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# Public Procurement and Business for Value: looking for alignment in law and practice

Nina Boeger, University of Bristol Law School<sup>1</sup>

## Introduction

The state traditionally procures from either market actors or charitable providers. If it buys from the market, the tendering process is subject to national and European public procurement law, but if it buys exclusively from charities, some exemptions apply—either as a result of special sectoral regimes,<sup>2</sup> or in order to preserve the constitutional role given to these entities in some jurisdictions.<sup>3</sup> But distinctions have become more complex as new forms of non-charitable enterprise emerge that combine a social mission with an entrepreneurial vision. These organisations are entrepreneurial in the same way as traditional businesses, but also committed to accounting for their impacts (positive and negative) on their stakeholders, internal and external, which sets them up to generate societal value rather than exclusively shareholder value. These commitments are embedded in the business, in binding procedural/structural mechanisms that are stronger than mere undertakings by management to ensure corporate social responsibility (CSR).

This chapter considers the benefits for the state in procuring from these value-led enterprises, compared to procuring from traditional shareholder corporations. Contracting from them enables the state to establish longer-term relationships for the provision of public goods and services by entrepreneurial actors that will fill gaps in underspecified procurement contracts in line with their commitments to societal value rather than exploit them exclusively to generate shareholder value.<sup>4</sup> Consequently, public contracts can be left more open and their performance demands be less carefully managed and policed because the state can rely on the value-led enterprise's procedural/structural commitments. In terms of the economy more widely, these relationships with value-led enterprises enable the state to nurture a particular form of capitalism and of enterprise that is more sustainable as it requires less external control than the shareholder corporation because of the internally embedded procedural commitments of the value-led enterprise. Given this is not the dominant form of capitalism now, many value-led enterprises struggle to get a foothold in markets (including public service markets) that are dominated by the shareholder corporation. The chapter consider how the state can resort to public procurement as a way of nurturing these alternative enterprise forms, and in doing so, transform the current, dominant form of capitalism.

The first part of the chapter defines the field of value-led enterprises, distinguishing them from traditional shareholder corporations, both those with and those without voluntary CSR policies. The fundamental distinction, even from shareholder corporations with extensive CSR policies, is that the

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<sup>2</sup> See Articles 74 to 77 of Directive 2014/24/EU, and in particular the latter.

<sup>3</sup> Case C-113/13, *Azienda sanitaria locale No. 5 'Spezzino' and Others v San Lorenzo società cooperative sociale and Others*; Case C-50/14 *Consorzio Artigiano Servizio Taxi e Autonoleggio (CASTA) and Others v Azienda sanitaria locale di Ciriè, Chivasso e Ivrea (ASL TO4) and Regione Piemonte*; for critical discussion see the various contributions to the *European Procurement & Public Private Partnership Law Review (EPPPL)* 2016 (11), issue 1.

<sup>4</sup> See also G L Sturgess, *Just Another Paperclip? Rethinking the Market for Complex Public Services - A Report to the Business Services Association*, 31 March 2017, available at <http://www.bsa-org.com/wp-content/uploads/2017/04/Just-Another-Paperclip-FINAL.pdf> (accessed 5 June 2017).

accountability for their impacts on all internal and external stakeholders (a claim made in many CSR policies) is effected through binding procedural/structural commitments embedded in the value-led enterprises' business model. The second part of the chapter studies how procuring from them addresses complexity and risk factors at the stage of tendering the public contract, and subsequently in simplifying the policing and management of its delivery. By contracting from value-led enterprises, the state takes advantage of their entrepreneurialism, yet can at the same time establish longer term relationships than with shareholder corporations because it can be more confident that their objectives align with its own. These relationships nurture value-led enterprises who might otherwise struggle to enter markets dominated by shareholder corporations, so that the state creates a win-win situation. The third part of the chapter addresses the question of how public procurement law, and especially EU public procurement law, hinders or enables the emergence of these relationships; considering in particular whether the law recognises the advantages for the state in these procurement relationships and so facilitates their establishment.

