Regulating the Pre-procurement Phase: Context and Perspectives

Willem A. Janssen

Introduction

This contribution considers the legal context and perspectives of regulating the pre-procurement phase in relation to public service delivery.[1] The pre-procurement phase encompasses the democratic decision-making phase, in which a public authority decides to favor either internal or external performance of a public service (Manunza 2010, p. 111). At this point in time, these authorities can choose freely between different modes of service performance. This discretion allows them to either internalize public service delivery by carrying it out themselves, possibly in collaboration with other public authorities, or to externalize the delivery of a public service (or to use the common EU terminology; service of general interest (SGI)) by approaching a third party. In the Netherlands, recent developments have revived the discussion surrounding the extent of this freedom. Internal performance of public services has become increasingly popular. This can, amongst other reasons, be explained by the Dutch government's policy combined with a diminished belief in competition. However, and perhaps more importantly, it is currently permitted by the possibilities created in European public procurement law and the jurisprudence from the Court of Justice of the European Union (ECJ; the Court). The law, by facilitating this freedom, appears to leave open undesired possibilities of inefficient and ineffective public service delivery.

[1] This contribution is part of an ongoing PhD research and concerns a revised and updated version of Janssen, W.A. (2014). "Public Procurement Law and In-house Delivery of Public Services: Improving a Paradox". In A. McCann, A. E. van Rooij, A. Hallo de Wolf & A. R. Neerhof (Eds.), When Private Actors Contribute to Public Interests: A Law and Governance Perspective (Vol. 1, pp. 7–26). The Hague, the Netherlands: Eleven Publishing. For comments please contact: w.a.janssen@uu.nl.

W. A. Janssen (✉)
Public Procurement Research Center and Utrecht Center for Regulation and Enforcement in Europe, University of Utrecht, Utrecht, Netherlands
e-mail: w.a.janssen@uu.nl

K. V. Thai (ed.), *International Public Procurement,* Public Administration, Governance and Globalization 14, DOI 10.1007/978-3-319-13434-5_11

This contribution takes a twofold approach. The first part discusses the context of the freedom to decide upon public service delivery within European Union (EU) public procurement law. The role of competition law, state aid law and free movement law are not assessed, but can also be relevant. The newly adopted public procurement directives further emphasize this freedom, justifying a focus on such field of law. In light of this discretionary power, it describes four Dutch sectors in which, despite the initial introduction of competition by ways of public procurement procedures, the performance of an SGI is internalized by a public authority, or is excluded by the legislature from competition. First, waste collection and supportive services such as IT illustrate the state's discretionary power in relation to SGI performance and the consistent application of these exemptions by Dutch courts. Second, public transport and social support suggest a situation in which the legislature (partially) reversed its obligatory tendering policy.

The second part of this contribution concludes by discussing two perspectives that can improve decision making in relation to public service delivery. For this purpose, the Dutch Public Procurement Act 2012 ("Wet van 1 november 2012, houdende nieuwe regels omtrent aanbestedingen, St. 2012, 542," 2012; PPA, 2012) and the US Federal Activities Inventory Reform Act of 1998 (US FAIR Act) are briefly discussed to aid shaping the legal contours of the pre-procurement phase. The introduction of a legal framework, which governs this pre-procurement decision-making phase, should identify internal and external service delivery modalities as equal alternatives with their own advantages and disadvantages.

Context: The Freedom to Provide and Define SGIs

It is important to initially discuss the freedom that European member states have to define SGIs. In recent years, the academic debate in Europe has focused on what SGIs are, and to what kind of services the internal market rules should apply. Despite this extensive debate, the member states have thus far kept their discretionary power in defining their public interests and SGIs. This freedom also allows member states to decide how these interests should be safeguarded and organized, and if a service is involved by whom it should be performed (Wetenschappelijke Raad voor het Regeringsbeleid 2000). In this respect, the Protocol (nr. 2) on Services of General Interest, accompanying the Lisbon Treaty, further complements this statement by recognizing:

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

Despite this distant role of the EU, the European Commission (Commission) attempted to further clarify the various forms of SGIs in 2011 (European Commission 2011). The Commission considers SGIs to be "services that public authorities of

the Member States classify as being of general interest and are therefore subject to specific public service obligations." These services can be divided into two groups; non-economic and economic activities. Services of general economic interest (SGEI) are seen as economic activities that deliver outcomes that benefit the overall public good that would not, or not sufficiently enough, be supplied by the market without public intervention. Such economic activities are subject to specific European legislation and are therefore covered by the internal market rules (i.e., Lisbon Treaty, free movement, state aid, competition, and public procurement rules.). Non-economic services of general interest (NESGI) are not bound to these sets of rules. Additionally, social services of general interest (SSGI) can also be either economic or noneconomic. This category includes "social security schemes covering the main risks of life, such as those linked to health, ageing and disability, and a range of other essential social services provided directly to the person, such as occupational training, rehabilitation and language training for immigrants."

