Public Procurement Law as an Expression of the Rule of Law: On How the Legislature and the Courts Create a Layered Dynamic Legal System Based on Legal Principles

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Abstract

The enormous amount of money involved in the public procurement market has forced authorities and scientists to concentrate excessively on the efficiency of the public procurement process from an economic perspective, with much less emphasis on the constitutional aspects of public procurement law. In this contribution, I will argue that the emphasis should move from "economic" effectiveness to "constitutional" effectiveness, aiming at ensuring the democratic rights of individuals and maintaining democracy and the rule of law. Constitutional effectiveness is to be considered a prerogative of good legislation and good enforcement. As legitimacy and coherence are essential for the creation of constitutional effectiveness, I will elaborate on this reasoning by analysing how public procurement law is evolving and expanding towards a more coherent area of law as a consequence of, on the one hand, a top-down EU legislative process and, on the other hand, as triggered—bottom-up—by litigation in the national courts. Potential tensions or conflicts emerging between economic and constitutional effectiveness could be resolved by adapting the concept of economy and the concept of costs related to public procurement. This estimation should include the costs needed for the protection of the democracy and the rule of law.

1. Introduction

1.1 The transactional State and constitutional effectiveness

All over the world, governments struggle to deal with society's most pressing problems, such as those related to social injustice, climate change and national security. It is alarming to see how often governments fail to deliver when it comes to transactions with market parties, transactions such as public procurement.[1] Newspapers and academic journals regularly report on problematic procurement procedures in areas such as the social domain, home care services, the collection and disposal of household waste, public transport and the purchase of schoolbooks. Recurring questions in these debates are about the economic advantages

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[1] The State always retains the prerogative to decide to perform public tasks/services itself or to externalise them and only in the latter case does public procurement law apply. See, E. Manunza, *European Public Procurement Law Problems in Privatisations and in the Fight Against Corruption and Organised Crime*, European Monographs (Kluwer-Deventer, 2001), Vol.68, pp.15–16.

(and disadvantages) of having the State[2] perform these activities itself instead of outsourcing them to the free market,[3] or about other related economic issues. This is not surprising: the public procurement market represents around US $12 trillion of the entire US $96 trillion of the global GDP and even considerably more if we include defence and health care spending.[4] This enormous economic amount has forced authorities and scientists to concentrate excessively on the *efficiency* of the public procurement process from an economic perspective, with much less emphasis on the constitutional aspects of public procurement law, its functions and its goals. It is of course impossible to overstate the importance of this economic effectiveness: by saving even a small portion of the public procurement expenditure, governments can relocate their resources to other valuable areas, improving the daily life of citizens by maximising welfare and thus shaping a better society.

This *economic* perspective of the ultimate goal of a "better society", often based on the idea that wealth maximisation is a worthy goal in itself,[5] may prevent us from realising the more fundamental function of public procurement law.

To give a small example, in 2021 the Dutch Ministry of the Interior and Kingdom Relations commissioned the mapping of advantages and disadvantages underlying the need to make public procurement more transparent by disclosing as much public procurement data as possible on an Open Public Procurement Data Platform.[6] The Ministry hesitated because disclosing data would be too expensive and thus inconvenient.[7] Apart from the fact that this is a misconception in financial terms,[8] the relevance of disclosing data goes further than checking whether tax money has been efficiently spent. Disclosing data means enabling citizens to check if their democratic, constitutional rights have been respected in public procurement procedures, which is of a much greater societal impact. The relationship between the quality of public procurement regulation and these fundamental, constitutional rights is often underestimated.

It is, however, no coincidence that well-developed countries from a democratic perspective, countries that honour the rule of law, have well-drafted public procurement legal systems in place. Poorly developed countries often have no or only rudimentary public procurement legal systems, which cannot compare with the EU public procurement rules which are based on the fundamental principles of transparency, non-discrimination, proportionality and objectivity. The main objective of these principles is to protect individual rights from the wide discretionary room for manoeuvre of contracting authorities in the Member States. Concomitantly, these principles prevent distortion of the internal market and protectionism, both with the aim of improving the economy as such. It is to ban discriminatory practices, to tackle and prevent protectionism, that the European legislature 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

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

[3] There are also other relevant legal discussions that could be addressed in this context but which fall outside the scope of this contribution. One of them regards the question whether such activities should be considered as *economic* or as of *general interest* according to EU law. This discussion has *mainly* focused on how these concepts—activities in the economic sphere or in the general interest—should be defined and under which conditions competition and public procurement regulation should be applied. The general assumption has been that determining whether public procurement law applies or not, depends on the nature of the activities according to (EU) competition and internal market law. The same question dominated the wave of privatisation that swept Europe in the mid-1980s when a great number of activities that previously were offered by the State were transferred to private parties. I have argued in several publications (see further for instance my contributions mentioned in fnn.10, 19 and 26) that, in my view, focussing on the nature of the activities results in an unproductive debate. The discussion has been centred for (too long) excessively on the *nature* of the activities, with much less emphasis on how the State uses its wide discretionary power to choose its in- or out-sourcing strategy and to achieve its policy goals.

[4] European Commission, "Internal Market, Industry, Entrepreneurship", *https://single-market-economy.ec.europa.eu/single-market/public-procurement/international-public-procurement_en*; *https://www.worldbank.org/en/news/feature/2020/03/23/global-public-procurement-database-share-compare-improve*.

[5] See also R. Dworkin, "Is Wealth a Value?" (1980) 9 *The Journal of Legal Studies* 191–226.

[6] See F. Schotanus, "Open Public Procurement Data by Default", report (7 April 2022), *https://www.government.nl/documents/reports/2022/04/07/open-public-procurement-data-by-default*.

[7] See for an overview of this policy response to the "Open Public Procurement by Default" report: *https://openstate.eu/en/2022/03/nederlands-doelgids-open-inkoop-de-weg-naar-een-open-en-centraal-inkoopregister/*.

[8] According to Open State Foundations: *https://openstate.eu/en/2022/03/nederlands-doelgids-open-inkoop-de-weg-naar-een-open-en-centraal-inkoopregister/*.

by introducing common transparent, objective, proportionate and non-discriminatory rules.[9] The creation of the internal market by the Treaty of Rome (1957) reduced the autonomy of the Member States in regulating and pursuing economic activity.[10] The main characteristic in that sense, which the frameworks of the internal market—the economic freedoms and the rules on competition—have in common, is that they only apply within the *economic sphere*.[11] As the European Court of Justice famously proclaimed in *Van Gend en Loos* (1963),[12] by initiating the integration process the signing States created, within this economic sphere, a "new legal order", thereby limiting their sovereign rights.[13] The development of the legal framework for public procurement in the 1970s fitted perfectly with the idea of limiting government intervention in the free market.[14]

However, this public procurement legal system should also ensures the effectiveness of the constitutional, fundamental democratic rights as enshrined in art.2 of the Treaty on the European Union (TEU): "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights (…)". This constitutional perspective is necessary to stress that the discretionary decision authority of the State is not unlimited. The State, the nation, exists to serve the citizens and not the other way around.