### Business for Value

Traditional shareholder corporations are run to optimise shareholder value. Even in regimes, like the UK, where managers are not strictly obliged in law to prioritise the interest of shareholders alone in their running of the company,<sup>5</sup> the practice and the ideology of shareholder primacy are widespread.<sup>6</sup> In recent decades, however, these corporations have taken on board the idea that they must improve their governance structures because serious corporate governance failings have damaged shareholder value and increased economic risk, with widely publicised corporate scandals diminishing public trust in the shareholder-value model.<sup>7</sup>

Putting in place a CSR policy is for many shareholder corporations a direct response to these developments. Voluntary CSR codes enshrine socially and environmentally responsible corporate policies, such as those that relate to renewable energy, emissions or fair trade. Companies with strong CSR policies would often argue they are committed to a wider social purpose than other businesses. However, many commentators contend that these voluntary commitments do not fundamentally change the character of the corporation,<sup>8</sup> but are usually linked to a business case for marketing the company as a responsible corporate citizen,<sup>9</sup> which can then be leveraged to generate more profit by selling a business image (e.g. 'greenwashing' its activities) or for avoiding risks that might potentially

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<sup>5</sup> The principle of 'enlightened shareholder value' enshrined in section 172 of the UK Companies Act 2006. For discussion, see G Tsagas, 'Section 172 of the Companies Act 2006: Desperate times call for soft law measures', in N Boeger and C Villiers (eds.), *Shaping the Corporate Landscape: towards corporate reform and enterprise diversity*, Oxford: Hart Publishing, forthcoming.

<sup>6</sup> See Sjøfjell's distinction between shareholder primacy as a social norm and shareholder value as a legal obligation in B Sjøfjell, 'Dismantling the Legal Myth of Shareholder Primacy: The Corporation as a sustainable market actor', in N Boeger and C Villiers (eds.), *Shaping the Corporate Landscape: towards corporate reform and enterprise diversity*, Oxford: Hart Publishing, forthcoming.

<sup>7</sup> There are plenty of recent examples, from Enron's accountancy fraud to BP's Deepwater Horizon environmental disaster; widespread tax avoidance including household names Amazon and Starbucks; Railtrack, the UK train network operator's inadequate health and safety record that led to fatal rail accidents; SportsDirect's poor treatment of its warehouse employees; the deleterious effects of CEO Philip Green's asset stripping of the UK clothing retailer BHS; systematic attempts by 'gig economy' corporations Uber and Deliveroo to sidestep employment laws; and so on.

<sup>8</sup> S B Banerjee, 'Corporate Social Responsibility: The Good, the Bad and the Ugly', (2008) *Critical Sociology* 34(1) 51-79; M Blowfield, (2005), 'Corporate Social Responsibility -The Failing Discipline and Why It Matters', *International Relations* 19(2) 173-191 N Boeger, R Murray and C Villiers (eds.), *Perspectives on Corporate Social Responsibility*, Edward Elgar Publishing, 2008.

<sup>9</sup> J Corkin, 'Misappropriating Citizenship: The Limits of Corporate Social Responsibility', in N Boeger, R Murray and C Villiers (eds.), above fn.8.

destroy shareholder value.<sup>10</sup> More fundamentally therefore, CSR has been criticised as a ‘specific development of neo-liberal ideology that is more of a step backwards from progressive socio-political change rather than a way forward.’<sup>11</sup>

Other businesses have gone further and set themselves up as value-led enterprises (hereafter ‘business for value’ or ‘BfV’) that are *categorically* different from shareholder corporations, even those with comprehensive CSR policies, in that their commitments to generating value beyond that to shareholders (return on shareholder investment) are not just fixed in voluntary codes. These commitments are procedurally/structurally embedded into the business’ constitution.

