

Public Procurement Distance

*Analysing European public procurement policy implementation
in 27 EU member states*

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- Page 82:** Specifications for infrastructural works around the Waal dike in Dalem. Ministerie van Binnenlandse Zaken: Afdeling Waterstaat (Afdeling III), dated 1814 (Nationaal Archief inv. 2.04.07, no. 5782).
- Page 102:** Specifications for the lighthouse construction on Sumatra. Departement van Kolonien.
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Inne setten vanden dierthe dain
omvender wetten ter dier heper
N. man d. v. v.

Men van Oudmonder
Op — m^c l. huro lnd

Mr Douth de roch — m^d l. huro lnd

Zergolomend van Gerecht met
Een soene op — m^d l. huro lnd

Weter de kppert met Eyn mede
gesellen op — m^d l. huro lnd

Hoos boos getuit Bernults — m^d l. huro lnd

Van de Douthert met Eyn consorten
op — m^d l. huro lnd

Chapter 1

INTRODUCTION: EUROPEAN PUBLIC PROCUREMENT POLICY

1.1 Central problem

Policy is only finally made when laws or regulations are fully implemented through subsequent processes that cascade from the initial declarations (Michael Lipsky, 2010: 213)

If European procurement policy is not implemented to the letter, a discrepancy arises between the intended policy and its implementation. This is called *public procurement distance*. This primarily concerns the mandatory public procurement policy to which contracting organisations must adhere. Discretionary public procurement policies also exist, which – in principle – contracting organisations implement on a voluntary basis. They cover topics such as socially responsible procurement, innovation, and encouraging participation in public contracts by small to medium-sized enterprises (SMEs). There are also public procurement policies that may be implemented at one's discretion regarding cross-border procurement, promoting purchases in member states other than one's own country to stimulate the use of the harmonised European market. In all of these policies, implementation is problematic. The aim of this research is to identify possible explanations for this distance between intended European public procurement policy and its implementation.

The first policy component to be discussed is mandatory procurement policy. The aim of this policy is to create a uniform legal framework for all member states within which governments can manage the execution of infrastructural works, services, and supply of goods in a common market (hereafter referred to as works, services and supplies).¹ Where this policy is con-

¹ Regulation of government contracts has always taken place. For example, according to Verkerk (1992: 233); King (2000: 1); Hurx (2012: 116-117), for there were tender procedures with bids in writing in the Middle Ages and Renaissance. Until the sixteenth century, a burning candle determined the duration of the bidding, whereby the person who had bid the lowest when the candle was extinguished was awarded the assignment (Janse, 1965: 27). The earliest purchase

cerned², there are persistent complaints about excessive administrative burdens, a lack of transparency, and overly complex regulations, meaning that the implementation of mandatory European public procurement policy is experienced as problematic (Csáki, 2006; Maandag, 2007; European Commission³, 2008c; 2011a: 3; 2017a: 5-6; Volker, 2010; European Court of Auditors, 2015; Arrowsmith, 2012: 96; 2015). A lack of knowledge and professionalism plays a role when it comes to the implementation (Commission, 2017a; 2021a: 5). Procurement practitioners also have to consider that a variety of external stakeholders from politics, social groups, business, and media influence their work (Gordon et al., 1993: 832-833; Commission, 2021a: 5). The result is that fair competition is sometimes lacking, and contracts are not always awarded to parties that should have won the government contract based on their tender (European Court of Auditors, 2015: 8).

Furthermore, several problems are linked with the implementation of the mandatory public procurement policy. For instance, 5% of public contracts are awarded directly after negotiations, without any tender procedure. Between 2006 and 2016, the number of tenders with one bidder increased from 17% to 30%, and the average number of bids per tender procedure declined from five to three (Commission, 2017a: 5). This means that competition between interested suppliers falls short. Mutual cooperation between contracting authorities to share knowledge and capacity is also limited, occurring in only 11% of the relevant tender procedures. Therefore, possible economies of scale are not always realised. Tender procedures are also highly susceptible to improper behaviour (European Court of Auditors, 2015; Commission, 2017a: 2, 5-6, 11). These shortcomings in the implementation of mandatory European public procurement policy mean that there is regularly a significant distance between this policy's intentions and its implementation.