As a consequence of these discretionary powers, member states have the power to exempt services from the internal market rules by labeling them as a noneconomic SGI ("Court of Justice of the European Union 2008, ECLI:EU:T:2008:29"). However, this is restricted by the manifest error test of the commission. In the Netherlands, it is left to the democratic processes to decide what kind of public interests should be safeguarded, and how it intends to promote these interests (WRR 2000). In addition, this process decides upon who should perform a certain service derived from the public interest. These questions are part of an older and broader debate on the extent of the state's responsibilities, and their relation with the market. However, it is clear that the influence of EU law is limited to situations in which the market is approached for the provision of SGIs.

The Performance of SGIs: Internalize or Externalize?

Dutch public authorities have various ways of performing SGIs. EU public procurement law adheres to this discretionary power by providing the legal basis for these alternative performance options. Over the past decade, many of these exemptions to public procurement law have been developed by the ECJ. Firstly, a public authority can decide to perform a service by using its own resources, which is completely "internal." This means, for instance, that it uses one of its own divisions to collect waste. Secondly, a public authority can entrust the performance of a service to an entity over which it exercises control similar to its own departments, and that entity carries out the essential part of its activities for the controlling public authority or authorities (also referred to as quasi in-house performance). In the Netherlands, this can be done on the basis of either private law (e.g., a Dutch *B.V.*, *Cooperatie* or *Stichting*) or public law (e.g., a Dutch *Openbaar Lichaam*, provided by the Dutch Inter-municipal Statutory Regulations Act) ("Court of Justice of the European Union" (1999, p. ECLI:EU:C:1999:562). Thirdly, a public authority can arrange the provision of a SGI by cooperating with other public authorities entirely within

the public domain. Such performance is exempted from public procurement law, which is based on the criteria derived from the Commission/Germany jurisprudence ("Court of Justice of the European Union" 2009, ECLI:EU:C:2009:357). Fourthly, a public authority can choose to grant another public authority an exclusive right, after which that entity decides upon questions surrounding performance. Such a right can be, for instance, granted through a ministerial regulation, a local bylaw regulation, or is included in the statutory documents of a separate entity. Fifthly, public authorities can grant a concession for the performance of a service, according to *Directive 2014/23/EU*. Lastly, a public authority decides to completely externalize a service to a third party. To achieve the best quality-lowest price ratio, such externalization is often achieved through a transparent and competitive procedure.

Consequently, public authorities have multiple alternatives to internalize or externalize the provision of SGIs. This variety of legal alternatives is not problematic as such, because member states and their public authorities should be able to perform a service themselves in certain policy fields. On the one hand certain functions, such as the administration of justice or democratic decision making, may not be externalized, whilst on the other hand, building maintenance and food services can. More troublesome is to identify the status of services, which are not as "black and white" as the previous examples. The grey area of this categorization is where decisions on public service delivery cause difficulties. In relation to these services, balanced decision making is even more important to be able to achieve the best outcome for society.

New Public Procurement Directives

On 28 March 2014, the modernized EU public procurement directives, namely Directive 2014/23/EU, 2014/24/EU, and Directive 2014/25/EU, were published. The modernization of these directives was part of a grand-scale operation to restructure and reform the EU internal market, which is based on thoughts that aim to open up Europe, by removing internal barriers and enforcing cross-border competition. For the purpose of this contribution, it is essential to describe the recent European developments on this matter, because internal performance alternatives as exemptions to public procurement law are also under scrutiny.