It is no coincidence that the implementation of public procurement law is mentioned as one of the key "fundamentals" listed by the European Commission to enhance and improve the accession negotiation process of the Western Balkan countries—Moldova, Georgia and Ukraine—to the EU.[15] Public procurement law is listed alongside independent judiciary and fundamental rights, justice, freedom, security, the functioning of democratic institutions and reforms of public administration. This is not the case with "internal market, competitiveness and inclusive growth" or other, more economic related issues. This clearly demonstrates the constitutional, rule-of-law nature of public procurement law. According to the European Commission, these fundamental reforms—including public procurement law—are central to the accession negotiations process with the Balkan countries: "credibility in the accession negotiation process should be reinforced through an even stronger focus on the fundamental reforms essential for success in the EU".[16] These reforms are a key tool for promoting democracy, rule of law and the respect for fundamental rights which are also—in the view of the Commission—the main engines of economic integration and the essential anchor for fostering regional reconciliation and stability, and they include public procurement law. Ukraine was one of the countries that had been very much involved in recent years in an intensive dialogue with the EU institutions in this respect.[17] That orientation towards democracy,

[9] Directive 70/32 on provision of goods to the State, to local authorities and other official bodies [1970] OJ L13/1 and Directive 71/304 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies of branches [1971] OJ L185/1. See also E. Manunza and N. Meershoek, "Fostering the Social Market Economy? Legal Impediments for New Types of Economic Actors" (2020) 6 P.P.L.R. 343–359, para.1.1.

[10] E. Manunza, "The European's Zigzag Course in the Area of Privatisations" in H.J. de Ru and J.A.F. Peter (eds), *Privatisation and free markets. State of affairs and perspectives*, Monographs on Government and Market 2002 No.1 (Sdu Publishers, 2002), pp.109–135.

[11] See also, O. Odudu, "Economic Activity as a Limit to Community Law" in C. Barnard and O. Odudu, *The Outer Limits of European Union Law* (Hart Publishing, 2009), p.225.

[12] *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* (26/62) EU:C:1963:1; [1963] C.M.L.R. 105 at [12].

[13] This is often linked to the existence of an "economic constitution", implying a system in which economic freedoms are enforceable by legal rules limiting political power in the mentioned economic sphere. According to W. Sauter, economic integration is, in other words, constitutionalised by legally enforceable principles banning obstacles to the optimal functioning of the market; see W. Sauter, "The Economic Constitution of the European Union" (1998) *Columbia Journal of European Law* 47.

[14] See for an extensive discussion on EU public procurement law in light of these "neoliberal" values: P. Kunzlik, "Neoliberalism and the European Public Procurement Regime" in *Cambridge Yearbook of European Legal Studies* (Cambridge: Cambridge University Press, 2012–2013), pp.283–356.

[15] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Enhancing the Accession Process — A Credible Perspective to the Western Balkans" COM(2020) 57 final, p.7.

[16] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Enhancing the Accession Process — A Credible Perspective to the Western Balkans" COM(2020) 57 final, p.7.

[17] See for instance, ProZorro (*https://prozorro.gov.ua/en*), a fully online public procurement platform and a collaboration environment that ensures open access to public procurement (tenders) in Ukraine. Fully implemented in 2016 as a hybrid (both centralised public and decentralised private marketplaces) system it has since been globally recognised as one of the most innovative public procurement systems aiming at delivering government services in a stakeholder-focused, transparent, effective, fair and low-cost way.

the rule of law and freedom is now at stake in Ukraine in a way that we could never have imagined on the European continent, but it shows what can also be at stake here on the whole territory of the European continent. The high level of corruption appears to be the main obstacle—besides the on-going war—of Ukraine's accession to the EU. It is not for nothing that the main "weapon" of the Commission in this respect is the possibility of suspending subsidies, because the rule of law and corruption problems are connected to the "efficient and effective" spending of that money. However, even corruption is often seen more as a risk for the economy than a risk for democracy and the rule of law. In contrast with collusion, bid rigging and other undesirable and fraudulent behaviours of economic operators, arbitrariness in the decision process of contracting authorities has attracted far less attention.[18]

Besides the specific roles in preventing corruption, public procurement is also part of a more general range of transactional options based on which the State contributes to designing society. The State has a preponderant position in designing society. To achieve its policy goals, the State uses its wide discretionary powers to choose and to determine the nature, scope and purpose of tasks and services which society should take care of, and who should take care of their performance.[19] The State does this by choosing from a wide range of legal transactional options, such as selling and buying property, performing tasks by itself (insourcing) or letting the market do its work by contracting market parties, by engaging in more structural public-private cooperation or by distributing limited authorisation schemes[20] (outsourcing). By making such choices, the State automatically demarcates the ever-shifting line between the "public" and the "private" due to its ever-evolving methods of transactions.

Such choices are made significantly differently from State to State, depending on their different traditions (collective vs individual; commons vs values), cultures (south vs north; east vs west), history, political philosophy (protectionism vs open economy; nationalism vs patriotism), legal systems, economic approaches (neoliberal vs nationalisation) and democratic development levels with regard to State intervention.[21] These choices significantly affect the functioning of society in a positive or negative way. The State thereby directly or indirectly designs and influences society, in a top-down manner, stimulating or limiting bottom-up initiatives. In short, how the State positions itself in this context is of enormous importance for democracy and the rule of law.

This contribution aims at a better understanding of public procurement law as an expression of the rule of law by focussing on its constitutional aspects. I will argue that the emphasis should move from "economic" effectiveness to "constitutional" effectiveness, aiming at ensuring the democratic rights of individuals and maintaining the rule of law.

To be fully guaranteed, constitutional effectiveness needs to be supported by a new conceptualisation of the subordinate economic effectiveness. As I will further discuss in section 1.3, a lot depends on how the idea of "economy" is conceptualised and on how cost-effectiveness is estimated: does this include the costs needed for the protection of democracy and the rule of law?

Legitimacy and coherence are essential for realising constitutional effectiveness (section 1.2). I will expand on this reasoning by analysing how public procurement law is slowly expanding and evolving towards a more *coherent* area of law. On the one hand this expansion has been partly triggered top-down by the legislature and, on the other hand, bottom-up by litigation in the national courts (sections 2 and 3).

[18] Manunza, *European Public Procurement Law Problems in Privatisations and in the Fight Against Corruption and Organised Crime*, European Monographs (Kluwer-Deventer, 2001), Vol.68, pp.243–252. See also Manunza and Meershoek, "Fostering the Social Market Economy? Legal Impediments for New Types of Economic Actors" (2020) 6 P.P.L.R. 343–359, sections 1.2–1.3, pp.348–350.

[19] E. Manunza, "The Art of Choosing" (2017) 66 *Ars Aequi* 962–964, *https://dspace.library.uu.nl/bitstream/handle/1874/358125/manunza.pdf?sequence=1*.

[20] Many, but not all, limited authorisation schemes can be considered to be a "transaction". This depends on national legislation.

[21] These and other questions play a fundamental role in the Utrecht University Platform "The transactional State as an Institution for Good" founded by E. Manunza, W.A. Janssen and H. Roelfsema in 2022. The aim of the platform is to investigate the prismatic role of the transactional State in triggering "good" behaviour or in stimulating activities with the ultimate goal of creating social value or having a go at solving societal challenges. See *https://www.uu.nl/en/research/institutions-for-open-societies/interdisciplinary-research/academic-foundations/the-transactional-state-as-an-institution-for-good*.