For traditional shareholder corporations with CSR policies, shareholders’ return on investment, long or short-term, remains the measure against which the business is assessed, even when socially responsible policies are incorporated into the business’ strategy. Shareholder corporations prioritise one type of value (financial value) for the benefit of one particular stakeholder group (the shareholders) even at the expense of wider stakeholders’ interests. BfV enterprises on the other hand extend the commitment to generating value to a wider group of stakeholders than purely their shareholders, which is measured not as (short- or long-term) return on investment, but rather as taking full account of the impact of the business, positively and negatively, on its stakeholders. Some are internal to the business (management and employees) and some external, both those directly affected (consumers, suppliers, local communities) and those indirectly implicated (citizens in the welfare state, tax payers, the environment). Good performance generates value by maximising the positive impact on internal and external stakeholders while limiting negative impacts, with trade-offs to be carefully balanced against each other.

Some activities may impact negatively on certain internal stakeholders (e.g. cuts to wages or employment conditions imposed on employees). Others impact positively on internal stakeholders, though not necessarily the same group (e.g. the distribution of profit-shares or bonuses to management and/or all or some employees). Some impact positively on certain external stakeholders, e.g. where the enterprise produces better or cheaper goods and services for the immediate beneficiaries of the business (connected to the businesses’ social mission); while others produce negative impacts on external stakeholders (e.g. communities, tax-payers, the environment). A BfV enterprise balances the interests of different internal and external stakeholders in these situations by weighing impacts against another internally (e.g. how to effect cost-savings by cutting salaries or working conditions for workers and/or remuneration packages or bonuses for management, or indeed how each ought to share in the success of the business); external versus internal impacts (the same pay cut may allow the business to reduce prices, benefitting consumers); or one external stakeholder group versus another (e.g. these consumer benefits may in turn have to be traded off against local communities that are adversely affected by a resulting growth in unemployment).

Procedural measures are built into the business, its governance rules and its constituting document, to ensure it accounts for the impact of its activities on these stakeholders, internal and external, as well as assess trade-offs between them. By embedding this commitment procedurally/structurally into its organisation, the BfV enterprise makes it truly binding - more than just a voluntary managerial undertaking - through concrete adjustments to its constitutional documents that can give rise to formal (legal) accountability. For example, constitutional object clauses integrate stakeholder

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<sup>10</sup> See the examples of corporate scandals above – where corporate irresponsibility either significantly diminished or entirely wiped out the corporation’s shareholder value.

<sup>11</sup> P Fleming and M T Jones, *The End of Corporate Social Responsibility: Crisis and Critique*, London: SAGE Publications, 2013, p. xii.

interests and/or commit the business to re-invest surplus for the benefit of its stakeholders; membership (and ownership) of the business includes its stakeholders, not just shareholders; voting rights are democratically allocated rather than based on size of (financial) shareholdings; board membership is adjusted to reflect its stakeholders (including e.g. employees or consumers); and additional reporting commitments may be legally required.

In comparison, CSR policies also refer to responsibilities to wider stakeholders who they promise to take into account, but the commitment is substantive – a management undertaking - without the formal procedural embedding that ensures compliance. The only accountability for CSR is through the market and hence the business case is central for CSR policies to succeed. Socially responsible management must increase profits or avoid structural risks that might damage shareholder value in the longer term. Even where stakeholders are consulted on certain issues, decision-making rests with a management whose primary commitment is to deliver shareholder value. BfV enterprises on the other hand include binding procedural mechanisms that commit them to consider the impacts on their stakeholders, and by doing so to generate wider societal value, so that value is not fixed *ab initio*, but co-determined by those affected, positively or negatively, by the business.

There is no single BfV format, but rather a continuum of different governance options and constitutional forms. They include cooperatives and mutual business models, businesses that trade as partnerships and associations, social enterprises and community businesses, trading charitable enterprises and some traditional limited companies. Some operate locally, others nationally or internationally. Some are longstanding businesses and others new start-ups. Some accept more commercial restrictions than others. In the UK, for example, social enterprises have come to be defined as businesses that earn most of their income through trading, but also enshrine a social (or environmental) purpose and principally reinvest their profits for that mission.<sup>12</sup> Legal formats such as the community interest company<sup>13</sup> or the community benefit society<sup>14</sup> are available to impose an asset lock on the business, a constitutional device that prevents the distribution of residual assets to members and ensures that the public benefit or community benefit of any retained surplus or residual value cannot be appropriated for the private benefit of members.<sup>15</sup> In addition, those community interest companies that are set up as companies limited by shares are subject to a regulated dividend cap that is calculated as an aggregate limit on the total dividend declared and on the business' ability to carry forward unused dividend capacity. The purpose of this is to ensure that a balance is achieved between attracting investment on the one hand and making sure that profits are principally invested for the community benefit.<sup>16</sup>

