Promoting Social Considerations into Public Procurement Procedures for Social Economy Enterprises

Matrix explaining how social considerations have been embedded in the Dutch law transposing Directive 24/2014/EU

Prepared by

Contents

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Article 18.2 of the Directive ► Article 2.81 of the Dutch Procurement Law (Aanbestedingswet 2012)			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 18.2 is implemented in article 2.81 of the Dutch Procurement Law (Aanbestedingswet 2012) **Text article 2.81** 1. In the tender documents, a contracting authority shall specify the body at which the candidates or tenderers may obtain information on obligations concerning the provisions relating to taxes, environmental protection, employment protection and working conditions applicable in the Netherlands or, if the transactions are carried out outside the Netherlands, which apply in the place where the operations are carried out and which will apply to those operations during the performance of the public contract. 2. A contracting authority requests tenderers or applicants to indicate that they have taken account of environmental, social and labour law obligations under European Union law and national law, when drawing up their tender or collective agreements, or under the provisions of international environmental, social and labour law listed in Annex X of Directive 2014/24/EU.	The contracting authority is allowed to require verification through the provision of independently verifiable documents that the tenderer has fully paid all taxes and social premiums, to require proof that the tenderer is fully compliable with collective wage agreements that have been declared universally applicable by the Minister for Social Affairs, and more in general is operating in full accordance with the Dutch environmental protection, employment protection and working conditions laws. Article 10 of the Order in Council relating to the Dutch Procurement Law (het Aanbestedingsbesluit) forms the basis of the Proportionality Guide (Gids Proportionaliteit). This 70-page guide gives guidance to contracting authorities on all aspects of the application of the Dutch Procurement law. The principle of proportionality means that the choices that a contracting authority makes and the requirements and conditions it imposes in a tendering procedure must be in reasonable proportion to the nature and scope of the contract to be awarded. The Guide is a compulsory guideline (verplicht richtsnoer) for contracting authorities. The Guide, however, has no specific section on social enterprises.	The article essentially stipulates that the tenderer can be required to provide written proof of full conformation to Dutch tax-, environmental protection-, employment protection- and working conditions law.	The article interacts with Dutch tax-, environmental protection-, employment protection- and working conditions law, but only on the level that the tenderer can be required to prove that he or she is fully compliant with the provisions and obligations contained within these laws.
Open questions	In practice the article is mainly used to require proof that all outstanding taxes and social premiums are fully paid on the registration date. In general, a Declaration by the Dutch Tax Authority (Verklaring Belastingdienst or also called Verklaring betalingsgedrag nakoming fiscale verplichtingen) is accepted provided it has been issued within six months prior to the registration date. There is an extensive body of case law concerning situations where the declaration is (slightly) older than six months, or indicated that taxes are nearly fully, but not completely, paid.		
Example of application from the national level (where applicable)	The Dutch Tax Authority (Belastingdienst) does not provide a web-based application form for the Declaration by the Dutch Tax Authority. This can result in disputes concerning liability in cases where the declaration cannot be provided on the registration date.		

Article 20 of the Directive ► Article 2.82 of the Dutch Procurement Law (Aanbestedingswet 2012)			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 20 is implemented in article 2.82 of the Dutch Procurement Law (Aanbestedingswet 2012) **Text article 2.82** 1.The contracting authority may reserve the right to participate in a procedure for the award of a public contract to sheltered workshops and to operators whose main objective is the integration, both socially and professionally, of disabled or disadvantaged persons , or the performance thereof within the framework of sheltered employment programmes, provided that at least 30% of the employees of these workshops, economic operators or programmes are disabled or disadvantaged workers. 2. The call for competition states a reservation as referred to in the first paragraph.	This provision allows the possibility to transpose exclusive participation in procedure and performance of contracts to the described sheltered workshops and operators. National implementing provisions are furthermore provided in the Proportionality Guide (Gids Proportionaliteit).	This provision aims to foster participation of procurement contracts for sheltered workshops and economic operators active in social and professional integration of disabled or disadvantaged persons. Performance of such contracts may also occur in the context of sheltered employment programmes. In the Netherlands virtually all municipal authorities (gemeenten) are (co)owners of a sheltered workplace (Sociale Werkvoorziening) and can have economic activities performed by these sheltered workplaces outside the framework of the Dutch Procurement Law (Aanbestedingswet 2012).	There is an indirect relation to the Participation Law (Participatiewet) which provides the legal basis for the Dutch system of sheltered workplaces (SW bedrijven) that are (co)owned by municipal authorities (gemeenten).
Open questions	Unfortunately, the provisions in article 2.82 are rarely used in the Netherlands. Therefore, hardly any case law exists.		
Example of application from the national level (where applicable)	The provision is not an exclusion from the obligation to conduct a tendering according to Dutch Procurement Law (Aanbestedingswet 2012). In other words, the contracting authority is not allowed to award a contract directly to a supplier with reference to this provision.		

Article 40 of the Directive ► Article 2.25 of the Dutch Procurement Law (Aanbestedingswet 2012)			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 40 is implemented in article 2.25 of the Dutch Procurement Law (Aanbestedingswet 2012) **Text article 2.25** The contracting authority applies one of the procedures in this section for awarding a public contract, whether or not after market consultation.	Contracting authorities are not allowed to engage in pre-negotiation nor to give information which could have the effect of distorting competition or violating the principles of non-discrimination, equal treatment and transparency. It is not possible to word selection criteria or award criteria and technical specifications in such a way that they can only refer to one tenderer or to a restricted group of tenderers. National implementing provisions are furthermore provided in the Proportionality Guide (Gids Proportionaliteit).	Contracting authorities are allowed to seek or accept advice from independent experts or authorities or from market participants. Quite frequently the authorities make use of a public market consultation (Marktconsultatie). It is customary to include the presentations presented during the consultation and a compact report of the consultation procedure in the tender documentation pack. In this way a level playing field between participants and non-participants in the consultation can be guaranteed.	
Open questions	There are no serious elements of legal uncertainty regarding the possibility to conduct preliminary market consultations. The development of case law is effectively prevented by the great care which is usually taken in providing all interested parties with full documentation on the proceedings of the market consultation.		
Example of application from the national level (where applicable)			

Article 42.1 of the Directive ► Article 2.75 of the Dutch Procurement Law (Aanbestedingswet 2012)			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 42.1 is implemented in article 2.75 of the Dutch Procurement Law (Aanbestedingswet 2012) **Text article 2.75** 1. A contracting authority shall include in the tender documents the technical specifications, including the characteristics prescribed for a work, service or supply. 2. The characteristics referred to in the first paragraph are related to the object of the public contract and are proportionate to the value and objectives of that contract. 3. For the purposes of the second paragraph, the characteristics in question relate to the subject matter of the public contract when they relate to the works, supplies or services to be performed in the context of that public contract, in all respects and at every stage of their assignment. life cycle, including factors related to: a. the specific production process, the offering or the trading of these works, supplies or services, or b. a specific process for another phase of their life cycle, even when these factors are not part of their material basis. 4. In the case of public contracts the result of which is intended for use by natural persons, either by the general public or by the contracting authority's staff, the technical specifications take into account the accessibility criteria for persons with disabilities or design for all users, with the exception of properly motivated cases. 5. Where binding EU legal acts have been adopted with accessibility criteria for persons with disabilities or design for all users, the technical specifications refer to this. 6. The technical specifications provide equal access for tenderers and do not create unjustified obstacles to the opening-up of public procurement to competition.	These provisions relate to inclusion of technical specifications, which may be included in the tender documents. In general, the contracting authority is under Dutch case law to a great extent free to determine what to acquire, provided the technical specifications do not limit the tendering process to a single tenderer, or to a limited group of tenderers. Provision 4 of article 2.75 specifically states that the contracting authority must take into account the accessibility criteria for persons with disabilities or the suitability of the design for all users, with the exception of properly motivated cases. National implementing provisions are furthermore provided in the Proportionality Guide (Gids Proportionaliteit).	The article means that contracting authorities may set technical specifications that are in direct relation to the products or services that are being tendered. To guarantee the possibility of access to the tendering process the term “of gelijkwaardig” (or equivalent) is frequently added to technical specifications.	The provision in article 4 could have a relation to Equal Treatment Act (Wet Gelijke Behandeling).