Secondly, regarding discretionary policies the aim is for procurement officers to voluntarily address a variety of policy themes such as sustainability and social return, innovation, and encouraging participation in public contracts by SMEs. There are also persistent problems in this regard. Rather than a lack of European policies, member states do not implement them or only do so partially. The Commission (2017a: 3) comments that "*Member States are not using to their full extent the possibilities of public procurement as a strategic tool to support sustainable, social policy objectives and innovation.*" For example, SMEs win only 45% of

order ever discovered was for "50 pots of oil in exchange for 600 small weights of grain," which stemmed from Syria and dated from the period between 2400 and 2800 BC, according to Coe (1989: 87) in Thai (2001: 11).

2 The terms procurement policy, European public procurement policy, tendering, contracting, purchasing and public procurement in this study refer to European procurement policy.

3 Subsequently referred to as the "Commission."

contracts (Commission, 2017a: 5), even though 99% of enterprises in the European Union fall into this segment (Commission, 2003). Innovation is hindered by aspects such as a lack of knowledge about the subject, risk aversion, and resistance to change (Commission, 2021a: 10). This leads to the intended optional procurement policy frequently falling short in its implementation. The causes might stem – for example – from risk avoidance, insufficient management direction and coordination, a lack of financial resources and adequately skilled staff, insufficient political support and involvement, and restrictive regulations (OECD, 2017: 42-45). Moreover, the focus is often placed on economic (Kingston, 2016: 30) or legal aspects (Semple, 2016).

The third element of the European public procurement policy is the promotion of cross-border procurement by member states on the common European market. Further expansion of this market is an important objective of European procurement policy (Cox, 1993: 9), although this is a discretionary rather than mandatory policy. Concerning cross-border procurement, contracting authorities should use the available possibilities more than at present (Commission, 2017a: 12-13). If member states pay little attention to the common market, this hinders further European integration (Cox, 1993: 9; Börzel, 2016). The Commission already highlighted the importance of breaking down internal borders and promoting cross-border public procurement in 1985, while also noting that this happens to a very limited extent (Commission, 1985: 23-24). This situation has remained over the years; for example, between 2009 and 2015, the share of direct cross-border awards compared to the total number of awards was 1.7% (Commission, 2017b: 29).

The Commission has made several attempts to revise its public procurement policy to address the issues surrounding the poor implementation of mandatory and discretionary policies, albeit without leading to solutions.⁴ This raises questions

⁴ In 2004, a revision of the guidelines in force since 1992 was published (Commission, 2004a; b). The main objectives of this revision were to strengthen the functioning of the internal market, realise savings in public expenditure, improve transparent understanding of available public contracts, make procedures less administratively burdensome for both public authorities and market parties, allow more strategic policy objectives to be included in tenders and fight corruption (Commission, 1998; 2001: 12, 29). However, the review solved little, as complaints about administrative burdens, a lack of transparency, and regulatory complexity did not disappear. The Commission was aware of the continuing shortcomings. Therefore, in 2014, revised guidelines were issued again to improve the 2004 version. The main objectives of the 2014 revision were to increase the effectiveness of public expenditure by generating more value for money, improve the implementation of strategic policy objectives, and combat corruption as well as preventing the favouring of certain parties (Commission, 2011a). This new set of guidelines was expected to strongly reduce the problem, although the exact same complaints largely persisted (Arrowsmith, 2012; 2015; European Court of Auditors, 2015; Semple, 2016; Commission, 2017a: 6; Andhov et al., 2022: 11, 55-61). In 2024, the Commission expressed the desire to review the guidelines again, given the continuing shortcomings.