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<sup>12</sup> D Gregory, 'The Politics, Policy, Popular Perception and Practice of Social Enterprise in the 21<sup>st</sup> Century', in N Boeger and C Villiers (eds.), *Shaping the Corporate Landscape: towards corporate reform and enterprise diversity*, Oxford: Hart Publishing, forthcoming.

<sup>13</sup> Companies (Audit, Investigations and Community Enterprise) Act 2004 and Community Interest Company Regulations 2005 (SI 2005/1788), as amended by the Community Interest Company (Amendment) Regulations 2009 (SI 2009/1942) and Community Interest Companies (Amendment) Regulations 2014 (SI 2014/2483).

<sup>14</sup> Co-operative and Community Benefit Societies Act 2014.

<sup>15</sup> Office of the Regulator of Community Interest Companies, *Community Interest Companies: Guidance Chapters*, last updated April 2017, available at: <https://www.gov.uk/government/publications/community-interest-companies-how-to-form-a-cic> (accessed 2 May 2017).

<sup>16</sup> S Lloyd, 'Transcript: Creating the CIC', *Vermont Law Review* 2010 (35) issue 1, 31-44; N Boeger, S Burgess and J Ellison, 'The Community Interest Company' in N Boeger and C Villiers (eds.), *Shaping the Corporate Landscape: towards corporate reform and enterprise diversity*, Oxford: Hart Publishing, forthcoming.

The idea of social enterprise has made regular appearances in UK policy over the past two decades, but recently the government has focused on the wider idea of ‘mission-led’ businesses.<sup>17</sup> It defines these as fully-profit distributing enterprises that identify an intention to have a positive social impact as a central purpose of their business, that make a long-term commitment to deliver on that intention, and that report on their social impact to their stakeholders.<sup>18</sup> Rather than an asset lock and dividend cap, the procedural mechanism to protect the BfV character of these enterprises is more flexibly defined. One way of doing so, without going as far as locking-in assets or restricting dividend distribution, is to become a certified B Corporation or ‘B Corp’. The B Corp label is not a legal format but a voluntary social certification available to businesses upon application (and payment of a fee) to B Lab, an independent not-for-profit organisation set up for this purpose. B Lab operates internationally, and the B Corp certification is now available in several countries worldwide, including the UK. The idea is that B Corp certification offers an independent assurance that a firm has procedural governance structures in place that commit it not just to its shareholders but to its wider stakeholders and the environment. To obtain the certification, it must have its governance and overall impact on internal and external stakeholders (including workers, communities, environment) assessed by an independent committee of industry experts at least every two years; it must identify in its constitutional document its objective to benefit shareholders *and* to have a positive impact on society and the environment;<sup>19</sup> and it must sign a declaration that sets out the firm’s commitment to its stakeholders and the environment.<sup>20</sup>

Social enterprise and mission-led business (such as businesses with a B Corp certification) are not the only structural options for BfV enterprises in the UK. As Ridley-Duff explains, there are other forms of ‘solidarity enterprises’ that integrate private, mutual and public interests by drawing on the democratic traditions of the co-operative movement<sup>21</sup> but updating them to advance a more open form of cooperativism.<sup>22</sup> Vieta describes the ‘new cooperativism’ whereby businesses are run by

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<sup>17</sup> UK Government, *Mission-led Business Review*, Call for Evidence, May 2016, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/521927/Mission-Led\\_Business\\_Review-Call\\_for\\_Evidence.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521927/Mission-Led_Business_Review-Call_for_Evidence.PDF) (accessed 2 May 2017); Advisory Panel’s Independent Report on the Review, *On a Mission in the UK Economy*, published in February 2017, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/574694/Advisory\\_Panel\\_Report\\_-\\_Mission-led\\_Business.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/574694/Advisory_Panel_Report_-_Mission-led_Business.pdf) (accessed 2 May 2017).