Open questions	There is a quite substantial body of case law on the question of “gelijkwaardig” (equivalent) in relation to technical specifications. In general, it is left to the tenderer who is starting proceedings for interim measures (Kort Geding) after not being awarded the contact to prove that his or her product or service is indeed equivalent, or indeed conforms to the prescribed technical specifications.
Example of application from the national level (where applicable)	There are no examples available of case law concerning provision 4 of article 2.75 with relation to the accessibility criteria for persons with disabilities.

Article 43 of the Directive ► Article 2.78a of the Dutch Procurement Law (Aanbestedingswet 2012)			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 18.2 is implemented in article 2.78a of the Dutch Procurement Law (Aanbestedingswet 2012) **Text article 2.78a** 1. If a contracting authority intends to purchase a work, supply or service with specific environmental, social or other characteristics, it may require, in the technical specifications, award criteria or contract performance conditions, a specific label as means of proof that the work, service or supply corresponds to the required characteristics, provided that: a. the label requirements concern only criteria which are linked to the subject-matter of the public contract and are appropriate to define characteristics of the work, the delivery or the service that is the subject-matter of the contract; b. the label requirements are based on objectively verifiable and non-discriminatory criteria, c. the label is established in an open and transparent procedure in which all stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, can participate, d. the label is accessible to all interested parties, and e. the label requirements are set by a third party on whom the operator applying for the label cannot exercise a decisive influence. 2. A contracting authority does not require a work, supply or service to meet all the hallmark requirements of a specific label, it shall indicate which label requirements must be met. 3. A contracting authority requiring a specific label, shall accept all labels that confirm that the work, supply or service meets equivalent label requirements. 4. A contracting authority accepts other appropriate means of proof, such as a technical dossier from the manufacturer, the specific mark or an equivalent mark, if an economic operator: a. demonstrates that it has not been able to acquire the specific label or equivalent label issued by the contracting authority within the relevant time limits for reasons that are not attributale to it, and b. proves that the work , the supply or service to be provided by the operator concerned, fulfils the requirements of the specific label or the specific requirements indicated by the contracting authority. 5. If a label fulfils the conditions provided for in the first paragraph, under b through e,	The provisions in article 2.78a allow the contracting authorities to require the provision or proof that the tender is in the possession of a currently valid label or certification, such as specified in the tender documents. National implementing provisions are furthermore provided in the Proportionality Guide (Gids Proportionaliteit).	The case law in the Netherlands is heavily dominated by the Noord Hollands Koffie Arrest (North Holland Coffee Ruling ECLI:EU:C:2012:284) which stipulates that tenders have an non-deniable right to provide an alternative proof of conformation to the standards that form the basis of the label or certification. The only exemptions to this general rule are professional registrations with a legal basis such as BIG for medical professions and NOvA for legal professions. The Noord Hollands Koffie Arrest ruling itself pertained to a fair trade certification with no clear legal basis. In the wake of the North Holland Coffee Case contracting authorities are, as a rule very careful in adding “of gelijkwaardig” (or equivalent) to any provision concerning fair trade, equal treatment	An interaction exists with laws requiring professional registrations for medical and legal professionals, such as BIG for the medical professions, NIP for psychologists, and NOvA for lawyers.

but also sets requirements that are not linked to the object of the contract, the contracting authority shall not require the label as such, but shall lay down the technical specifications by reference to the detailed technical specifications of that label or parts thereof which are linked to the subject-matter of the contract and which are appropriate for the description of the characteristics of this subject-matter.		labels or certificates.	
Open questions	The Noord Hollands Koffie Arrest (North Holland Coffee Ruling ECLI:EU:C:2012:284) gave rise to a quite substantial body of case law on the question of “gelijkwaardig” (or equivalent) in relation to labels or certification In general, it is left to the tenderer who is starting a court case (Kort Geding) after not being awarded the contract to prove that their organisation’s certification is equivalent, or indeed conforms to defined technical specifications. There is also reverse case law in which not-awarded tenderers who are in possession of a certain certificate disputed the equivalency (gelijkwaardigheid) of an awarded tenderer which was not in possession of that certificate.		
Example of application from the national level (where applicable)	Since the case law is quite complex and not entirely clear on the status of certificates, or on the equivalency thereof, this topic gives rise to frequent legal disputes. Initiatives on the national level such as the Social Entrepreneurship Certificate, which has been developed by TNO Innovation for Life are therefore limited in their application.		

Article 46 of the Directive ► Articles 1.5 and 2.10 of the Dutch Procurement Law (Aanbestedingswet 2012)			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 46 is implemented in articles 1.5 and 2.10 of the Dutch Procurement Law (Aanbestedingswet 2012) **Text article 1.5** 1. A contracting authority or special-sector company shall not merge contracts, unless this is necessary. Before merging takes place, at least attention shall be paid to: a. the composition of the relevant market and the influence of the merger on access to the contract for sufficient small and medium-sized enterprises; b. the organisational consequences and risks of merging the contracts for the contracting authority, the special-sector company and the operator; c. the degree of coherence of the assignments. 2. If merging contracts takes place, this shall be motivated by the contracting authority or the special-sector company in the tender documents. 3. A contracting authority or a special-sector company shall divide a contract into several lots, unless it considers this inappropriate, in which case the contracting authority or the special-sector company shall justify it in the tender documents. **Text article 2.10** 1. A contracting authority shall state in the contract notice whether tenders may be submitted for one or more lots. 2. If several lots may be awarded to the same tenderer, a contracting authority may award a public contract for a combination of lots or for all lots provided that the authority, in the contract notice: a. has reserved the possibility to do so, and b. has indicated which lots or groups of lots can be combined. 3. Notwithstanding the first paragraph, a contracting authority may limit the number of lots to be awarded to one tenderer, provided that the maximum number of lots per tenderer is indicated in the contract notice. 4. In a case as referred to in paragraph 3, a contracting authority shall indicate in the tender documentation the objective and non-discriminatory rules that it will apply to determine which lots will be awarded if the application of the award criteria would lead to the award of more lots than the maximum number, to the same tenderer.	Paragraph 1 and 2 of the provision are included with the aim of preventing contracting authorities to aggregate contracts unnecessarily. This is commonly referred to as the anti-aggregation rule (“clusterverbod”). By putting a restraint on the merging of contracts the provision aims at reducing the average size of a tender and/or reducing the average size of a lot within a tender. This means more opportunities for medium- and small-sized enterprises (Midden en Klein Bedrijf, or MKB). Since the majority of Dutch social enterprises can be classed as MKB the provision will benefit social enterprises indirectly. Paragraph 3 of the provision is the mirror of paragraph 1 and 2 and is aimed at encouraging contracting authorities to split up tenders in separate lots, whenever possible. National implementing provisions are furthermore provided in the Proportionality Guide (Gids Proportionaliteit). The Guide specifically stipulates that Contracting Authorities should carefully consider the position of small- and mediumsize enterprises (“MKB”) before making any decision on the merger of contracts or on the division of tenders in separate lots.	In practice this means that a tenderer has good legal grounds to contest an aggregation of tenders that were put out in separate contracts before. The burden of proof on the necessity (“noodzaak”) of the aggregation falls mainly on the contracting authority. However, if a tenderer wishes to argue a case that a large tender should be split in smaller lots to provide more changes for small and midsize companies the burden of proof is with the tenderer.	There is a certain amount of interaction with the Competition Law (Mededingingswet) since (small) tenderers have to be careful to work within the framework of the Competition Law before taking collective action on this issue.