These reforms were initiated by Monti in his report "A New Strategy for the Single Market" (Monti report), which strived to initiate a re-claiming process of the internal market. The Monti report identified the internal market's achievements, but ultimately noted its future challenges, and subsequently proposed possible actions in numerous areas of the EU, such as the free movement principles, public procurement, SSGIs, regional and industrial policy, and coordination of taxation policies. The report identified that these areas are the "building blocks for reconciliation between the single market and the social and citizens" dimension in the treaty logic of a highly competitive social market economy" (Monti 2010, p. 68). The vision brought forward by Monti, in relation to public procurement, clearly shows

its importance; "EU public procurement law plays a key role in the creation and maintenance of the single market" (Monti 2010, p. 7).

After a long legislative process, the new directives have, therefore, been adopted by the European Parliament and Council. On the one hand, the public procurement directives intend to increase the efficiency of public spending to ensure the best possible procurement outcome in terms of value for money. This modernization aims to simplify rules and to provide further flexibility in applying these rules. On the other hand, it enables public authorities to put public procurement to better use and to thus achieve societal goals, such as the protection of the environment, stimulation of innovation, and the betterment of social inclusion (Janssen 2012).

The new "Classic" directive on public procurement includes new rules in relation to in-house procurement and public–public collaboration. These rules predominantly codify the existing exemptions based on case law of the ECJ. The codification itself exemplifies the importance of these exemptions to public procurement law by emphasizing the freedom public authorities have to internalize public service delivery (Bleeker and Manunza 2014). Article 12 of the recently adopted Classic directive codifies the jurisprudence line of Teckal and Commission/Hamburg, but leaves many questions unanswered. It does elucidate the percentage of commercial activities which a separate Teckal-like entity or noninstitutional collaboration is allowed to perform. This has been set at 20 %. Additionally, contracts awarded to a controlling "mother" entity or a controlled "sister" entity are included in this doctrine. The new directive also confirms that collaboration between public authorities does not necessarily have to involve services derived from the public interest, and as a result supportive services can be included. The most predominant change to the scope of this exemption is the acceptance of private capital, which the court had firmly rejected on earlier occasions ("Court of Justice of the European Union 2005, ECLI:EU:C:2005:5"). Finally, the commission's initiative to abolish the exclusive right exemption was taken out by the council, leaving a commonly used exemption in place.

Two conclusions can be drawn from these changes. First, no further guidance is provided on what can be identified as SGIs or their relation with public procurement law. Therefore, a standard European approach to this subject will remain absent in the future. Second, the changes made to the scope of this article, are perhaps the most important conclusion. Its scope has substantially widened, meaning that applying these exemptions to public procurement law will become easier in the future.

Explaining Internalization of SGI Delivery

As previously stated, internal performance of services, and especially public–public collaboration, has gained importance in recent times (European Commission 2011a). In the Netherlands, an increase of collaborations between (local) public authorities has occurred, which consists of 698 collaborations based on public law, and 1022 collaborations based on private law. Such collaboration within the public

domain, can first of all be explained by a leading vision document of the former Dutch government, which is still being implemented. It demonstrates the thoughts of former Dutch minister, Piet Hein Donner, who advocated a "compact" government. The role of "compact" refers to a strong and small government. It focuses on more efficiency and lower administrative burdens by intensifying collaboration amongst public authorities, which has its effect especially on a decentralized level (Ministry of the Interior and Kingdom Relations 2011, p. 5). This desire for more collaboration can be explained by the need to spend public funds efficiently. More collaboration amongst public authorities for efficiency purposes becomes even more relevant in times of financial crisis. Additionally, the Lisbon Treaty has emphasized the role of regional and local self-governance, which enforces this development (Manunza 2010, p. 76).

Second, internalization of SGI delivery as a whole is influenced by the current views on the public and private divide. It is fair to say that member states have become more critical in relation to the role of the market as a performer of SGIs. The advantages of introducing competition into markets are not as commonly accepted, and thus applied throughout Europe, as they were in the 1990s. In those times, liberalization and privatization were introduced in various areas, and public procurement procedures were often introduced if public authorities decided to externalize services. Monti described this situation as "market fatigue," which represents a loss in confidence in the market and has, consequently, led to lower acceptance of the market and its actors involved. This is, to some extent, caused by the fact that the limitations of the market, and the services it can provide, have become more visible. In the Dutch public debate, the market is often seen as unfair and a cause of inequality. In this regard, Monti stated that those who propose, instead of oppose, are forced to defend their views on the liberalization of markets and the introduction of more competition. Such views enhance the idea that government performance is vital in order to safeguard public interests and can obstruct clear views on the advantages and disadvantages of performance alternatives (Monti 2010, p. 12).