<sup>18</sup> Call for Evidence, above fn. 17\*, p. 2. For discussion see e.g. *Mission-led Business Review: Response from Locality*, available at <http://locality.org.uk/wp-content/uploads/Mission-led-businesses-Locality-response.pdf> (accessed 2 May 2017); *Social Enterprise UK – Response to Mission-Led Business Review: Call for Evidence*, available at <https://www.socialenterprise.org.uk/Handlers/Download.ashx?IDMF=4809c576-7264-4545-8e58-7deae1ff67a6> (accessed 2 May 2017). See also D Hunter and N Boeger, ‘What is the Point of Business?’, University of Bristol Law School Blog, available at <http://legalresearch.blogs.bris.ac.uk/2016/12/what-is-the-point-of-business/> (accessed 2 May 2017).

<sup>19</sup> In the UK, this requires the adoption of a wording in the constituting document that repeats s. 172(1) of the Companies Act 2006 but with some ‘small but significant’ alterations to satisfy this legal test, according to D Hunter, ‘The Arrival of B Corps in Britain: another milestone towards a more nuanced economy?’ in N Boeger and C Villiers (eds.), *Shaping the Corporate Landscape: towards corporate reform and enterprise diversity*, Oxford: Hart Publishing, forthcoming.

<sup>20</sup> Available at <https://www.bcorporation.net/what-are-b-corps/the-b-corp-declaration> (accessed 2 May 2017).

<sup>21</sup> E Mayo, *The Co-operative Advantage: Innovation, co-operation and why sharing business ownership is good for Britain*, Cooperatives UK, 2016.

<sup>22</sup> R Ridley-Duff, ‘The Internationalisation of the FairShares Model: where agency meets structure in US and UK company law’, in N Boeger and C Villiers (eds.), *Shaping the Corporate Landscape: towards corporate reform and enterprise diversity*, Oxford: Hart Publishing, forthcoming; J Laville, ‘The social and solidarity economy: a theoretical and plural framework’ in J Defourny, L Hulgard and V Pestoff (eds.), *Social Enterprise and the Third Sector*, Routledge, 2014.

workers and communities. They include a wealth-distribution mechanism to achieve sustainable development goals, with more horizontal labour relations, more egalitarian distribution of surplus, a stronger community orientation and (as with traditional social enterprises) social and/or environmental objectives.<sup>23</sup> As Ridley-Duff points out, whereas ‘old cooperativism’ confined discussion of a common bond (solidarity) to the social characteristics of a single stakeholder group (workers, consumers, producers etc.), new cooperativism assumes that, provided appropriate institutional arrangements are in place, solidarity can be forged between all these stakeholders.<sup>24</sup> Ridley-Duff himself has developed a ‘FairShares Model’, a constitutional blueprint that businesses may adopt, adjusting it to their individual needs, when they set up as a solidarity enterprise that enfranchises multiple stakeholders. The model may be adjusted to their individual needs, regardless of the legal format they choose to adopt (a limited company, association or society).<sup>25</sup>

Thus, in the UK alone there are different formats for BfV enterprises, and a diversity of governance structures and constitutional models exist. But the commitment to generating value for more than just shareholders, and the concrete procedural/structural guarantees that enshrine this commitment, are what unites all these forms, and what makes these businesses categorically different from the traditional shareholder corporation, including those with voluntary CSR policies which are still ultimately only committed to maximising shareholder value. The business is socialised through that procedural/structural embedding that commits it to deliver wider, societal value, replacing financial value as the measure of its success.