Open questions	Because of the (perceived) interaction with the cartel prohibition in competition law, the case against unnecessary merger of tenders is often taken up by organisations and federations of small- and medium-sized enterprises (MKB) . Since the organisations have no direct economic interest in any tender, their position when starting legal procedures is not clear. Case law does not commonly accept employer federations as an interested party in Dutch procurement law procedures.
Example of application from the national level (where applicable)	The Proportionality Guide (Gids Proportionaliteit) offers the only application on the national level, though only in a very general way: “Every form of clustering has advantages and disadvantages. These are dependent on the specific circumstances of the assignment and must be made transparent”.

Article 56 of the Directive ► Article 2.101 and article 2.103 of the Dutch Procurement Law			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Articles 56.1 and 56.2 are not separately implemented at the national level Article 56.2 is implemented in article 2.101 and article 2.103 of the Dutch Procurement Law (Aanbestedingswet 2012) Articles 56.3 and 56.4 are not separately implemented at the national level **Text article 2.101** 1. The contracting authority / entity may, at any time during the course of the procedure, request tenderers and candidates to submit, in full or in part, the current evidence required for the data and information provided in the self-declaration, if this is necessary for the proper conduct of the procedure. 2. In the application of the first paragraph, the contracting authority may request a tenderer or a candidate to supplement or clarify the supporting documents referred to in the first paragraph. 3. The contracting authority may, when applying the open procedure, by way of derogation from articles 2.86 and 2.87 and from paragraph 1, only check whether the tenderer to whom it intends to award the public contract, should not be excluded and whether it complies with suitability requirements. **Text article 2.103** 1. A contracting authority shall inform the rejection or exclusion of the candidates and tenderers concerned in writing, as soon as possible. 2. At the request of a party concerned, a contracting authority shall inform a rejected candidate as soon as possible and no later than fifteen days after receipt of their written request, of the reasons for rejecting his or her request to participate. 3. At the request of a party concerned, the contracting authority shall inform every unsuccessful tenderer as soon as possible but no later than within fifteen days of receipt of their written request, of the reasons for his or her rejection, including in the cases referred to in the Articles 2.77 and 2.78, the reasons for the decision that there is no equivalence or that the works, supplies or services do not meet the functional or performance requirements. 4. The first and second paragraph shall apply mutatis mutandis to the tenderer referred to in Article 2.101, third paragraph.	The provision in paragraph 3 of article 2.101 allows the contracting authority to postpone, in open procedures, the examination of the suitability requirements (geschiktheidseisen) till the point in the procedure when a preliminary choice of the winning tenderer(s) has been made. National implementing provisions are furthermore provided in the Proportionality Guide (Gids Proportionaliteit).	The paragraph is aiming to diminish the administrative requirements during a tender procedure. Since only the proposed winning tenderers have to be checked on the suitability requirements, they are the only ones that have to provide evidence. However, since the usually allowed period for providing documents of proof is 7 to 10 days, and the application for some of the key documents may take 4 to 6 weeks, in practice every tenderer still has to apply for the documents, so they can be provided within the allowed timeslot in case the tender is awarded to them. Since social enterprises in the Netherlands predominantly are small- or medium-sized organisations who do not regularly participate in public tenders this practice could be seen as an obstacle for social enterprises.	

Open questions	There is some case law on the question of whether an application for a document of proof (such as a tax statement) can be accepted by the procuring authority on the provision that the award of the tender can be revoked and the contract annulled if the document is not provided before a specific date.
Example of application from the national level (where applicable)	This allows more time for the tenderer to procure the documents of proof but also means a risk for the procuring authority in case the required documents are not provided within the state's timeslot.

Article 57 of the Directive ► Article 2.86 of the Dutch Procurement Law (Aanbestedingswet 2012)			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 57 is implemented in article 2.86 of the Dutch Procurement Law (Aanbestedingswet 2012) **Text article 2.86** 1. A contracting authority will close a candidate or tenderer against whom a final judgment has been rendered a conviction as referred to in the second paragraph that is known to the contracting authority as a result of verification in accordance with articles 2.101, 2.102 and 2.102a or others, out of participation in a tender procedure. 2. For the application of the first paragraph, convictions with regard to: a. Participation in a criminal organisation within the meaning of Article 2 of the Council Framework Decision 2008/841/JHA of 24 October 2008 to combat organised crime (PbEU 2008, L 300); b. bribery within the meaning of Article 3 of the Convention on the fight against corruption involving officials of the European Communities or of the Member States of the European Union (PbEU 1997, C 195) and of Article 2 (1) of Framework Decision 2003/568/JHA of the Council of 22 July 2003 on combating corruption in the private sector (PbEU 2003, L 192); c. fraud within the meaning of Article 1 of the Convention on the protection of the Community's financial interests (OJ 1995, C 316); d. money laundering within the meaning of Article 1 of Council Directive 91/308/EEC of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering (PbEG L 1991, L 166) as amended by Directive 2001/97/EC of the European Parliament and of the Council (PbEG L 2001, 344); e. terrorist offences or criminal offences related to terrorist activities within the meaning of Articles 1, 3 and 4 of Council Framework Decision 2002/475/JHA of 13 June 2003 on combating terrorism (OJ 2002, L 164); f. child labour and other forms of trafficking in human beings within the meaning of Article 2 of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, replacing Framework Decision 2002/629/JHA (PbEU 2011, L 101).	This provision allows the contracting authority to exclude organisations that have been convicted of any of the crimes that are mentioned in paragraphs 2, 3 and 4 of article 2.86. To prove that a tenderer is not in any of the circumstances contained in article 2.86, the contracting authority can request a Declaration of Conduct for Tendering (Gedragsverklaring Aanbesteden or GVA) which is issued by an agency of the Justice Ministry (Dienst Justitie). The GVA is a statement that an investigation has shown that there are no objections that a natural person or legal entity registers for a public contract, special sector assignment, concession agreement for public works or competition. To this end, Justice consults the Judicial Documentation System and examines whether there are relevant decisions of the Authority for Consumers and Markets or the European Commission. Requesting a Declaration of Conduct for Tendering is not mandatory under the Public Procurement Act 2012, but if a contracting authority chooses this option, it must use the nationally provided model. National implementing provisions are furthermore provided in the Proportionality Guide (Gids Proportionaliteit).	The most common application of this provision is paragraph 2.a (bribery), 2.c (fraud) and 3 (non-payment of taxes). However, an irrevocable and binding judicial or administrative decision has to have been taken before this paragraph can be applied. Proceedings may stretch out over a very long period of time (literally years) and especially larger companies who are accused of any of the aforementioned crimes or offences have a vested interest in preventing a formal conviction by paying a (often quite large) fine in an out-of-court settlement. After an especially large out-of-court settlement made by a Dutch banking conglomerate, the Dutch national government (“Rijksoverheid”) recently opted not to use the optional years on the contract for the government banking services and to re-issue the tender.	Interaction exists with an extensive body of laws, but primarily with tax laws and with the Dutch criminal law (Wetboek van Strafrecht). Article 140 of the criminal law provides the basis for declaring an organisation a criminal organisation. However, the actual legal classification as a criminal organisation is a complex process. For instance, court proceedings to ban and disband Outlaw Motorcycle Gangs on the basis of article 140 have been met with quite a varying degree of success.