Two lines of development have become visible in legal proceedings. In the first one market participants demanded a competitive distribution of games of chance, lotteries and slot machines based on the internal market rules (section 3.1). The second line of development has become visible in the Dutch courts where market participants, in absence of EU and national rules for the sale of government property, demanded a competitive procedure based on general principles of law (section 3.2). The line of reasoning here is certainly not specific to the Netherlands and is therefore relevant for the entire EU jurisdiction.

This analysis opens the way to questions of a more fundamental theoretical nature such as: what other elements and principles play a role alongside the internal market rules to argue in favour of regulating *competitive* procedures (i) to buy or (ii) to sell public property and (iii) to distribute (limited) authorisations and (iv) other public rights? Another fundamental question is: what developments have these evolving elements and principles undergone? Investigating these elements and principles and their evolution implicitly gives me the opportunity to investigate the *natural* lines demarcating public procurement law from other (related) areas of law; or, to put it in other words, to question the current scope of public procurement law.

To this end the emphasis moves from public procurement law *stricto sensu* to public procurement law in a *broad sense*. I use the term "public procurement law *stricto sensu*" to refer to the legal system governing exclusively *public procurement competitive procedures* to buy goods, services and works to check how taxpayers' money is spent and to ensure that society achieves the best value for money. The term "public procurement law in a *broad sense*" is used to refer to the envisaged, more coherent legal system governing the whole transactional habits of the State (buying and selling property activities and distributing rights and licences *through competitive procedures* to ensure the fundamental democratic rights of citizens, such as equal treatment and transparency).

Another distinction is made between *public procurement procedures* and other types of *competitive procedures*. The term "public procurement procedures" is used to refer to the procedures laid down in the 2014 EU Public Procurement Directives and the earlier 2009 Directive for the defence and security sectors.[22] The terms "competitive procedures" or "competitive awards of contracts" or "competitive distribution procedures" are used to refer to other forms of competitive obligations in situations which are outside the scope of the EU public procurement directives and which have been developed in the case law of the Court of Justice of the EU (CJEU) concerning distribution of (limited) authorisations (for example for games of chance or the exploitation of casinos or lotteries).[23] The term "competitive procedure" is also used to refer to competitive obligations in situations which are outside the scope of the TFEU provisions and which have been developed in the national (Dutch) case law, such as when State property has to be sold.

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

1.2 Enhancing constitutional effectiveness through consistency and coherence

The term "constitutional effectiveness" is used to express that exercise of the State authority which needs to be justified and legitimised.[24] It is understood in light of the deeper goals that underlie the EU as such and in which it finds its *raison d'être*. In the words of art.3(1) TEU, "the Union's aim is to promote peace,

[22] Directive 2014/23 on the award of concession contracts [2014] OJ L94/1. Directive 2014/24 on public procurement contracts and repealing Directive 2004/18 [2004] OJ L94/65. Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17 [2004] OJ L94/243. Directive 2009/81 public contracts in the fields of defence and security [2009] OJ L216/76.

[23] As I will discuss further in sections 3 and 3.1, service concession cases had been subject to the same development before being liberalised by the 2014/23 Directive on the award of concession contracts. This directive also aimed at codifying the jurisprudence of the CJEU on this matter.

[24] Of course, there are also other, non-instrumental grounds for legitimacy but it is beyond the scope of this contribution to address them.

its values and the well-being of its peoples".[25] Legitimacy and coherence are essential for the creation of constitutional effectiveness. Since the Lisbon Treaty of 2009, the EU Treaties place more explicit emphasis on good governance aspects of EU action, including the need for consistency and coherence. For example, art.13(1) TEU provides that the EU must have an institutional framework "which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions".

As I will discuss in sections 2 and 3, some of the transactional habits of the State fall under the EU internal market rules, others fall under the public procurement directives, and yet another category is not subject to either of these (nor to national law). The incoherent and inconsistent rules[26] governing the various types of State transactions—or their absence—affect the functioning of the economy and society in a negative way. This is still the case, even considering the evolution that the legal system has undergone during recent years towards more consistency and coherence. Still much remains to be done, as I will discuss further in section 3.

In public procurement, achieving positive outcomes such as those adopted by the United Nations with the sustainability development goals (UN SDGs) depends on the chosen legal instrument: choosing in-house, for example, will reduce the possibility of increasing social innovation by contracting out to social enterprises or citizen initiatives. A responsible choice can only take place when the legal system is clear, consistent and coherent; and when legal concepts are used consistently and standards are compatible not only with the regulations of which they form part but also with other relevant components of the law and of the legal system in general, including general principles of law.[27]

Detrimental fragmentation, other types of incoherence and inconsistency, wide discretionary powers of contracting authorities and unclear demarcation lines between legal instruments are all impediments to the realisation of, on the one hand, the policy goals (policy effectiveness) and economic effectiveness and, on the other hand, constitutional effectiveness. Clarity, consistency, coherence and legal certainty are hindered by the "layered" structure of public procurement law. This area of law is formed by layers of regulation from different legal orders: international law (for example the Agreement on Government Procurement and Free Trade Agreements),[28] EU law (*primary* EU law: the Treaties and derived general and fundamental principles as well as the jurisprudence of the CJEU; *secondary* EU law: regulations,[29] directives;[30] *tertiary* EU law: soft-law regulation) and national law. This "layered" legal system gives rise to interpretation questions and, at international and EU level, to the question which source of law has

[25] According to Maduro, the "Treaties can be seen as a constitutional framework that has created an autonomous legal order underpinned by its own normative foundations", see M.P. Maduro, "Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism" (2007) 1 *European Journal of Legal Studies* 4–5. According to the principle of conferral laid down in arts 4(1) and 5 TEU, the EU may only act within the boundaries of the competences conferred upon it. See also K. Tuori, *European Constitutionalism* (Cambridge: Cambridge University Press, 2015), p.46. Constitutional effectiveness aims at ensuring these procedural constitutional aspects as well. However, they are not subject to further analysis in this contribution.

[26] See for a more in-depth discussion on coherence and consistency: E. Manunza, "Member States Not Free in Privatisation Policy. Is the European Community Pursuing a Neutral or, Rather, a Liberal Policy Towards Privatisations?" (2001) 8 *Tijdschrift Privatisering* 4–8; Manunza, "The European's Zigzag Course in the Area of Privatisations" in de Ru and Peter (eds), *Privatisation and Free Markets. State of Affairs and Perspectives*, Monographs on Government and Market 2002 No.1 (Sdu Publishers, 2002), pp.109–135; E. Manunza, "Towards a Consistent and Efficient Regulation of the Public Procurement Market" in J.M. Hebly, E. Manunza and M. Scheltema, *Reflections in Response to the Legislative Proposal Public Procurement Act*, preliminary report containing recommendations for the Association of Construction Law (2010) pp.49–123; E. Manunza, "Crossing Borders. From Public Authorities' Obligations to Citizens' Rights", inaugural lecture delivered on 29 September 2010 in acceptance of the full professorship of International and European Public Procurement Law, Utrecht University.

[27] G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart Publishing, 2012), p.161.

[28] Agreement on Government Procurement and Free Trade Agreements, adopted on 30 March 2012 and as confirmed on 6 April 2014 (GPA/113).

[29] See for instance the regulation concerning the thresholds above which advertising of contracts in the Official Journal of the EU is obligatory. Thresholds are revised every two years by a new regulation. Full and up to date thresholds can be checked on the EU public procurement website, *https://eur-lex.europa.eu/legal*.