### Procuring from Business for Value

Many public contracts, especially for larger and more complex public service projects, are incomplete.<sup>26</sup> With limited resource and information, the state cannot predict all the eventualities that may affect contractual performance, and attempting to cover these eventualities in full is complex and costly, especially as some are difficult to quantify or verify. Gaps and ambiguities in these contracts are often not only inevitable, but also beneficial because the delivery can then be adapted to unforeseen eventualities, and mechanisms for ongoing learning and experimentation built into the contract where services are too complex to pre-specify them fully, and too difficult to tie them down contractually in advance. In these circumstances, an important question for the state (in terms of the cost, effectiveness and value-for-money of the contract in question) is to what extent it can rely on providers to fill any gaps and ambiguities in the contract in a way that it would have done, had it been able to anticipate and/or pre-specify these at the time of entering into the contract.

Shareholder corporations, with or without a CSR policy, respond to contractual uncertainty by exploiting it to maximise their shareholders’ return on investment (following the principle of shareholder primacy set out above). Company directors ensure that the corporation complies with regulatory or contractual constraints to the extent that they consider it in the best interest of shareholders not to incur fines or, in the longer term, not to sully the corporation’s reputation when this might impact on its ability to secure future tenders. But to the extent that it serves the interests of their shareholders, they will fill in gaps and ambiguities that arise in the performance of the contract

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<sup>23</sup> M Vieta, ‘The New Cooperativism’ (Editorial), *Affinities: A Journal of Radical Theory, Culture, and Action*, (2010) 4 (1), 1-11.

<sup>24</sup> Ridley-Duff, above fn. 23\*; M Lund, *Solidarity as Business Model: A Multi-Stakeholder Co-operative’s Manual*, Kent, OH: Kent State University, 2012.

<sup>25</sup> R Ridley-Duff, *The Case for FairShares: A New Model for Social Enterprise Development and the Strengthening of the Social and Solidarity Economy*, Charleston: CreateSpace Independent Publishing Platform, 2015.

<sup>26</sup> O D Hart, *Firms, Contracts and Financial Structure*, Oxford: Clarendon Press, 1995; O D Hart and J Moore, ‘Contracts as Reference Points’ (2008) 123 *Quarterly Journal of Economics* 2008 1–48; Sturgess, fn. 4\*



in the interests of their shareholders, even where doing so has negative impacts for public service users, tax payers, employees, sub-contractors etc. Public tendering and contract management becomes a zero-sum game between the state and the shareholder corporation, and the further the corporation pulls one way, seeking to exploit uncertainties and ambiguities for shareholder gain, the more the state has to pull back. This forces the state to draft contracts more specifically (with greater complexity); tightening performance measurement and contract monitoring and, if necessary, complaints procedures; or in extreme cases, punitive measures that include the possibility of excluding providers from future tenders. Transaction costs mount and efficiencies are forgone that might otherwise have been secured with a more flexible contract that allowed for learning in its delivery. Resolving contractual ambiguities or unexpected risks by way of (re)negotiation or if necessary judicial interpretation is also costly and time-consuming.

These are also resource-intensive measures for the state, requiring skilled personnel and capacity for which, according to the UK National Audit Office (NAO) and others, the state struggles to compete with market actors. Evidence collated by the NAO, for example, documents widespread weaknesses in contract management across all UK government departments as a 'long-standing issue'. The NAO's latest major report into the issue, conducted in 2014 following a string of serious overbilling scandals that involved large corporate contractors, points out that fraud and error, including cases where the provider in question chose to prioritise private profit at the expense of quality and/or integrity, are key consequences of public management weaknesses in circumstances of contractual complexity and uncertainty.<sup>27</sup> Compounding these findings, according to the NAO, is the fact that government departments at all levels currently lack management capacity to effectively address these issues, exposing them to risks, especially vis-à-vis corporate providers with access to considerable resource and expertise to help maximise their own benefit in performing public contracts. Government, the NAO attests, is currently unable to afford 'either to bring in or retain commercial experts to match the combined expertise of its contractors.'<sup>28</sup> Meanwhile, according to the House of Commons Public Accounts Committee, certain public services in the UK 'are now dominated by a small number of contractors, and the government is exposed to huge delivery and financial risks should one of these suppliers fail.'<sup>29</sup> The state depends on a handful of shareholder corporations, some of which may be "too big to fail" and, according to the NAO, 'difficult to live with or without.' But the NAO is concerned that 'the general level of transparency over contractors' cost and profits is limited. The government needs a better understanding of what is a fair return for good performance for it to maintain the appropriate balance between risk and reward.'<sup>30</sup>