Consequences: Performance Internalization in Four Dutch Markets

The internalization of SGI performance, notably described in the above paragraphs, and the loss of confidence in market performance, which often accompanies it, can be exemplified by assessing the waste collection, supportive services, public transport, and social support market. Public procurement law's exemptions play a significant role in these markets, in which despite the initial introduction of competition by ways of public procurement procedures, the performance of an SGI is internalized by a public authority, or is excluded by the legislature from competition. Waste collection and supportive services, such as IT, exemplify the state's discretionary power in relation to SGI performance, and the consistent application of these exemptions by Dutch courts. The cases of the public transport and social

support consider situations in which the legislature (partially) reversed its obligatory tendering policy, after which internal performance can gain importance again. This situation can also be seen as an example of Monti's "market fatigue."

The Waste Sector: Courts Uphold Internal Performance Exemptions

In the Netherlands, municipalities have been granted the responsibility to perform the collection of household waste under Article 10.21 Section 1 Dutch Environmental Protection Act. In order to fulfill this duty, municipalities have, as previously described, various performance alternatives. In the past decade, the Dutch government has attempted to introduce, or further expand, competition in the waste management sector. It aimed to fully liberalize this market by 2050. The introduction of more competition is desired in order to maximize the positive effects for the environment at the lowest cost (VROM-rapport 2003, p. 5). Despite the fact that a greater part of the market is now in the hands of third parties, it can be argued that in recent years public authorities have limited their contribution to this liberalization. The collection of waste is historically performed by using the recourses of public authorities, which in 2007 accounted for 25% of all cases. It is performed in alternative ways in 75% of the Dutch municipalities. From this part, 35% of these municipalities leave performance up to market parties (Van Ommeren and Vermont 2007, p. 2). The remainder is performed through a collaboration of public authorities. More recent studies discuss a similar situation in other European member states (Hulst and Van Montfort 2007; Dijkgraaf and Radius 2008) Hence, internal performance is substantially present in the waste collection market, which is intended to be entirely liberalized.

Market parties in this sector have not hesitated to file court proceedings against these internal performance alternatives by claiming that these contracts should have been tendered under European public procurement law. Three cases before Dutch courts illustrate such actions. In the first case of AVR/Westland, the High Court confirmed the Court of Appeal's ruling by granting the municipality of The Hague permission to join the public collaboration of local public authorities. This entity, called "HVC," was established to collect and dispose of household waste ("Court of Appeal's-Gravenshage 2009, ECLI:NL:GHSGRL2009:BK6928"). In the years before this, appellant AVR had been contracted for the waste disposal via a public procurement procedure. After the expiry of the contract, the government was allowed to internalize performance, based on the exclusive right exception. The second case involved a situation whereby the public authority of Friesland contracted Afvalsturing Friesland N.V. for their waste collection and disposal services. This local government was exempted from using a public procurement procedure for a different reason as it could rightfully rely on the in-house exception ("Court of Appeal Arnhem-Leeuwarden 2013, ECLI:NL:GHARL:2013:6675"). This in-house exception also led to proceedings before the Court of s-Hertogenbosch, which

rejected the claims of appellant Shanks, relying on the fact that this exception was no longer right due to a substantial change in supervision of Attero-Zuid. Shanks was unable to sufficiently prove this, which resulted in the fact that this collaboration between municipalities could continue ("District Court's-Hertogenbosch" 2012, ECLI:NL:RBSHE:2012:BY1 110).

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

Supportive Services: Internal Performance Outside the Public Interest

Services that support the provision of SGIs, such as IT, can also be performed entirely within the public domain ("District Court Utrecht." 2009, ECLI:NL:RBUTR:2009:BG9524). Briefly noting them is thus justified in this context. In addition to IT, transport, graphic design, and educational services that support the state's functioning, are also increasingly internalized and are also part of the public debate (De Lange 2013, p. 3). From a public procurement law standpoint, the legality of such legal constructions was confirmed by the Court of Utrecht in relation to IT. In this case, Amsterdam, Rotterdam, The Hague, and Utrecht were able to rely on the quasi in-house exemption. This allowed them to continue their collaboration in the form of "Wigo4it," because it met the criteria of being "closely connected" and had proper "supervision." For that reason, the application of public procurement law exemptions must be seen in a broader sense. Services, in and outside, the public interest can be exempted from public procurement obligations, which is confirmed by the new public procurement directives.