3. A contracting authority shall also exclude a candidate or tenderer from participation in a tendering procedure if the contracting authority has knowledge of an irrevocable conviction, as referred to in the second paragraph, pronounced against a person who is a member of the administrative, management or supervisory body or who has powers of representation, decision-making or control. 4. A contracting authority shall also exclude a candidate or tenderer from participation in a contract award procedure if the contracting authority is aware that an irrevocable and binding judicial or administrative decision is taken in accordance with the legal provisions of the country in which the candidate or tenderer is established or in accordance with national legal provisions it has been established that the operator does not fulfil his obligations to pay taxes or social security contributions. 5. The fourth paragraph does not apply if the candidate or tenderer has fulfilled his or her obligations by paying the taxes or social security contributions due, including accrued interest or penalties if applicable, or by making a binding payment arrangement. 6. Convictions as referred to in the second paragraph shall in any case be regarded as convictions pursuant to articles 134a140, 140a, 177, 178, 225, 226, 227, 227a, 227b, 273f, 285, third paragraph, 323a, 328ter, second paragraph, 420bis, 420ter or 420quater of the Penal Code, or convictions for violation of the offences referred to in Article 83 of the Criminal Code, if the provisions of that article have been met. 7. In the application of the first paragraph, the contracting authority only involves judgments that have become irrevocable in the five years prior to the time of submitting the request for participation or registration.			
Open questions	The case law is not entirely clear on the question: at what stage is a judicial or administrative decision “irrevocable and binding”.		
Example of application from the national level (where applicable)	As long as any form of appeal is still before the courts it can be argued that the judicial or administrative decision is not final. It can also be argued however that the invocation of an unwinnable or useless appeal forms a delaying tactic which should not be rewarded by the inclusion of the offending organisation in a tender procedure. The counter argument “innocent until proven guilty” however cannot be dismissed.		

Article 67 of the Directive ► Article 2.114 and article 2.115 of the Dutch Procurement Law (Aanbestedingswet 2012)			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 67.1 is implemented in article 2.114 of the Dutch Procurement Law (Aanbestedingswet 2012) Article 67.2 paragraph 1 to 5 is implemented in article 2.114 and article 2.115 of the Dutch Procurement Law (Aanbestedingswet 2012) The option provided in Article 67.2 paragraph 6 was not used on the national level Article 67.3 is implemented in article 2.115 of the Dutch Procurement Law (Aanbestedingswet 2012) Article 67.4 is implemented in article 2.113a of the Dutch Procurement Law (Aanbestedingswet 2012) Article 67.5 is implemented in article 2.115 of the Dutch Procurement Law (Aanbestedingswet 2012) **Text article 2.113a** 1. Award criteria shall ensure the possibility of effective competition and shall be accompanied by specifications enabling the information provided by the tenderers to be effectively assessed in order to assess the conformity of the tenders with the award criteria. 2. In the event of any doubt, a contracting authority checks the correctness of the information and means of proof provided by the tenderers. **Text article 2.114** 1. The contracting authority awards a public contract on the basis of its judgement to the economically most advantageous tender 2. The most economically advantageous tender shall be determined by the contracting authority on the basis of: a. best value for money, b. lowest costs calculated on the basis of cost - effectiveness, such as the life - cycle costs referred to in Article 2.115a, or c. lowest price. 3. In the application of the first paragraph, the award is made on the grounds of part a of the second paragraph. 4. A contracting authority may, by way of derogation from the third paragraph, award on the basis of subsection b or subsection c of the second subsection.	Article 2.114 of the Public Procurement Act 2012 as clarified in the Proportionality Guide (Gids Proportionaliteit) states that a contracting authority should award a tender on the basis of the best price-quality ratio (Beste Prijs-kwaliteitverhouding or BKVP). However, the contracting authority can choose to award the contract on price only, provided that choice is motivated in the tender documents. Article 2.115 of the Public Procurement Act 2012 states that in a BKVP (best price quality ratio) tender the contracting authority should be clear on the quality aspects that are being taken into consideration. One of the examples given in paragraph 2 of article 2.115 is 2.d: “social, environmental and innovative characteristics”. In the case of the Social Support Act (Wet Maatschappelijke Ondersteuning) which is administered by local municipalities, additional rules have been set on the national level, to guarantee a good relationship between the price for the provision of a work, product or service and the requirements for the quality of these, and that the continuity of the assistance between the client and the care provider has been set in a Order in Council (Algemene Maatregel van Bestuur). This instrument, commonly known as	Article 2.115 provides the contracting authority with the choice of an award requirement for social enterprises. In principle, classifying as a social enterprise, or showing that social enterprises will be awarded subcontracts, or will otherwise be promoted by the tenderer, can be used as an (additional) award requirement. Unfortunately, there are no examples of paragraph 2.d of article 2.115 actually being used in public procurement procedures. Article 2.114 is generally conceived to be aimed at preventing tenders on price only. Price-only award criterion can lead to a “race to the bottom” which is often considered to be detrimental to wages, working conditions and social aspects of tendering companies. Since the introduction of article 2.114 the use of price only contracting however is not completely banned, since a contracting authority can still make this choice, provided it is motivated in the tender documents. Also, some “nearly price only” tenders have emerged with a quality/price ratio of 10 to 20	