[30] Directive 2014/23 on the award of concession contracts [2014] OJ L94/1. Directive 2014/24 on public procurement contracts and repealing Directive 2004/18 [2004] OJ L94/65. Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17 [2004] OJ L94/243. Directive 2009/81 public contracts in the fields of defence and security [2009] OJ L216/76.

priority above another and to the question which rule (can) have direct effect to be enforced in the national courts, and if so, under what circumstances and based on what legal conditions.[31]

Only by achieving this constitutional effectiveness, can public procurement law be considered as "good". "Good" regulation and enforcement play a key role in addressing global concerns, serving the goals of the EU as enshrined in art.3(1) TEU to secure peace, to protect EU's core values and ensure people's well-being more generally.[32] Following the 2019 Conclusions of the Council of the EU on the "Economy of Wellbeing",[33] "the EU is to put people and their wellbeing at the centre of policy and decision-making". The new concept of *multi-dimensional sustainable economic growth,* as envisaged by the UN SDGs, and the ever-evolving concept of well-being work together to the benefit of people and society.[34] This *multi-dimensional sustainability* concept is much wider and includes (local) social and environmental considerations.

In this context it is essential to view the EU Treaties themselves as a coherent system, and their various components—such as internal market law, public procurement law, etc.—not as independent pillars but as coherent parts of a single common system and in the light of the overarching objective set out in art.3(1) TEU.[35] EU public procurement law must therefore contribute to these goals as well.

1.3 Enhancing constitutional effectiveness through a new economic concept

Despite the relevance of economic effectiveness for improving welfare, welfare cannot be a goal in itself for State expenditure. Constitutional effectiveness aims to protect inalienable, universal rights inherently related to human dignity, to democracy and the rule of law. The question as to which type of effectiveness, the economic or the constitutional, should prevail above the other is easily answered: constitutional and economic effectiveness aim at different goals and, for this reason, cannot compete with each other. The question is how to reconcile inevitable tensions between the two types of effectiveness.

One of the presuppositions of economic regulation, under which public procurement law is usually brought, is often that competition should be encouraged as much as possible.[36] However, to meet the needs of the present without compromising the needs of the future, the focus should be to strive for "better" and not for "more" competition to stimulate the economy and to aid sustainable economic transition. Addressing competition from this new angle enables us to partly solve the potential tension between constitutional and economic effectiveness. Striving for better competition forces us to change how we look at the concept of "economy" and how we estimate cost-effectiveness in public procurement procedures. This estimation should include the costs needed for the protection of democracy and the rule of law.

[31] E. Manunza and R.G.T. Bleeker, "The Influence of European Law on Dutch Public Procurement Law", in A. S. Hartkamp et al., (eds), *The Influence of European Law on Dutch Private Law* (Business and Law Series 2014; Vol.81, No.II, Kluwer), Vol.II, Special Part, pp.741–810), *https://dspace.library.uu.nl/bitstream/handle/1874/354821/Manunza_Bleeker_DE_INVLOED_VAN_HET_EUROPEES_RECHT_OP_HET_NEDERLANDSE_AANBESTEDINGSRECHT_2014.pdf?sequence=1*.

[32] As argued by L.A.J. Senden, E.R. Manunza and S. Meyer, The Conceptual, Constitutional and Theoretical Foundations of Shared Regulation and Enforcement for a stronger Europe—COCOT Building Block Note, *https://www.uu.nl/sites/default/files/rebo-renforce-bb-COCOT%20Concept%20Note.pdf*.

[33] Council of the EU, Brussels, 24 October 2019 (OR.en), 13432/19.

[34] As discussed on 9 December 2022 at the Conference *Europe and the Price of Well-being. How to secure Good Regulation and Enforcement in Europe?* organised by L.A.J. Senden, E. Manunza and S. Meyer at Utrecht University, *https://www.uu.nl/en/events/europe-and-the-price-of-well-being*.

[35] See for a broader discussion on the methods used by the CJEU to interpret EU legislation: S. Meyer & L.A.J. Senden, "Towards a Constitutional Responsibility Approach for Securing Good Regulation and Enforcement in the Shared European Legal Order", Working Paper, *https://www.uu.nl/en/research/utrecht-centre-for-regulation-and-enforcement-in-europe/building-blocks/foundations-of-shared-regulation-and-enforcement-for-a-stronger-europe*; Manunza, *European Public Procurement Law Problems in Privatisations and in the Fight Against Corruption and Organised Crime*, European Monographs 2001 (2001) (Kluwer-Deventer, 2001), Vol.68, pp.255–263. See also: E. Manunza, N. Meershoek and L.A.J. Senden, "The Ecosystem for the Military Logistics Capabilities of the Adaptive Armed Forces. In the light of the NATO Treaty, the EU Treaties and National Public Procurement and Competition Law" (Utrecht University Centre for Public Procurement & RENFORCE, 2020), para.2.1–2.2, *https://www.uu.nl/sites/default/files/UU%20Report%20on%20Logistics%20Ecosystem%202020%20%28English%20Translation%29-better-version.pdf*.

[36] See for instance CJEU 13 December 2007, *Bayerischer Rundfunk v GEWA—Gesellschaft fur Gebaudereinigung und Wartung mbH* (C-337-06) EU:C:2007:786 at [39]: "As regards specifically public service contracts, the Court has emphasised that same primary objective, namely the free movement of services and the opening-up to competition in the Member States which is undistorted and *as wide as possible* (see, to that effect, Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraphs 44 and 47)" [Emphasis added].

The aim underlying the launch of the European Community project after the Second World War was to prevent wars, to jointly control resources and to enshrine freedom and democracy, just as in the words of the later art.3(1) TEU. The internal market, public procurement and competition are merely means of achieving these goals and therefore naturally subordinate to it. These aims in art.3(1) TEU are also the basis for the effectiveness of all EU policies. The goals, namely what we consider "good" in society and strive for through public procurement procedures, are ever-evolving concepts. After the Second World War the main public procurement goal was to create jobs and to protect strategic industries. Nowadays our main goal is to save the planet from climate change and to improve social conditions and since February 2022—after the start of the war in Ukraine—we realised that safeguarding national security is just as important as safeguarding the environment and social conditions.

In its Conclusions on the Economy of Well-being, the Council of the EU states that *well-being* is both a value in itself[37] and instrumental for economic, fiscal and social goals.[38] Nonetheless the line demarcating "values" and "goals" at this point can be vague. Certain fundamental values are the precondition for arriving at common ideas of the good, such as democracy and solidarity. These values would not be subject to change.

By making its choices, the transactional State affects—directly or indirectly—the functioning of society in a positive or negative way, stimulating or limiting bottom-up initiatives. To give one example: there are various entities that can compete in providing services for the State, the State itself, other public authorities, for-profit and non-profit actors. Nevertheless, it is the State that determines who is allowed to add to what is deemed to be good in society and who will take care of it, by choosing between these various providers. Non-profit actors include voluntary organisations, charities and religious institutions,[39] citizen initiatives and social enterprises. For-profit actors also include socially oriented undertakings not primarily aiming to maximise profit but at pursuing a social mission that contributes to societal challenges relating to sustainability and social inclusion. Undertakings such as Tony's Chocolonely,[40] aimed at making chocolate "slave free", and Triodos Bank,[41] aimed at only investing in projects seeking to resolve societal issues such as sustainability, are good examples of for-profit actors aiming in the first place not at maximising profit but at using profit to solve societal challenges.[42] Hence, social entrepreneurship, social enterprises and citizen initiatives are of growing importance to society, thereby changing the relationship between State and market. In short, the State can choose to create not more but "better" competition by choosing those actors that are better suited to achieve just and sustainable policy goals.