Public Transport: Inconsistent Obligatory Tendering

The case of public transport exemplifies a partial drawback of competition. Public transport is often regulated through concessions as opposed to public contracts. These concessions grant a party the right to perform a mode of public transport for a specific route. Service concessions fall under the scope of the newly adopted Directive 2014/24/EU on concessions. Such competition allows third parties, as a rule of thumb, to compete for public transport concessions in the Netherlands.

The Dutch regulatory framework of this sector consists of the Passenger Transport Act 2000 (PTA), which was introduced to stimulate the use of public transport and to efficiently utilize public funds. In addition, the European PSO-regulation is in place and provides guidance on how decentralized governments ensure the

quantity, quality, and safety of public transport for a reasonable price. The Dutch Public Transport Decree 2000 further explicates the obligations of such a competitive procedure. Under the PSO-regulation, local governments are still allowed to apply the in-house exemption to national public procurement rules. However, whilst reforming the PTA in 2010, the legislature decided that in the Netherlands local public authorities will be not be able to apply this exemption. Hence, public transport concessions had to be distributed by using a transparent and objective competitive procedure, and internalization was excluded as a performance alternative. Despite these reforms, another amendment of the PTA was passed by Dutch parliament in October 2012. This amendment exempted four major cities in the Netherlands (Amsterdam, The Hague, Utrecht, and Rotterdam) from the obligation to follow a competitive procedure whilst distributing public transport concessions. The discussion in the Dutch Senate clarified that it was intended to provide freedom of choice and local autonomy. This amendment allows these cities to apply the in-house exception, which leads to the fact that state owned companies, such as HTM in the Hague, RET in Rotterdam, GVB in Amsterdam, and GVU in Utrecht, can often continue to operate their services without being influenced by competition. In this regard, it is interesting to consider that the utilization of these concessions is often not economically viable and market parties are, therefore, compensated by the government. Despite this exemption, the milestone ruling of Altmark, in which the court ruled that subsidies granted to an undertaking providing public transport can be identified as state aid if the price is not the result of a competitive procedure or if the Altmark criteria are fulfilled, is still applicable ("Court of Justice of the European Union 2003, ECLI:EU:C:2003:415). An extensive analysis of this situation goes beyond the scope of this contribution, but it does show that state aid rules must nonetheless be complied with. To conclude, this change of legislation in the Netherlands has led to inconsistent obligatory tendering, to say the least, and exemplifies a call from the major cities to keep a broad discretionary power whilst deciding upon public service provision.

Social Support: Obligatory Tendering Pulled Back Entirely

In the healthcare market, a similar situation occurred regarding the performance of the Social Support Act 2006. This act incorporates a compensation duty, which means that local authorities have to compensate citizens for the provision of equipment or services in various areas related to the consequences of their impairments. Examples of possible compensation are, "assistance with running a household" and "means of transportation." Article 10 of the act obligated local governments to externalize the performance of these services via public procurement procedures. It is important to note that such a duty to tender is derived from EU public procurement law which identifies two types of services under the current directives: IIA and IIB services. For IIA services, a strict public procurement regime applies, and for the second, no specific duty to use public procurement procedures exists. The Dutch government stated that assistance with running a household was to be

predominantly classified as "cleaning services," which led to a classification under IIA-services. Others claimed the contrary, that it should have been classified as an IIB-service. In 2010, the Dutch parliament adopted three proposals to change the Social Support Act 2006. The most important amendment abolished the duty for municipalities to use public procurement procedures. As a consequence, assistance with running a household is now classified as an IIB-service. The legality of this amendment can be questioned in light of European law. In this regard, the Commission responded to questions posed by the Dutch government and stated that most of these services should be performed by market parties after the use of public procurement procedures.

In the overall assessment of this sector, it is of importance to consider whether the healthcare market in general, and this sector in specific, can benefit from competition. The need to safeguard the basic principles of this market, namely quality, accessibility, and affordability, ensures a continuous debate in relation to this topic. The vehement discussions in the European Council and Parliament involving the reforms of the public procurement directives exemplify this. It is clear that the healthcare market is a particular market, whereby the clash of safeguarding public interests and competition is very clear (Canoy 2009). However, such a debate is less relevant for contractible cleaning services, which are able to benefit from competition.