In this case, the contracting authority will justify the application of that criterion in the tender documents. 5. The determination of the economically most advantageous tender solely on the basis of the award criterion, referred to in the second paragraph, part b or part c, is not permitted with respect to categories of contracting authorities and types of assignments to be designated by or pursuant to an order in council. 6. The nomination for a general administrative order to be adopted pursuant to paragraph 5 shall be made no sooner than four weeks after the draft has been submitted to both chambers of Parliament. **Text article 2.115** 1. The contracting authority which determines the most economically advantageous tender on the basis of the best value for money, makes public in the contract notice the detailed criteria it sets for the application of this criterion. 2. The further criteria referred to in the first paragraph relate to the subject matter of the public contract and may concern, inter alia: a. quality, including technical merit; b. aesthetic and functional characteristics; c. accessibility; d. design suitability for all users; e. social, environmental and innovative characteristics; f. the trade and the conditions under which it takes place; g. the organisation, qualification and experience of the personnel for the execution of the contract, when the quality of that staff can have a significant influence on the level of execution of the assignment; h. customer service and technical assistance; I. delivery conditions, such as delivery date, delivery method, delivery period or deadline for completion. 3. Further criteria as referred to in the first paragraph relate to the subject-matter of the public contract when they relate to the works, supplies or services to be carried out within the framework of this public contract, in all respects and at every stage of their life cycle, including of factors related to: a. the specific production process, the offering or the trading of these works, supplies or services, or b. a specific process for another phase of their life cycle, even when these factors are not part of their material basis. 4. In the tender documents, the contracting authority shall specify the relative	the “Realistic Pricing Order” (Besluit Reële Kostprijs) has precedence over the Procurement Law. National implementing provisions are furthermore provided in the Proportionality Guide (Gids Proportionaliteit). Specifically: When applying the award criterion BPKV, the announcement or the tender documents must specify the relative weight of the chosen further (sub)criteria. This weight can be expressed by means of a margin with an appropriate difference between minimum and maximum. If a weighting cannot be given for demonstrable reasons, the criteria may be in descending order of importance. The criteria to be set must be objective and unambiguous. Award criteria must refer to the contract. The following precautions must be taken to prevent the price becoming too dominant in a BKPV tender: The number of points awarded to the qualitative criteria relative to the number of points awarded to the price criterion must be sufficiently high to make a difference. Use a sound and transparent scale for all assessment criteria to avoid uneven quantities, such as the simultaneous use of a scale from 0 to 10 for rating of one criterion and a rating of good/bad for the other criterion. The qualitative criteria must play a determining role. The Contracting Authority should prevent the	on quality and 80 to 90 om price. In general, best price quality ratio (BKVP) tenders are in the interest of social enterprises. Social considerations may be taken into account in accordance with article 2.115, 2.d. Since Social enterprises are usually small- or medium-sized companies and have specific cost structure, price only tenders are not beneficial to social enterprises. So, the discouraging effect of article 2.114 on “price only” works in their interest.	

weight of each of the further criteria chosen by it for determining the most economically advantageous tender on the basis of the best price-quality ratio. This weight can be expressed by means of a margin with an appropriate difference between minimum and maximum. 5. If, for objective reasons, no weighting is possible, the contracting authority shall state in the tender documents the further criteria in descending order of importance.	situation where all tenderers are expected to score (almost) the same on the quality criteria, so making the price ultimately decisive.		
Open questions	There is a sizable number of cases in case law where “price only” and “nearly price only” tenders have been tested in court. As a general rule, the case law states that contracting authorities have a great degree of policy freedom on this point, provided they include a transparent and unambiguous motivation for that choice in the tender documents. The “Realistic Pricing Order” (Besluit Reële Kostprijs) which is applicable only to the Social Support Law gave rise to a number of cases in which fixed prices set by local municipalities were disputed. The application of the divergent case law to individual tenders gives rise to a large amount of legal uncertainty.		
Example of application from the national level (where applicable)	Even in a best price quality ratio tender (BPKV) the element price can become more dominant than originally planned. It is quite common to use a quality/price ratio of 60/40 or 70/30. If, however some, or in some cases even most, of the quality aspects can easily be answered by most tenderers, the awarding of the contract might still be predominantly decided on the price factor.		

Article 69 of the Directive ► Article 2.116 of the Dutch Procurement Law (Aanbestedingswet 2012)			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 69 is implemented in article 2.116 of the Dutch Procurement Law (Aanbestedingswet 2012) **Text article 2.116** 1. If a tendering for a public contract is made that appears abnormally low in relation to the works, supplies or services to be performed, the contracting authority requests an explanation of the proposed price or costs of the relevant tender. 2. An explanation as referred to in the first paragraph may, among other things, be related to: a. the efficiency of the construction process, of the production process of the products or of the service; b. the technical solutions chosen or exceptionally favourable conditions of which the tenderer can benefit from the delivery of the works, the delivery of the products or the provision of the services; c. the originality of the works, supplies or services proposed by the tenderer; d. the fulfilment of obligations in the field of environmental, social and labour law under the law of the European Union, national law or collective agreements or pursuant to the provisions of international law set out in Annex X of Directive 2014/24/EU environmental, social and labour law; e. the receipt of State aid by the tenderer; f. fulfilling the obligations referred to in Article 2.79. 3. The contracting authority will examine the information provided in consultation with the tenderer. 4. A contracting authority may reject a tender only if the low level of the proposed prices or costs is not adequately supported by the evidence provided, taking into account the elements referred to in the second paragraph. 5. A contracting authority shall reject a tender if it has	The provisions allow, but not in all cases oblige, contracting authorities to reject abnormally low tenders. If a tender is perceived to be abnormally low the contracting authority has to go into a verification process with the tenderer. A contracting authority may reject a tender only if the low level of the proposed prices or costs is not adequately supported by the evidence provided. However, a contracting authority is obliged to reject a tender if it have been established that the tender is abnormally low because it does not fulfil the obligations under the environmental, social and labour law, under European Union law, national law or collective agreements, or by virtue of the provisions of international environmental, social and labour law listed in Annex X of Directive 2014/24/EU. Moreover, a contracting authority which finds that an invitation to tender is abnormally low because the tenderer has received State aid may only reject the tender on that basis after consulting the tenderer. If the tenderer cannot, on request, demonstrate that the aid in question was not granted in breach of Article 107 of the Treaty on the Functioning of the European Union then the tender has to be rejected. National implementing provisions are furthermore provided in the Proportionality Guide (Gids Proportionaliteit).	The article is aimed at preventing competition distortion caused by abnormally low prices. On the basis of case law in most tenders the contracting authorities will describe manipulative pricing tactics that will not be tolerated under any circumstances, such as setting prices for elements on the pricing sheet at €0.00 or €0.01, negative pricing, pricing which blocks the calculation formulas in the pricing sheet, offering discounts outside the range set in the tender documents and/or not (fully) disclosing or hiding price elements that are integral to the scope of the tender. There is however uncertainty on the distinction between “manipulative” and “strategic” pricing. Case law states that “manipulative” pricing can be, and in some cases must be, used by contracting authorities to reject tenders. Case law also states that all pricing in tenders is up to a level “strategic” pricing, since the tenderer aims at being awarded the contract and will present his or her best possible offer. The distinction between “manipulative” and “strategic” pricing can be a difficult one to make in practice.	There is a certain amount of interaction with the Competition Law (Mededingingswet), since abnormally low or high prices can be a sign of price fixing or cartel formation.

established that the tender is abnormally low because it does not fulfil the obligations in the field of environmental and labour law under Union law, national law or collective agreements or by virtue of the provisions of international environmental, social and labour law listed in Annex X of Directive 2014/24/EU. 6. A contracting authority which finds that a tender is abnormally low because the tenderer has received State aid may only reject the tender on that basis after consultation with the tenderer, if the tenderer cannot, on request, after a sufficiently long period specified by the contracting authority, demonstrate that the aid in question was not granted in breach of Article 107 of the Treaty on the Functioning of the European Union. 7. If the contracting authority rejects a tender in a case as referred to in the sixth paragraph, it shall inform the European Commission.			
Open questions	Case law makes a distinction between (forbidden) “manipulative” pricing and (allowable) “strategic” pricing. Case law also clearly indicates that contracting authorities have to be extremely careful in setting percentage limits when deciding on abnormal low prices, such as setting the maximum percentage for a tendered price which may differ from the average of all tendered prices. Case law accepts the setting of minimum and maximum prices as long as the contracting authority includes a specification on the level at which the minimum and maximum is set in the tender documents.		
Example of application from the national level (where applicable)	The distinction between (forbidden) “manipulative” pricing and (allowable) “strategic” pricing is clear in theory but can be a complex matter when comparing tenders.		