However, a new conceptualisation of economy and competition is not enough to enhance the Economy of Well-being, to embrace and implement the UN SDGs and especially to safeguard democracy and the rule of law, in short: to realise constitutional effectiveness. To this end, the concept of public contract should be adjusted. According to EU public procurement law, only the economic operator and the contracting authority have a procedural role in public tenders: mandatory participation or consultation of other societal stakeholders does not exist. As long as public contracts are considered exclusively as contracts between two parties—the contracting authority and the economic operator—guaranteeing constitutional effectiveness will be at risk. Responsible commissioning should be considered as a partnership between all the parties that should benefit from a public contract. These parties are (i) the end-users, the citizens, society in general terms, the environment; (ii) the economic operator and its employees and (iii) the

[37] Welfare is not the same as well-being. Well-being allows us to consider a "fully rounded humanity" whereas welfare focuses on economic utility. See Dworkin, "Is Wealth a Value?" (1980) 9 *The Journal of Legal Studies* 191–226.

[38] Council of the EU, Brussels, 24 October 2019, (OR.en), 13432/19.

[39] A large segment of the social care services in the city of Amsterdam is awarded to the Salvation Army. In Germany the *Diakonie Deutchland* plays an important role as provider of social services to the government.

[40] See *https://tonyschocolonely.com/int/en*.

[41] See *https://www.triodos.nl/over-triodos-bank*.

[42] See Manunza and Meershoek, "Fostering the Social Market Economy? Legal Impediments for New Types of Economic Actors" (2020) 6 P.P.L.R. 343–359, s.2, p.350.

contracting authority and its employees. The transactional State should carefully and constantly weigh all their interests global, local, public and private, and try to reconcile emerging tensions.

2. Legislature and the courts create a layered dynamic based on legal principles[43]

2.1 A top-down dynamic process

As a relatively new area of law, EU public procurement law is characterised by a strong dynamic that has led to its continued expansion over the last 50 years. It has also influenced other fields of law by showing the relevance of competitive obligations in situations which are outside the scope of EU public procurement law, such as the distribution of (limited) authorisations (for example for gambling, games of chance or the exploitation of casinos or lotteries). More and more types of public contracts, concessions, limited administrative authorisations, permits and licences have gradually become subject to *competitive award* and *competitive distribution* legal obligations. The economically most significant public purchases are subject to competition obligations under the EU internal market Treaty rules. Soon after the Treaty of Rome came into being, it became clear that the Treaty prohibitions were not sufficiently effective in the public procurement market to counteract the risks of protectionist behaviour by national governments and thereby the risks of discriminatory government decisions. The introduction of liberalisation and harmonisation directives became necessary in order to oblige the Member States to actively remove existing barriers to trade. Directives successively opened-up supplies and works (1970s), services (1980s), utilities (early 1990s) and, in 2009, defence and security procurement, to interstate competition. In parallel to this dynamic legislative process, the European Commission pursued a policy of expanding the application of EU law in this field with a large number of soft-law documents[44] and infringement proceedings.[45]

With the aim of also subjecting contracts below the EU thresholds and public service concessions to a degree of liberalisation, the Commission enforced, before the CJEU, the effective functioning of the internal market freedoms and of the "general principles of Community law applicable to contracts for the provision of such services", in particular transparency, equality and non-discrimination.[46] Applying considerations of economic efficiency, the benefits of this gradual opening-up have been quickly proven, given the estimation of the EU public procurement market at around €2,155 billion (15–18% of the EU's GNP). This expanding process continued even after opposition from national governments which feared ever-increasing curtailment of their policy-making powers in many areas.[47]

2.2 Consequences of the absence of adequate and coherent legal rules: bottom up developments

This development perfectly illustrates how tensions between the EU and national spheres of competence in EU legal practice arise not only at the *legislative* level and as a result of infringement proceedings by the European Commission before the CJEU. More striking is that they are also determined in the *courts* of the EU Member States as a result of lawsuits brought at the national level by private individuals who

[43] On the same topic but in Dutch: E. Manunza, "Een wat minder incoherent rechtsgebied" (in English: "A somewhat less incoherent area of law"), in A.G. Castermans et al. (eds), *Parels aan de kroon. Het bouw- en aanbestedingsrecht en familievermogensrecht op de bogen van het 30-jarige BW* (in English: Pearls in the Crown. Construction and Public Procurement Law and Family Property Law Over the 30-year-old Dutch Civil Code) (Liber Amicorum, Wolters Kluwer, 2022), pp.129–139.

[44] See for instance: Interpretative Communication EC on contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02).

[45] CJEU, 26 April 2007, *Commission of the European Communities v Finland* (C-195/04) EU:C:2007:248: contract below the EU thresholds/conflict with the free movement of goods; CJEU, 13 November 2007, *Commission of the European Communities v Ireland* (C-507/03) EU:C:2007:676; [2008] 1 C.M.L.R. 34: conflict with the right of establishment, the free movement of services and the general principles of European (Community) law.

[46] *Commission of the European Communities v Ireland* (C-507/03) EU:C:2007:676; [2008] 1 C.M.L.R. 34 at [1] and [14].

[47] E.g. Court of First Instance, 20 May 2010 (T-258/06), Germany (supported by the Netherlands, France, Poland, Greece and Austria, United Kingdom of Great Britain and Northern Ireland) against the Interpretative Communication (mentioned in fn.44).

could not obtain a contract or a licence given the *absence* of adequate and coherent legal rules and consistent policies. Over a period of more than two decades, private individuals have been going to the courts to claim *competitive awards of contracts* that did not fall within the scope of the EU public procurement directives, or to claim *competitive distributions* of rights/licences. Unlike lawmakers, courts cannot ignore relevant legal questions concerning such fundamental issues, but must answer them. The CJEU did so by recognising, from 1999 onwards, an increasing number of public procurement obligations for contracts falling outside the scope of the directives, such as public service concessions[48] and certain forms of public-private partnerships (PPP).[49] These types of contracts were very similar to those specifically regulated by the EU but which, due to unconvincing legal arguments, fell outside the liberalisation. The CJEU accepted these obligations on the basis of the Treaty provisions on free movement and the derivative general principles of non-discrimination, equal treatment and transparency. Later on, in 2014, the EU legislature codified the competitive legal obligations for concession as recognised by the CJEU in the directive 2014/23 ([2014] OJ L94/1). In the following sections I will illustrate how the EU legislature and the EU and the national courts triggered the expansion of the scope of public procurement law by applying different legal principles and thereby creating a "layered" dynamic public procurement legal system.