Towards regulating the pre-procurement phase

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

In response to these developments, it has been suggested to introduce a transparent and objective legal framework that governs this "internal vs. external" decision-making phase (Manunza 2010, p. 115). The introduction of such a pre-procurement test can result in an improved provision of public services, as it answers the question of *who is most suitable to perform a service*; the market or the state (Manunza and Berends 2011). Such an approach relies on the economic analyses of markets to determine who should perform a service. It has been suggested to take an approach in which "social welfare" is the key criterion to analyze whether the market or the government should perform an SGI (Manunza 2010, p. 117). Additionally, it is said that the legal dimension of public procurement law is often not aligned with the economic restrictive approach "towards public make-or-buy decisions" (Sánchez Graells 2011, p. 232).

Key Factors: Objective Criteria and Transparency

On a conceptual level, the framework regulating the pre-procurement phase should be characterized by principles of objectivity and transparency. First, this means that the prior comparison between state and market performance of a service, and the subsequent decision on public service delivery, should both be based on criteria which are objectively identified beforehand. Instead of solely focusing on a price comparison, the comparison should be based on quality. The quality comparison can still take into account the cost of performance, but should in largely be focused on what is best for society as a whole. This is also in line with the newly adopted public procurement directives which favor competition based on quality. The exact determination of these criteria goes beyond the scope of this contribution and will require further research. Second, the decision making of public authorities in the pre-procurement phase will require transparency. The advantage of transparency lies in the fact that market parties can foresee public procurement policy and adjust their market behavior accordingly (Manunza 2010, p. 117). Vice versa, the decision-making phase of a public authority is able to improve due to this transparency, ensuring that the goal of best-value for money is achieved. However, the extent of this transparency, when it would be required and how this would be embedded in a legal framework also requires more research.

The following aims to contribute to this research endeavor by discussing two distinct types of legal regulations, which can contribute to constructing a more transparent and objective framework for public procurement whilst deciding upon public service delivery. First, the Dutch PPA 2012 is considered, in which a move toward regulating the pre-procurement phase is present. Second, the US FAIR Act is discussed which regulates this phase extensively on a federal level in the USA.

Motivating Public Procurement Choices

The following considers the importance of the Dutch PPA 2012, which has introduced a further emphasis on motivating procurement choices for contracting authorities. This can be necessary in the call for tenders, the relevant documents or the proposed contract. However, two choices made before the start of a procedure can possibly impact the need to motivate the decision to internalize or externalize performance. According to article 1.4 PPA 2012, contracting authorities must base the choice for the type of procedure, and the choice for tenderers, or candidates in this procedure, on objective criteria. Such a motivation must be provided by the contracting authority upon the request of undertakings. This duty to motivate has the potential to improve the choice between internal or external performance, because it could force contracting authorities to examine which performance alternative is most suitable for the performance of their public tasks. In addition, article 1.4 PPA 2012 proposes to improve the decision-making process of contracting authorities by focusing on the “societal value” of tenders. Societal value is described as the

proper allocation and possible saving of public funds in an economic sense. It is unclear what the exact meaning of this term is. The Dutch term "maatschappelijk" indicates a "social" notion in the Dutch language. However, the achievement of societal goals, such as social inclusion and sustainability, are seemingly not necessarily intended by this article. If a market party would decide to contest the internal performance of a service before a Dutch court in the future, the assessment of the court may be different than the cases previously described in the waste sector. Hence, due to this duty to motivate, not only legal considerations, but also economic consideration can potentially play a role in the court's assessment. The first ruling on this matter by a Dutch district court stated that article 1.4 PPA 2012 was to be interpreted as requiring the achievement of best-value for money, but did not delve further on the potential scope of this article ("District Court Noord-Nederland 2013, ECLI:NL:RBNNE:2013: 7100"). Nonetheless, a broader interpretation, based on the Explanatory Memorandum, could greatly improve the decision-making process of public authorities. Whether or not higher courts agree with this interpretation, and if judges are sufficiently equipped to scrutinize public procurement policy, is to be found out in the future.

Additionally, the introduction of the Commissie van Aanbestedingsexperts ("Committee of Public Procurement Experts") can play a role in the future in the emergence of interpretations relating to article 1.4 PPA 2012. Even though their advice is not binding, the committee aims to provide an alternative to costly litigation by providing advice and mediation for disputes between contracting authorities and applicants. Considering that committee consists of lawyers, public purchasers, and economists, their advices could contain a more economic approach instead of a purely legal perspective.

