEU ruled that when the contracting authority chooses to base the award of the contract on the criterion of the economically most advantageous tender, as the municipal entity also did in the present case, that choice may, however, relate only to criteria aimed at identifying the economically most advantageous tender.[87]

The Court of First Instance defines such an economically most advantageous tender as 'the one with the best price-quality ratio, taking into account criteria justified by the subject of the contract' as the tender offering the best value for money can be defined as the one with the best price-quality ratio, taking into account criteria justified by the subject of the contract.[88] According to the Court of First Instance this means that 'where the contracting authorities choose to award the contract to the most economically advantageous tender, they must assess the tenders in order to determine the one which offers the best value for money'.[89] I believe that these judgments must be understood to mean that a contracting authority is required to apply scoring rules enabling them to identify the one tender that actually offers the best price-quality ratio. However, the abstract and general fixing by the national legislature of a single criterion for the award of public works contracts deprives the contracting authorities of the possibility of taking into consideration the nature and specific characteristics of such contracts, taken in isolation, by choosing for each of them the criterion most likely to ensure free competition and thus to ensure that the best tender will be accepted.[90]

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[85] L.c., paras. 3.5-3.7.

[86] See: See: C.E.C. Jansen, Case note on *Ricoh NL BV v. Municipality of Utrecht* (2014), Nederlands Juristenbad 2016/342. See also: E.R. Manunza, 'Economie en recht', *Tijdschrift Aanbestedingsrecht* 2014, pp. 124-126, E.R. Manunza, J. Telgen and W.A. Lohman, 'Andere uitkomst als een van de inschrijvers toch niet meedoet', Cobouw 159, 19 September 2014, pp. 12-13 and E.R. Manunza and J. Telgen, 'Emvi ontbeert goede gunningsmethode: apert foute methoden juridisch niet altijd verboden', Cobouw 144, 29 August 2014, p.11.

[87] See Case C-513/99, *Concordia Bus Finland* [2002] ECLI:EU:C:2002:495, para. 59: While Article 36(1)(a) of Directive 92/50 leaves it to the contracting authority to choose the criteria on which it proposes to base the award of the contract, that choice may, however, relate only to criteria aimed at identifying the economically most advantageous tender (see, to that effect, concerning public works contracts, Case C-31/87, *Beentjes* [1988] ECLI:EU:C:1988:422, para. 19, Case C-324/93, *Evans Medical and Macfarlan Smith* [1995] ECLI:EU:C:1995:84, para. 42, and Case C-19/00, *SIAC Construction* [2001] ECLI:EU:C:2001:553, para. 36). Since a tender necessarily relates to the subject-matter of the contract, it follows that the award criteria which may be applied in accordance with that provision must themselves also be linked to the subject-matter of the contract.

[88] See Case T-402/06, *Spain/Commission* [2013] ECLI:EU:T:2013:445, para. 76.

[89] L.c., para. 76 with reference to Case C-368/10, *Commission/Netherlands* [2012] ECLI:EU:C:2012:284.

[90] See Case C-247/02, *Sintesi SpA/Autorità per la Vigilanza sui Lavori Pubblici* [2004] ECLI:EU:C:2004:593, para. 40.

10.7. Conclusion

As discussed in section 3 and 4, the Europe 2020 strategy entails an evaluation of a range of objectives that - at the level of implementation - could be conflicting. This means that it is essential to create legal and objective evaluation frameworks to make the range of options and broad discretionary powers of the contracting authorities subject to review. It is also necessary to provide injured parties whose rights have been infringed by the abuse of those powers with the possibility to review the limits of the broad discretionary power of a contracting authority in the Courts.

Under European public procurement law it is not permitted to apply conditions that are known in advance to entail the risk that the contract will have to be awarded to a tenderer that does not offer the best price-quality ratio. In this regard, once again it can be stated that all knowledge from the decision-making sciences, mathematics and the economic sciences about which scoring rules lead to objective results and which other methods lead to - even - absurd outcomes is being completely ignored.

Most importantly, award methods need to be considered within the legal framework in which they occur, just as award criteria. The principle of transparency was introduced by the Court to enable economic operators to monitor whether the contracting authorities did not discriminate in a way that is contrary to the internal market provisions of the Treaties. Now that the objectives of this internal market are widened the principles need a more dynamic understanding. Public procurement is now considered as a strategic tool for achieving social and environmental goals. Great importance is attached to the principles of transparency and equal treatment that should contribute to these goals. However in some cases they fail to deliver, meaning they cannot resolve certain problems in practice other than objectivity. Rule in place that demand this objectivity are hardly needed, and which can be relied upon in court. Quantifiable rules on objectivity could form a solution. While the Court on other subjects, clearly, has been a leading institution on the demarcation of public procurement law, on the subject of award methods it has been rather restrained. Perhaps cases of *rank reversal* through relative scoring methods – because of their obvious arbitrariness - will in the future open the way for the Court to scrutinize award methods more critically.

It is for the political actors, as the Commission and the national governments, to stimulate contractors to better define their wishes. The European and national legislator should adopt more explicit rules that demand objectivity of scoring rules. The judiciary will have to deal with cases of reverse ranking and other problems resulting from relative scoring methods. In the end, a court needs to ask itself the question whether, in a given case, the awarding method obstructed effective competition, both on price and quality. If so, the procedure could best be started over in a legitimate manner.