3. On how the expansion of the public procurement legal system has influenced related areas of law

In public economic law—where EU public procurement law belongs—the dynamic is by definition strong. However, the previously mentioned expansion (see section 2) is only partly the result of the regulatory activities of the EU and national legislatures. What is striking is the *impact* of public procurement legal principles on other transactional activities of the State falling at the national level under public law and, increasingly, also civil law, which strictly speaking are not covered by public procurement law because there is simply no question of public *procurement*.[50]

In many cases, rights to provide activities are distributed by the State between market parties in the form of (limited) authorisations or awarded to them as service concessions. Until 2014, for different reasons, both (limited) authorisations and service concessions fell outside the scope of the public procurement directives. There were no obligations to follow one of the competitive public procurement procedures laid down therein. Before being regulated by Directive 2014/23, in the past the choice to explicitly exclude the award of service concessions from the scope of the directives was based on political reasons.[51] The distribution of (limited) authorisations is still outside the scope of the directives, perhaps for a different reason. However, as will be explained below, it follows from the case law of the CJEU that the award of such public contracts by public authorities to third parties is also subject to some form of *competitive procedure*. Two lines of developments have become visible in legal proceedings. In the first one, market participants demanded a competitive distribution of games of chance, lotteries and slot machines[52] based on the internal market rules. In the second line of development, they demanded a

[48] CJEU 18 November 1999, *Unitron Scandinavia A/S v Ministeriet for Fødevarer, Landbrug og Fiskeri* (C-275/98) [1999] E.C.R. I-8291 first application of the principle of transparency in supply concessions. CJEU 7 December 2000, *Telaustria Verlags GmbH v Telekom Austria AG* (C-324/98) EU:C:2000:669. CJEU 21 July 2005, *Coname* (C-231/03) EU:C:2005:487. CJEU 13 October 2005, *Parking Brixen GmbH v Gemeinde Brixen* (C-458/03) EU:C:2005:605; [2006] 1 C.M.L.R. 3. CJEU 13 November 2007, *Commission of the European Communities v Ireland* (C-507/03). CJEU 15 May 2008, *SECAP and Santorso* (C-147/06 and C-148/06) EU:C:2008:277. CJEU 6 October 2016, *Tecnoedi Costruzioni Srl v Comune di Fossano* (C-318/15) EU:C:2016:747.

[49] CJEU 15 October 2009, *Acoset SpA v Conferenza Sindaci e Presidenza Prov Reg ATO Idrico Ragusa* (C-196-08) EU:C:2009:628; [2010] 1 C.M.L.R. 35.

[50] Cf. R.J.G.M. Widdershoven, "De olievlekwerking van het aanbestedingsrecht" (7 May 2021), *https://www.uu.nl/opinie/de-olievlekwerking-van-het-aanbestedingsrecht*.

[51] Manunza, *European Public Procurement Law Problems in Privatisations and in the Fight Against Corruption and Organised Crime*, European Monographs (Kluwer-Deventer, 2001), Vol.68, pp.126–148.

[52] See e.g. CJEU 3 June 2010, *Sporting Exchange* (C-203/08) EU:C:2010:307; CJEU 24 March 1994, *Her Majesty's Customs and Excise v Schindler and Schindler* (C-275/92) EU:C:1994:119; [1995] C.M.L.R. 4; CJEU 13 September 2007, *Commission of the European Communities v Italy* (C-260/04) EU:C:2007:508; [2007] 2 C.M.L.R. 50. See E. Manunza et al., "The Legal Lotteries System in the Netherlands: EU-proof? An Investigation into the

competitive procedure for the sale of government property,[53] or in the form of a partial sale of shares[54] and even, in the case of the sale of a television network,[55] based on general principles.

What all these situations have in common is that they cannot be considered as a purchasing activity from a legal perspective. Indeed, the authority in question does not purchase anything nor does it spend tax money. Instead, it "encumbers" its own rights or sells government property and receives remuneration in exchange, at least in some cases. This development revealed that the need to expand the legal obligations to set up competitive award and distributing procedures in the previously mentioned cases, is determined by reasons other than the original ones. The emphasis moves from the fulfilment of the internal market to ensuring the effectiveness of fundamental principles and thus equal opportunities for every single citizen in our society. This shift leads to a legally more consistent and systematic legal approach. However, it is still by no means a coherent system yet, as I will show below.

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

In the cases concerning games of chance and slot machines, affected market participants who also wanted to provide games of chance in other Member States[56] demanded before the national court a competitive *distribution* of the limited licences by invoking, among other things, violation of the free movement of services and the right of establishment laid down in the TFEU, and violation of the principle of non-discrimination and derivative principles, such as the principle of transparency.

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

With the resurgence of populism, protectionism and nationalism in Europe,[57] questions such as why EU (primary) law applies to the provision of gambling services, while the EU has no sector-specific legislative competence to liberalise the gambling sector through secondary regulation (directives or regulations),[58] become more important and need further explanation.

Although these questions are not explicitly the subject of these court cases, an answer can be formulated by analysing them. Member States are and remain autonomous in the way they organise their gambling services because the EU lacks specific legislative competence in this field. However, when the public authority chooses to outsource these activities to the *market* instead of organising services *itself* or, as

Conformity of the Regulation of Lotteries in the Netherlands with European Law" (9 July 2021), *https://zoek.officielebekendmakingen.nl/kst-24557-173.html*.

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

[54] First clarified in: CJEU 23 May 2000, *Commission of the European Communities v Italian Republic* (C-58/99) EU:C:2000:280; see also CJEU 1 October 2009, *Minister voor wonen, Wijken en Integratie v Woningstichting Sint Servatius* (C-567/07) EU:C:2009:593; [2010] 1 C.M.L.R. 17.

[55] CJEU 13 November 2008, *Coditel Brabant SA v Commune d'Uccle* (C-324/07); EU:C:2008:621; [2009] 1 C.M.L.R. 29.

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

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

[58] See consideration 25 of Services Directive 2006/123, 12 December 2006: Gambling activities, including lottery and betting transactions, should be excluded from the scope of this Directive in view of the specific nature of these activities, which entail implementation by Member States of policies relating to public policy and consumer protection.

occurred in these cases, regulates the different types of games of chance—lotteries, slot machines and the like—in an *incoherent* and *inconsistent* manner, EU law limits a public authority's discretionary power. Indeed, the CJEU, in its interpretation of EU law, mainly uses the goal-oriented (teleological) and systematic methods of interpretation.[59] The underlying purpose and broader system, of which specific TFEU provisions such as those relating to the internal market form part, serve as the primary means of guidance on how these provisions should be interpreted. The secondary means is rooted in the ideal of coherence and non-contradiction of law and policy and expresses the basic requirement of consistency, namely that concepts are used consistently and standards are compatible not only with the regulations of which they form part but also with other relevant components of the law and of the legal system in general, including general principles of law.[60]

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

3.2.1 The first group: State owned corporation

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

The first group includes the foundation of a private company charged with carrying out a task, for example, by municipalities for the collection and processing of household waste or to provide services in the social domain (*State-owned corporation*). Often the entire share package remains in the hands of the founding public authority or other participating public authorities. In other cases the authority places only a part of the share package with a private investor. Such processes raise the question of whether both the performance of the set of *tasks* and the partial placement of the *share* package on the market are subject to the obligation to invite tenders.[61] The answer to the question of which law is applicable to each of these two situations varies considerably. As a rule, the set of tasks falls under public procurement law and must be put out to tender. After all, it may concern a public works, service or supply contract which, as such, is covered by the EU public procurement directives. A partial placement of shares, on the other hand, is covered by the free movement of capital[62] and is therefore neither a service nor a supply contract and hence not covered by the EU public procurement directives. Nonetheless, in the *Acoset* case of 15 October 2009, the CJEU ruled that the *selection of* a private investor to become a shareholder should be opened up to review in a public procurement procedure.[63] Thus, some of these types of transactional activities of the State fall under the public procurement directives (set of *tasks* in State-owned corporations) and others do not (*share* package), but the latter *are* subject to a competitive procedure.