Transparency and Review Procedures

In addition to motivating public procurement choices, regulation from the USA can prove to be an inspiring example (Manunza 2010, pp. 116-118). In the USA, a different approach is taken by which the decision to externalize or internalize public service delivery on a federal level is extensively regulated by the US FAIR Act. It is best described as a *may the best man win* approach. It introduces the obligation to publish a list of all federal governmental activities, making the intentions of these agencies transparent. This list divides services into "inherently governmental functions" or "commercial services." Inherently governmental functions are those functions that are so intimately related to the public interest that they mandate performance by government employees. As a rule, these functions are performed by government officials and the delivery of commercial services is externalized.

The inherently governmental functions, according to the US FAIR Act, fall into two categories. The first being the act of governing, i.e., the discretionary exercise of government authority; and the second being monetary transactions and entitlements. In general, agencies have considerable discretion in determining whether particular functions are inherently governmental. Factors that should at least play

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

If a service is considered to be of commercial nature, a "streamlined" or "standard" competitive procedure can be followed, according to Section 2 of the Act. In the streamlined competitive procedure, the governmental agency calculates, compares, and certifies costs based on the scope and requirements of the activity, in order to determine whether government agency performance or private sector performance is most efficient and suitable. In the standard competition process, tenderers compete against one another based on objective and transparent criteria such as, a demonstrated understanding of the government's requirements, costs, technical approaches, management capabilities, or personnel qualifications. Interestingly, the government agency itself can also submit a tender, which allows for comparison of public and private performing actors. Section 3 of this act allows for a challenge and review process. These are also in place to give third parties a role in this decision-making process. "Interested parties" are allowed to submit a challenge of an omission of a particular activity, or an inclusion of a particular activity on the published list. The scope of this article is broad as it allows private parties and unions to object to the classification of the list. Such procedures with elements of transparency and judicial review can be of interest when creating a more coherent public procurement approach.

Concluding Remarks

To conclude, Dutch public authorities have various alternatives for the performance of SGIs and supportive services. The European reforms in relation to the internal market will not change the discretionary power that public authorities have for this purpose, nor will it sufficiently clarify the exemptions to European public procurement law in relation to internal performance. If anything, it has mostly expanded the scope of in-house exemptions. The sectors discussed have exemplified the consequences of this freedom, whereby these authorities have to decide upon the organization of public services. It has been shown that this freedom can lead to inconsistent public procurement policy and a growing internalization of public service delivery, justifying a stronger research focus on this matter.

The hesitation of public authorities to externalize services can be seen in strong contrast with the previous period of extensive market performance. Finding the right balance between the two should be the goal of public authorities in order to secure the best performance of a public service. The legality of the performance

alternatives from a public procurement law perspective, combined with the freedom to provide services, can lead to outcomes, which are not beneficial for society. To improve the democratic decision making in the pre-procurement phase, elements of the Dutch PPA 2012 and the US FAIR Act have been assessed. Integrating these elements, such as objectivity and enhanced transparency in an integrated framework approach, which includes the fundamental choice between different service delivery alternatives, can result in improved public service delivery. The goal of such a coherent legal framework should be to objectively identify the advantages of various performance modalities and to reach the best performance of a public service.

Acknowledgments The author wishes to thank Prof. Dr. E. R. Manunza, Dr. H. van Harten, and B. Jones BA for their valuable comments on earlier drafts of this contribution.

References

Bleeker, R. G. T., & Manunza, E. R. (2014). De Invloed van het Europees Recht op het Nederlandse Aanbestedingsrecht [The influence of European Law on Dutch public procurement law]. In A. S. Hartkamp, C. H. Sieburgh, L. A. D. Keus, J. S. Kortmann, & M. H. Wissink (Eds.), *De Invloed Van Het Europese Recht op het Nederlandse Privaatrecht* [The influence of European Law on Dutch Private Law] (Vol. 1, pp. 741–810). Deventer: Kluwer.

Canoy, M. (2009). Marktwerking in de Zorg; Ondernemende Zorg of Zorgende Ondernemers? [Competition in the healthcare sector; entrepreneurial care of caring entrepreneurs?] Inaugural Speech 6 February 2009 at the University of Tilburg. Tilburg, The Netherlands.