Article 70 of the Directive ► Article 2.80 of the Dutch Procurement Law (Aanbestedingswet 2012)			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 70 is implemented in article 2.80 of the Dutch Procurement Law (Aanbestedingswet 2012) **Text article 2.80** 1. A contracting authority may impose special conditions on the performance of a public contract, provided that such conditions are related to the subject matter of the contract and are stated in the contract notice or the tender documents. The conditions under which the public contract is executed may relate to economic, innovation-related, work-related, social or environmental considerations. 2. Article 2.115, third paragraph, applies mutatis mutandis to special conditions connected with the execution of a public contract.	Article 2.80 allows contracting authorities to set additional conditions for performance of contracts linked to their subject matter. National implementing provisions are furthermore provided in the Proportionality Guide (Gids Proportionaliteit).	In the Netherlands article 2.80 is very commonly used to promote Social Return on Investment (SROI, the Dutch use the English term). Social return is an approach to create more employment opportunities for people with a large distance to the labour market. Contracting authorities can encourage or oblige the contractor to involve vulnerable groups in the labour market in the execution of the assignment. When a SROI clause is included the usual percentage is set at 5% for labour intensive contracts (such as services) and at 2% for labour extensive tenders such as technical supplies. For contracts that involve wholesale supplies (buying and supplying) the percentage might be set at 5% of the wholesale margin. Contracting authorities can formulate the SROI clause as a best efforts obligation ("inspanningsverplichting") or as an obligation to achieve a result ("resultaatverplichting"). In the first case the tenderer merely has to prove his or her good will and their efforts to employ vulnerable groups in the labour market. In the second case a tenderer may lose part of the assignment or be fined if he or she does not meet the fixed percentage. Subcontracting to the Dutch system of sheltered workplace ("SW bedrijven") is usually included as one of the alternative ways to fulfil a SROI obligation. Over the last few years some municipalities, such an Amsterdam, Rotterdam and Utrecht have included subcontracting to social enterprises in the SROI system. Amsterdam even started a certification system so social enterprises and companies with an SROI obligation are facilitated to cooperate.	There is an indirect relation to the Participation Law (Participatiewet) under which long-term unemployed persons receive a social benefit from the local municipality and which provides the legal basis for the Dutch system of sheltered workplace (SW bedrijven). The local municipalities work in close cooperation with the semi-public UWV which administers earnings related to short-term unemployment benefits and disability benefits and which runs the system of local job centres. Crucially, municipalities and UWV cooperate in 35 regional employer service points. At the employer service point, employers find a single point of contact for information, advice and specialist expertise. The personal services provided by the employer service points are aimed at employers who have job vacancies that are difficult to fill or who are prepared to create workplaces in the region for people with a distance from the labour market. Job Placement under the SROI provision is usually entrusted to the regional employer service point.
Open questions	Case law states that SROI should be clearly related to the scope of the tender. In practice, this provides a problem for developing a successful SROI approach. Especially the larger building and infrastructural projects require a highly skilled a well-trained specialised workforce that cannot be found among the vulnerable groups in the labour market. Social enterprises can fill the gap, but in many cases they provide goods and services which are not *directly* related to the scope of the tender. The quintessential Dutch custom of "gedoogbeleid" (semi-regulated toleration policy) allows contracting authorities some room for manoeuvre.		

Example of application from the national level (where applicable)	During the economic recession, SROI projects were sometimes accused of having the adverse effect of forcing out other persons at the lower end of the labour market. This happens when well-functioning employees of an operator 'lose' work because people with a distance to the labour market will carry out these activities. However, no clear proof of this forcing out effect happening on a substantial scale has ever been provided. On the waves of the current upswing in the economy, the reverse can be seen. Companies with an SROI obligation and even social enterprises complain that the official employer service points cannot provide them with enough candidates with a large enough distance to the labour market. Cooperation is being built up between all parties to set up a stepped programme with the social enterprise as the first step, SROI jobs as the middle, and regular employment as the ultimate goal.

Article 71 of the Directive ► Article 2.79 of the Dutch Procurement Law (Aanbestedingswet 2012)			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 71.1 is not separately implemented at the national level Article 71.2 is implemented in article 2.79 of the Dutch Procurement Law (Aanbestedingswet 2012) The option provided in Article 71.3 was not used on the national level Article 71.4 is not separately implemented at the national level Article 71.5 paragraph 1 is implemented in article 2.79 of the Dutch Procurement Law (Aanbestedingswet 2012) The option provided in Article 71.5 paragraph 2 was not used on the national level Article 71.5 paragraph 3 a 4 is implemented in article 2.79 of the Dutch Procurement Law (Aanbestedingswet 2012) The option provided in Article 71.5 paragraph 5 was not used on the national level The option provided in Article 71.6 was not used on the national level The option provided in Article 71.7 was not used on the national level Article 71.8 is not separately implemented at the national level **Text article 2.79** 1. The contracting authority may stipulate in the tender documents that a tenderer indicates in his tender which part of the contract he or she intends to subcontract to third parties and which subcontractors he or she proposes. 2. In the case of public works contracts and in the case of public service contracts, which are to be provided on the spot under the direct supervision of the contracting authority, a contracting authority shall require the main contractor to inform him or her after the award of the public contract. With the execution of that assignment, the following information is provided to the extent that they are known at that time: a. the name, b. the contact details, and c. the legal representatives of its subcontractors involved in the execution of the works or the provision of the services. 3. A contracting authority requires the main contractor to inform them of:	Article 2.79 allows contracting authorities to acquire information relating to subcontracting from the supplier and to verify that no exclusion grounds are applicable to the subcontractor(s). National implementing provisions are furthermore provided in the Proportionality Guide (Gids Proportionaliteit).	Article 2.79 is in standard use by tenderers to disclose (a) which subcontractor(s) they rely on to comply with admission requirements and (b) which subcontractor(s) will be used to fulfil a part or parts of the contract. Case law, in accordance with article 2.79, prevents contracting authorities from completely excluding subcontractors from tenders and contracts. Up to a degree, case law will permit the contracting authorities to specify that a specific part, or several specific parts of the contract, will be performed by the main contractor. The contracting authority in this case is obliged to include a transparent motivation in the tender documents. The motivation has to be based on the scope of the tender itself, such as guarantees for quality and safety control in complex technical projects.	There is an interaction with the Chain Liability Act (Wet Ketenaansprakelijkheid) which makes main contractors fully accountable for the behaviour of subcontractors in the fields of adherence to collective wage agreements, health and safety in the workplace, payment of social premiums and taxes, and (international) labour laws.