[59] Manunza, Meershoek and Senden, "The Ecosystem for the Military Logistics Capabilities of the Adaptive Armed Forces. In the light of the NATO Treaty, the EU Treaties and National Procurement and Competition Law", (2020), section 2.2.

[60] Beck, *The Legal Reasoning of the Court of Justice of the EU* (2012) p.161.

[61] Manunza, *European Public Procurement Law Problems in Privatisations and in the Fight Against Corruption and Organised Crime*, European Monographs (Kluwer-Deventer, 2001), Vol.68, Ch.5.

[62] According to the jurisprudence of the CJEU on the free movement of goods, the concept of "good" includes both tangible and intangible goods ("activa"). The question is now whether the shares—being (intangible) goods/products—could fall within the scope of Directive 2014/24 since goods and products are synonyms of each other. However, art.2, s.8 of Directive 2014/24 defines public supply contracts only as "contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products". Such a contract for the placement of a share package can therefore be regarded neither as a service nor as a supply and even if a share package were to be regarded as an intangible asset, the contract could still not fall within the scope of Directive 2014/24 because the directive only covers purchasing activities. In short, the placement of a share package is "placement of capital" and falls under the EU provisions for the free movement of capital. See also the CJEU cases mentioned in fn.54.

[63] *Acoset SpA v Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa* (C-196-08) EU:C:2009:628; [2010] 1 C.M.L.R. 35 concerned a service concession. At that time, a service concession was not covered by EU public procurement; however, national (Italian) law did provide an obligation to follow a competitive public procurement procedure.

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

The second group includes the sale of public property, which can take three forms. The first is the *divestment of a state-owned company*, which takes place by way of the *total* sale of shares on the stock exchange;[64] the second is the *company sale*, which takes place by way of the (total) sale of the (state-owned) company as a whole or in parts to other companies. In addition, the government can sell real estate such as *land and buildings*,[65] and movable property. All of these are subject to different rules. Below, I will only discuss the third form—the sale of immovable property such as land and buildings[66]—because it gives me the opportunity to draw attention to a fundamental tension that strongly influences the development of public procurement law, namely the tension between two basic EU principles: the internal market as the basis of the EU economy and the freedom of Member States and their public authorities to determine their internal public organisation themselves as they see fit.

3.2.2.1 Preventing market distortion instead of protecting individual rights? When the European Community was founded in 1957, the participating Member States chose to leave the regulation of property ownership in the Member States outside the scope of European Community intervention. Under art.345 TFEU, which provided that "the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership", Member States retained primary responsibility for their policy in this area. Neither primary nor secondary EU law contains rules on the sale of government property. The question then is how far the property ownership *right* extends.

Article 17 of the EU Charter of Fundamental Rights clarifies that the right to property as a fundamental right is limited. It only protects the right of everyone to *own, use, dispose of and bequeath* his or her lawfully acquired possessions. The provision is silent on acquisition and disposal as such.[67] This limitation possibly explains why the EU did not introduce specific rules governing the sale of public property but instead clarified, through *soft law*, a number of strict conditions on sales processes that prevent a government from selling its property directly—without any form of competitive procedure—to the buyer of its choice. A sale of land and buildings following a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an *auction*, accepting the best or only bid is by definition at market value and consequently does not involve State aid.[68] If the sale is not conducted through such an open and unconditional bidding procedure (an *auction* similar to a public tender), the Commission may examine whether there is a conflict with art.107 TFEU.[69] It is through State aid control that the EU requires the sales process to aim at a fair market result from an economic perspective.

However, this EU system is not always satisfactory where the protection of the rights of potential buyers is concerned. After all, a sale without competition can also lead to a fair market outcome from an

[64] In the case of partial divestment, some form of public-private partnership will always remain. With total divestments, the situation may be different. It depends on who acquires the divested entity. See for the differences between partial and total divestment, Manunza, *European Public Procurement Law Problems in Privatisations and in the Fight Against Corruption and Organised Crime*, European Monographs (Kluwer-Deventer, 2001), Vol.68, pp.153–242.

[65] Cf. the reports on the Commission's competition policy in the first decade of this century (downloadable from the European Commission website) with those of the last decade where information on sales (then called 'privatisations') is increasingly scarce or non-existent. See Communication on State aid elements in sales of land and buildings by public authorities, 10 July 1997, [1997] OJ C209/3, as replaced by that on the concept of State aid, 19 July 2016, [2016] OJ C262/1.

[66] See for an in depth elaboration on these three forms of public property sales: Manunza, "Towards a Consistent and Efficient Regulation of the Public Procurement Market" in Hebly, Manunza and Scheltema, *Reflections in Response to the Legislative Proposal Public Procurement Act* (2010) from section 3.3.2.

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

[68] According to the Communication on State aid (fn.65).

[69] According to the Communication on State aid (fn.65).

economic perspective. State aid rules are concerned with preventing market distortion by the State and not with individual rights. If public authorities do not intend to use an unconditional bidding procedure, an independent evaluation should be carried out by one or more independent asset valuers prior to the sale negotiations, in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The market price thus established is the minimum purchase price that can be agreed without granting State aid.

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

The emphasis moves now from ensuring the protection of the internal market to ensuring the effectiveness of fundamental principles and thus equal opportunities for every single citizen in society.

3.2.2.2 An unregulated area of law: how the Dutch national courts fill the gap in the absence of legislation Seventy years ago, according to art.1 of the Act of 24 January 1952,[70] in the Netherlands the State was required to sell movable and immovable property in public following a sufficiently well-publicised, open and unconditional bidding procedure.

The underlying principle was that public property had to be acquired as cheaply as possible and to be sold as expensively as possible. Not all were convinced by the effectiveness of the legal system. The Dutch State attorney, Droogleever Fortuijn, argued that "the legal obligation for the State to buy or to sell property following a sufficiently well-publicised, open and unconditional bidding (procurement) procedure ensures the effectiveness of fundamental democratic rights because it ensures that all eligible private individuals have equal opportunities to conclude a contract with the State", but expressed severe doubts that the provision's goal could be achieved due to the serious "incoherencies contained in the legal system".[71]

His conclusion, that "the European Economic Community will draw the attention — and hopefully will further elaborate — on the fundamental rights of individuals to conclude a contract on equal terms with the State by *submitting their bids* under an unconditional buying or selling procedure (…). We are certainly awaiting Community regulations in this regard"[72] was somewhat visionary.

The EEC adopted the first liberalisation directive in the field of public supply contracts only five years after the above statement but it did not stop there.

Unlike in other EU Member States where sales are subject to regulation,[73] in the Netherlands the area has remained unregulated after the repealing of the Act of 1952 decades ago for obscure reasons. In past years complainants have been to court demanding that the sale of land and buildings should take place following a sufficiently well-publicised, open and unconditional bidding procedure.