De Lange, R. (2013/04/13). Bedrijfsleven Boos over Valse Concurrentie Door Bijklussende Overheid [Businessworld angry about false competition of double dipping government], *Het Financieele Dagblad [Dutch Financial Times]*, pp. 5–6.

Dijkgraaf, E., & Radius, R. (2008). *The waste market: Institutional developments in Europe*. Dordrecht: Springer.

European Commission. (2008). Commission interpretative communication on the application of community law on public procurement and concessions to institutionalised PPP (Brussels 2008/C 91/02). Brussels, Belgium: European Commission.

European Commission. (2011). *A quality framework for services of general interest in Europe (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions)*. Brussels: European Commission.

European Commission. (2011a). Commission Staff Working Paper Concerning the Application of EU Public Procurement Law to Relations between Contracting Authorities ("Public-Public Cooperation") (Brussels, 4.10.2011 SEC (2011) 1169 final). Brussels: European Commission.

Hulst, R., & Van Montfort, A. (2007). The Netherlands: Cooperation as the only viable strategy. In R. Hulst & A. Van Montfort (Eds.), *Inter-municipal cooperation in Europe* (Vol. 1, pp. 139–168). Dordrecht: Springer.

Janssen, W. A. (2012). Maatschappelijk Verantwoord Aanbesteden; Van een Instrumentele Naar een Procedurele Benadering van het Aanbestedingsrecht [Societally responsible public procurement; from a procedural to an instrumental approach of public procurement law]. *Tijdschrift Aanbestedingsrecht, 9*(1), 7–17.

Manunza, E. R. (2010). Naar Een Consistente en Doelmatige Regeling van de Markt voor Overheidsopdrachten [Towards Consistent and Efficient Regulation of the Public Procurement Market]. In J. M. Hebly, E. Manunza, & M. Scheltema (Eds.), *Beschouwingen Naar Aanleiding*

Van Het Wetsvoorstel Aanbestedingswet [Reflections on the Proposal for a Public Procurement Act] (Vol. 1, pp. 49–123). The Hague: Preadvies voor de Vereniging van Bouwrecht.

Manunza, E. R., & Berends, W. J. (2011). Social services of general interest and the EU public procurement rules. In U. Neergaard, E. Szyszczak, J. W. van de Gronden, & M. Krajewski (Eds.), *Social services of general interest in the EU, legal issues of services of general interest* (Vol. 1, pp. 347–384). The Hague: T.M.C. Asser Press.

Ministery of the Interior and Kingdom Relations. (2011). *Visiedocument "Bestuur en Bestuurlijke Inrichting: Tegenstellingen met Elkaar Verbinden" [Vision Document "Administration and Administrative Design: Connecting Opposites"]*. The Hague: Ministry of the Interior and Kingdom Relations.

Monti, M. (2010). *"A new strategy for the single market; at the service of Europe's economy and society." (Report to the President of the European Commission José Manuel Barroso)*. Brussels: European Commission.

Sánchez Graells, A. (2011). *Public procurement and the EU competition rules*. Oxford: Hart Publishing.

Van Ommeren, F. J., & Vermont, J. A. R. (2007). Uit- Aan- en Inbesteden in het Publiek- en Privaatrecht? De Uitbesteding van het Recht om Huishoudelijk Afval in te Zamelen. [Internalisation and externalisation in public and private law? The externalisation of the right to collect household waste]. *De Gemeentestem, 7266*(7), 29–37.

VROM-rapport. (2003). Toekomstig Afvalbeleid: Een Eerste Stap naar een Nieuwe Lange Termijnvisie voor het Afval Beleid [Future Waste Policy: A First Step towards a Long-Term Vision for Waste Policy]. The Hague, The Netherlands: Ministery of Infrastructure and Environment.

Wetenschappelijke Raad voor het Regeringsbeleid. (2000). *Het Borgen van Publiek Belang (Rapporten aan de Regering) [Safeguarding the Public Interest (Report to the Dutch Government, nr. 56)]*. The Hague: Sdu Uitgevers.

Willem A. Janssen LLM is a lecturer and PhD researcher in the Public Procurement Research Center and Utrecht Center for Regulation and Enforcement in Europe, University of Utrecht. His research interest is in procurement law and procurement policy.