a. all changes to the data referred to in the second paragraph, during the execution of the public contract, and b. the data, referred to in the second paragraph, of new subcontractors which the main contractor will involve in the execution of the works or the provision of the services. 4. A contracting authority may extend the obligations referred to in the second and third paragraphs to: a. public supply contracts; b. public service contracts other than those to be provided on the spot under direct supervision by the contracting authority; c. suppliers involved in public contracts for works or services; d. subcontractors of the subcontractors of the main contractor or further down the chain of subcontractors. 5. If a contracting authority wishes to check whether a ground for exclusion as referred to in articles 2.86 or 2.87 of a subcontractor exists: a. the contracting authority shall state in the contract notice that the contract is awarded only to a main contractor who intends to include subcontractors in the performance of the public contract to whom no ground for exclusion as referred to in Article 2.86 applies; b. the contracting authority shall state in the announcement if it intends to award the public contract exclusively to a main contractor who intends to include subcontractors in the performance of the public contract to whom no ground for exclusion as referred to in Article 2.87 applies; c. the contracting authority may require, prior to the award of the public contract, the main contractor to submit a self-declaration of the subcontractors it intends to involve in the performance of the public contract; d. the contracting authority shall ensure that the agreement provides that the main contractor replaces the subcontractor about whom in the investigation a ground for exclusion as referred to in Article 2.86 has become known; e. the contracting authority can ensure that the agreement provides that the main contractor will replace the subcontractor about whom in the investigation a ground for exclusion as referred to in Article 2.87 has become known; f. the contracting authority may ensure that the contract provides that the main contractor submits a declaration, certificates or other supporting documents from the subcontractors.			

Open questions	Case Law on subcontractors concentrate on claims that subcontractors on which a main contractor relies to comply with admission requirements do in fact not (completely) comply with these requirements themselves and/or are not really available for the main contractor. Case law clearly states that it is the duty of the Contracting Authority to verify, after being challenged by a competing tenderer that these subcontractors are indeed complying with the admission requirements and are indeed available for the main contractor. The contracting authority cannot solely rely on the statement(s) of the main contractor.
Example of application from the national level (where applicable)	Larger building and transport companies sometimes stand accused of building a network of subcontractors, sub-subcontractors and even sub-sub-subcontractors, which might screen off disreputable companies from the view of the Contracting Authority. Usually these claims are strenuously denied, even though the Dutch Inspection for Work and Income has proven some cases of companies transgressing the law.

Article 74 of the Directive - none			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 74 is not separately implemented at the national level, since it is supposed to be contained in article 2.6a of the Dutch Procurement Law (Aanbestedingswet 2012). **Text article 2.6a** By way of derogation from Articles 2.2, 2.3, 2.5 and 2.6, the provisions of or pursuant to Part 2 of this Act apply to public contracts and design contests for social and other specific services, referred to in Annex XIV of Directive 2014/24/EU, of which the estimated value is equal to or higher than the amount referred to in Article 4 (d) of Directive 2014/24/EU, excluding sales tax.	Article 2.6a obliges Contracting Authorities to publish tenders for social and other specific services above a contract value of (currently) €750 000, as compared to the general publishing value ("grenswaarde") for services which is set at (currently) €210 000.	The article allows Contracting Authorities to use a higher contract value in the decision to publish for social and other specific services.	There is no interaction with other national laws.
Open questions	There is no case law available which specifically relates to this subject.		
Example of application from the national level (where applicable)	There are examples of application from the national level available.		

Article 75 of the Directive ► Article 2.39, 2.58a and 2.62 of the Dutch Procurement Law (Aanbestedingswet 2012)			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 75.1 is implemented in articles 2.39, 2.58a and 2.62 of the Dutch Procurement Law (Aanbestedingswet 2012) Article 75.2, 75.3 and 75.4 are not separately implemented **Text article 2.39** 1. The contracting authority applying the procedure for social and other specific services goes through the following steps. The contracting authority: a. announces an advance notice or announcement of the public contract; b. assesses whether the tenders comply with the technical specifications, requirements and standards set by the contracting authority; c. makes an official report of the assignment; d. can conclude the agreement; e. announces the announcement of the awarded public contract. 2. When applying the procedure for social and other specific services, only sections 2.3.1.2, 2.3.2.1, 2.3.2.2 and 2.3.3.1 and section 2.3.8.9 of Chapter 2.3 are applicable. 3. Contracting entities that lay down grounds for exclusion or suitability requirements require an economic operator to submit its own declaration with its request for participation or registration using the model set up for that purpose and indicate which data and information must be provided in the self-declaration. Section 2.3.4 applies accordingly. **Text article 2.58a** 1. If the prior information notice concerns a public contract for social and other specific services as referred to in Annex XIV of Directive 2014/24/EU, the contracting authority shall in any event state in the prior information notice: a. the type of services to which the public contract relates; b. that the contract will be awarded without further notice; c. that operators must make their interest known in writing.	Articles 2.29, 2.58a and 2.62 form the basis for the Dutch system of digitally prior notices of an intention to start a tender (vooraankondiging), the publication of the tender itself (aankondiging), the publication of the tender documents (aanbestedingsdocumenten) and the publication of the awarded tenderer (gunningsbericht). The national government provides a digital platform for publishing their announcements called TenderNed. National implementing provisions are furthermore provided in the Proportionality Guide (Gids Proportionaliteit).	Contracting authorities obliged to publish their announcements on TenderNed. This includes (advance) contract notices, rectifications, early termination of invitations to tender, announcements of award decisions and changes to contracts. This obligation applies both to contracts above the European tender thresholds and to (voluntary) publication of (national) assignments. The aim is to be able to retrieve all announcements in one place, thereby reducing the burden (costs of searching for possible assignments) of entrepreneurs. • TenderNed, as a public service aims to reduce paperwork for all concerned since information is communicated electronically. • Create uniformity in procurement. • Reduce the margin of error for tenderers. • Simplify participation in tenders.Inform interested companies through a free Attention Service on newly published tenders. A number of commercial companies provide more or less the same service. While contracting authorities are obliged to publish a new tender on TenderNed at the start of the tender process, and the awarded tender at the end, they are free to choose a digital platform for any steps in between. So, Social Enterprises that regularly participate in tenders have to have an account in, and be skilled in working with, at least five platforms. This forms an obstacle for social enterprises that wish to participate in tenders.	

2. The advance notice referred to in the first paragraph shall be published on a continuous basis. 3. The first and second paragraphs do not apply if the public contract concerns an assignment as referred to in the first paragraph, on which the negotiated procedure could be applied without notice. **Text article 2.62** 1. The contracting authority intending to award a public contract shall publish a contract notice for this purpose. 2. The announcement of the notice shall be made by electronic means using the electronic system for tenders. 3. For the publication of the notice, the contracting authority shall use the form provided for that purpose by the electronic tendering system. 4. The first paragraph does not apply if: a. the contracting authority applies the negotiated procedure without prior notice; b. it concerns a public contract for social and other specific services as referred to in Annex XIV of Directive 2014/24/EU to which the negotiated procedure could be applied without prior notice; c. a pre-information notice was issued of a public contract for social and other specific services as referred to in Annex XIV of Directive 2014/24/EU.			
Open questions	There is some case law concerning situations where a tenderer was not able to upload his or her tender before the deadline. Case law states that any failure to upload in a last-minute situation (on one case the tenderer started the uploading process less than 4 minutes before the deadline) is at the expense of the tenderer. If, however the whole system has a failure, the contracting authority is obliged, and usually provides without being prompted, an extension of the deadline.		
Example of application from the national level (where applicable)	The (perceived) cost of registering on different platforms, learning how to work on each of them and implementing a pro-active system of progress monitoring, form a barrier often preventing medium or small companies, including social enterprises, from participating in tenders.		