In the absence of regulation these complainants have invoked either (i) the Dutch private-law principle of *reasonableness and fairness*,[74] and/or (ii) the principle of equal treatment as safeguarded by Dutch administrative law, the derivative principle of transparency, the principle of due care and the prohibition of arbitrariness, and/or (iii) principles of EU origin such as the fundamental public procurement principles, in particular the principles of equality and transparency.

What emerges is the following picture. The Dutch courts seem to interpret the Dutch private-law principle of reasonableness and fairness in the light of the principle of equality. The courts use this principle

[70] Act of 24 January 1952, Dutch Government Gazette 37.

[71] E. Droogleever Fortuijn, "Should the Legislator Regulate All Contracts Concluded by the State?" (original title in Dutch: "Dient de wetgever regelen te geven met betrekking tot overeenkomsten met de overheid?"), preliminary recommendations to the Dutch Lawyers Association, 1965, p.163.

[72] E. Droogleever Fortuijn, "Should the Legislator Regulate All Contracts Concluded by the State?" (original title in Dutch: "Dient de wetgever regelen te geven met betrekking tot overeenkomsten met de overheid?"), preliminary recommendations to the Dutch Lawyers Association, 1965, p.163.

[73] See arts 822–831 Italian Civil Code. Furthermore, the subject-matter, based on the principle of public auction, was brought under the Government Accounts Act in that country from the 1920s onwards (R.D. [Royal Decreet] 2440/1923) and has been amended several times up to the more recent D.L. 98/2011. See *http://venditaimmobili.agenziademanio.it/AsteDemanio/sito/php*.

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

as a collective term to refer to various principles of national as well as EU origin, such as the public procurement principles as derived from the 'parent' principle of non-discrimination.

In some cases, general principles of good administration are also mentioned. For example, since the Dutch Supreme Court's judgment in 1987 in the case of *Amsterdam v IKON*,[75] we know that the government, when allocating land, is also bound by the principle of equality. However, that case dealt with *compliance* with the leasehold conditions, rather than with the acquisition of the leasehold right itself.

In *Province of Zeeland*, the Dutch Supreme Court ruled in 1992 that, for a judicial review of the general principles of good administration, as partly laid down in the General Administrative Law Act, "only a marginal review" does not suffice.[76] Consequently, these principles also apply to private-law transactions by (the State and its) administrative bodies. For example, according to Dutch private law when choosing contracting parties, administrative bodies must adhere to the principles of due care and legitimate expectations. With the introduction of Book 3 of the new Dutch Civil Code (DCC) in 1992, this Supreme Court decision was codified in art.3:14 DCC.[77]

In subsequent cases[78] the courts expressed, each time in different ways, how the principles of public procurement law *and* the principles of administrative law or the principles of fairness and reasonableness can play a role in the context of concluding a contract for the sale of land or buildings; however, there was no obligation to organise a competitive procedure if the choice —or rejection—of a certain contractual party could be properly justified.

Similarly, the Supreme Court ruled in 2002 that when the public authority has chosen such a competitive procedure, this choice entails the application of the principles of equal treatment and transparency.[79] These principles require that selection and award criteria and the scope of the contract are clear and made known in advance.[80] This is linked to "the expectations that (potential) tenderers could reasonably have on that basis".[81]

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

In the more recent *Didam* case of 26 November 2021, the Dutch Supreme Court went a considerable step further.[82] The obligation of a public body, when selling land, to comply with the general principles of good administration, specifically the principle of equality (art.3:14 of the Dutch Civil Code), entails an obligation to provide room for competition and transparency. The Supreme Court identified the equality principle in this context as the principle "to provide equal opportunities". These opportunities must not only be offered "if there are multiple candidates for the purchase of the immovable property in question" but also "if it can be reasonably expected that there will be multiple candidates". With this last expansion, the Supreme Court introduced a general "public procurement" obligation in cases that do not, strictly speaking, fall within the scope of public procurement law and in the absence of any other regulation on the subject. This is because the Supreme Court added that "the public body must, with due observance of the room it is afforded to make policy, establish criteria on the basis of which the buyer is selected. These

[75] Supreme Court 27 March 1987, *Amsterdam v IKON*, NJ 1987, 727.

[76] Supreme Court 24 April 1992, *Province of Zeeland*, NL:HR:1992:ZC0852.

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

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

[79] Supreme Court 4 April 2003, *RZG/ConforMed*, NL:HR:2003:AF2830. To some extent these obligations apply to private tenders as well; see: District Court Amsterdam 6 May 2009, *KLM*, LJN: BI4270; Supreme Court 3 May 2013, *KLM*, LJN: BZ2900.

[80] Above sections 3.4.4 and 3.5.2.

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

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

criteria must be objective, verifiable and reasonable" (point 3.1.4.). I would add "and sufficiently well-publicised in advance".

4. Concluding remarks

Constitutional effectiveness is to be considered a prerogative of good legislation and good enforcement. By aiming at safeguarding fundamental individual principles, democracy and the rule of law, this type of effectiveness forces us to understand, to interpret and to apply EU public procurement law in light of the goals that underlie the EU as such and in which the EU finds its *raison d'être*. In the words of art.3(1) TEU: "the Union's aim is to promote peace, its values and the well-being of its peoples". More importantly, these goals underlie the legal system in which the EU legal order and the national legal order co-exist.

EU public procurement law must therefore contribute to these goals as well. This constitutional perspective needs to be brought to the forefront of public procurement law to enable us to find new paths for the global problems that urgently need to be resolved and that would stay covered if we would only focus on policy and economic effectiveness.

Legitimacy, coherence and consistency are pivotal to this end. The expansion of public procurement law insofar as it was triggered by litigation has led to a more coherent, consistent and equitable legal system of distribution and award. This evolving process, leading towards a more coherent area of law, is not yet complete and much remains to be done.

There are many types of transactions to which the public procurement directives do not apply but the basic principles of the Treaty do, such as arts 34–37, 56–62 TFEU and the derivative principles of equal treatment, transparency and non-discrimination, and arts 63–66 TFEU. This is not the case, however, where it involves the sale of government property which is, in EU law, exclusively subject to a number of strict conditions on sales processes as laid down in *soft-law* regulation, with the only aim being to prevent the government from selling its property in conflict with the EU State aid rules. These last rules are aimed at preventing market distortion by the State and not at protecting individual rights, indicating a gap in terms of constitutional effectiveness in the legal system regulating State transactions.

As far as the Dutch courts are concerned, inconsistencies are reduced by applying one of the oldest legal concepts: the principle of equality.[83] In fact, the same applies at EU level. All these courts, at the national and at the EU level, do the same thing within different legal frameworks. They ensure that citizens and businesses are treated equally by the government as far as possible, or at least are given equal opportunities. This, in itself, is an expression of legitimacy.

As a consequence of this rapidly growing number of court decisions, the (Dutch) legislature is challenged to develop the principle of equality by a consistent and fair regulation of the public "allocation" of land and buildings and other forms of market approach not covered by the procurement directives, on the basis of objective, proportionate, transparent and non-discriminatory criteria, rather than waiting for citizens (and companies) to claim their right to equal treatment in court.[84]

Good public procurement regulation means regulation that contributes as much as possible to the realisation of the EU core values through the rule of law; and this regulation should be as constitutionally effective as possible.

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

[84] The Italian legislature was there first: see fn.73.