Article 76 of the Directive ► Article 2.39.2 of the Dutch Procurement Law (Aanbestedingswet 2012)			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 76 is implemented in article 2.39.2 of the Dutch Procurement Law (Aanbestedingswet 2012) **Text article 2.39.2** In applying the procedure for social and other specific services, only sections 2.3.1.2, 2.3.2.1, 2.3.2.2 and 2.3.3.1 and section 2.3.8.9 of Chapter 2.3 are applicable. . The sections which are mentioned in article 2.39.2 refer to: 2.3.1.2: Communication and information (9 articles) 2.3.2.1: Advance notice (3 articles) 2.3.2.2: Publication (8 articles) 2.3.3.1: Technical Specifications (3 articles) 2.3.8.9: Reporting and Publication (7 articles)	Article 2.39.2 allows a contracting authority to simplify the tender procedure in the case of social and other specific services, since only a limited number of sections in the Dutch Procurement Law (Aanbestedingswet 2012) are applicable. National implementing provisions are furthermore provided in the Proportionality Guide (Gids Proportionaliteit).	Article 2.39.2 is commonly used by municipal authorities for tenders in the social sector (Sociaal Domein), which includes local youth care, local care for the elderly, and local care for persons with physical or mental impairments. In most of these cases, the contracting authority will use a standard approach in the tendering process. So, even while municipal authorities habitually invoke article 2.39.2 when publishing a tender in the social sector (Sociaal Domein), these authorities do not make full use of the possibility to limit the procedure to the sections mentioned in article 2.39.2. It should be stressed that tenders in the social sector (Sociaal Domein) are not specially aimed at social enterprises. Only one example is known of a municipal authority planning to limit a specific tender (basic home care for the elderly, “thuiszorg”) to social enterprises. This plan has been postponed after strong objections from organisations representing the more commercial-oriented companies in the sector.	n.a.
Open questions	Since article 2.39.2 is widely used, but de facto “in name only”, there is very little case law specifically relating to article 2.39.2.		
Example of application from the national level (where applicable)	One example is known of a municipal authority planning to limit a specific 2.39.2 tender (basic home care for the elderly, “thuiszorg”) to social enterprises. This plan has been adapted after strong objections from organisations representing the more commercial oriented providers in the sector. The authority decided to state a preference for awarding contracts to workers cooperatives, but ultimately did not limit participation in the tender to social enterprises.		

Article 77 of the Directive ► Article 2.82a of the Dutch Procurement Law (Aanbestedingswet 2012)			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 77.1 to 77.4 is implemented in article 2.82a of the Dutch Procurement Law (Aanbestedingswet 2012) Article 77.5 is not separately implemented at the national level **Text article 2.82a** 1. The contracting authority may reserve the participation in a procedure for the award of a public contract to an organisation as described in the second paragraph, provided that the contract concerns services covered by the CPV codes referred to in Article 77, first paragraph, of Directive 2014/24 / EU. 2. An organisation as referred to in the first paragraph meets the following conditions: a. its purpose is to fulfil a general interest task relating to the services referred to in the first paragraph, b. Profits are reinvested with the aim of representing the organisation's aim or being paid out or redistributed and benefit or redistribution of profits on the basis of participative considerations, c. the management or ownership structures of the organisation carrying out the assignment are based on employee share ownership or participation principles or require the active participation of employees, users or stakeholders, and d. the contracting authority has not awarded the contract to the organisation for the services in the contract to be awarded in the three years prior to the award decision. 3. The duration of an agreement awarded in accordance with this article is not longer than	Article 2.82a.2 allows contracting authorities to reserve the participation in a tender to organisations whose purpose is to fulfil a general interest, have employee share ownership or participation principles or require the active participation of employees, users or stakeholders, provided that the profits of the contract are reinvested with the aim of representing the organisation's aim or being paid out or redistributed on the basis of participative considerations. This is further limited by stating that the maximum length of a contract is 3 years, while it cannot be awarded to an organisation that held the same or a similar contract in the previous 3 years. Article 2.82a.1 specifically states that it can only be applied to CPV codes referred to in Article 77, first paragraph, of Directive 2014/24/EU, limiting the use of this article to: • Administrative educational services • Administrative healthcare services • Administrative housing services • Supply services of domestic help personnel • Supply services of nursing personnel • Supply services of medical personnel • Pre-school education services • Higher education services • E-learning services • Adult-education services at university level • Staff training services • Training facilities • Tutorial services • All types of medical services • Library, archives, museums and other cultural services • Sporting services	There are no examples known of article 2.82a of the Dutch Procurement Law (Aanbestedingswet 2012) ever being used in a tender. In the Netherlands the legal form of a non-profit foundation with specific aim (stichting) is commonly used in the social sector (Sociaal Domein), health care, education and social work. Foundations participate in tenders and can develop into large-scale organisations with a turnover of hundreds of millions euro a year. These foundations compete side by side for tenders with commercial organisations. On the other hand, organisations that are based on employee share ownership or participation principles or require the active participation of employees, users or stakeholders exist only on a very small scale in the Netherlands. They are small in number and generally also small in size. Over the last few years a number of small cooperatives have emerged in the market for basic home care for the elderly (“thuiszorg”), which might be considered to be comparable to the “supply services of domestic help personnel” that are included in article 2.82a.1. Due to their small number, small size, and limited geographical spread, it would probably not be feasible for a contracting authority to limit home care for the elderly (thuiszorg) tender on the basis of article 2.82a. Even in the case of the eventually postponed plan of a municipal authority planning to limit a specific tender (basic	The Healthcare Institutions Admission Act (Wet Toegelaten Zorginstellingen, WTZi) prevents profits being paid out in the health care sector. While this formally does not prevent a health care provider with having a legal organisation form that would allow profits being paid, is difficult to actually pay them, on the fear of losing the WTZi certification and thereby the right to secure health care contracts.

three years. 4. The announcement of the assignment states a reservation as referred to in the first paragraph.	• Services furnished by social membership organisations • Services provided by youth associations.	home care for the elderly, “thuiszorg”) to social enterprises the use of article 2.82a was not included in the plan, owing to the limitation on the duration of the contract to a non-extendable 3 years.	
Open questions	Since there are no examples known of article 2.82a of the Dutch Procurement Law even being put into practice, no case law exists. It must be stressed that both the Directive and the Dutch Procurement Law are not entirely clear. Should the provisions in paragraph 2 be read to mean that an organisation must fulfil all three conditions described under a, b and c, or is it possible to qualify while conforming to just one or two of the conditions. In the Netherlands a large number of non-profit foundations with a specific aim (“stichtingen”) are active that are not based on employee share ownership or participation principles. On the other hand, the majority of organisations based on employee share ownership or participation principles do not specifically fulfil a general interest task.		
Example of application from the national level (where applicable)	Speaking in general it appears that the “stacking” of conditions in article 2.82a (which is a direct translation of the same “stacking” in Article 77.1 to 77.4 of the Directive) is unhelpful in creating conditions under which tenders can be successfully limited to social enterprises. For the article to be put in more general use it would be necessary to widen the scope of the scope of CPV codes in paragraph 1, to clear the apparent uncertainty on the qualification of tenderers in paragraph 2 under a, b and c, and to lift the three-year limitation contained in paragraph 2 under d and in paragraph 3.		