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<sup>27</sup> National Audit Office, *Transforming Government's Contract Management*, Executive Summary, available at <https://www.nao.org.uk/wp-content/uploads/2014/09/Cabinet-office-cross-government-transforming-governments-contract-management-summary.pdf>, September 2014 (accessed 2 May 2017).

<sup>28</sup> *Ibid.*, p. 10.

<sup>29</sup> House of Commons Committee of Public Accounts, *Contracting Out Public Services to the Private Sector*, 47<sup>th</sup> Report of Session 2013-14, available at: [http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/777.pdf?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=contracting-out-public-services-to-the-private](http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/777.pdf?utm_source=rss&utm_medium=rss&utm_campaign=contracting-out-public-services-to-the-private), 14 March 2014, p. 8 (accessed 2 May 2017).

<sup>30</sup> National Audit Office, *The Role of Major Contractors in the Delivery of Public Services*, available at: <https://www.nao.org.uk/wp-content/uploads/2013/11/10296-001-BOOK-ES.pdf>, presented to the House of Commons on 12 November 2013, p. 10 (accessed 2 May 2017). See also Social Enterprise UK, *The Shadow State: A Report About Outsourcing of Public Services*, available at <https://www.socialenterprise.org.uk/the-shadow-state-a-report-about-outsourcing-of-public-services>, 2012, p. 12: 'Even though contracts are a matter of public record, it is usually impossible to find out key details like how much profit is built into each one.' (accessed 2 May 2017).



Contracts with BfV enterprises offer the state an opportunity to reduce the impact of these constraints because they are not performed to maximise shareholder value alone but respond to uncertainties and ambiguities in any public contract that they are committed to delivering, according to their procedural/structural commitment to consider the impacts on their stakeholders. By procuring from BfV, the state can take advantage of their entrepreneurialism and efficiencies as market actors, yet at the same time establish longer-term relationships than with traditional shareholder corporations because it can be more confident that the objectives of these providers align with its own.<sup>31</sup>

For the state, contracting with BfV enterprises therefore constitutes an alternative model to either full privatisation (where the provider operates for-private-profit) or reliance on charitable providers (run not-for-profit and not-for-trade) in the delivery of public contracts; the advantage of this model being that the state may tap into the entrepreneurship of BfV enterprises as well as their ability to deliver social values by accounting to internal and external stakeholders. Most importantly, where gaps and ambiguities exist in these public contracts, the state can rely on BfV contractors (though not shareholder corporations) to fill them in a way that it would have done had it anticipated the gap or ambiguity at the time it drafted the contract, relying on the procedural mechanisms that commit the BfV to considering its impacts (value generation) on its wider stakeholders, not just its shareholders. This offers the state the opportunity to simplify public contracts and formulate them in a more open-ended way, incorporating mechanism for ongoing learning and experimentation on details that are difficult to pre-specify, and to save on its policing and management of the contract's delivery. The state can save on (though not eliminate) risks and reduce the capacity for contracts to go wrong because it can be more confident that the gaps will be filled in in a way that aligns with what it was aiming to achieve in contracting out.

The traditional procurement contract involves a fixing of goods or services to be delivered at a moment in time. Using BfV that incorporate a procedural mechanism that allows for ongoing input from stakeholders right through to the point of delivery of whatever was procured for sets up a long-term relationship between the BfV enterprise, the state and its stakeholders (widely conceived). It is a radical step away from a traditional privatisation because the delivery of public contracts by BfV enterprises allows for ongoing collective self-determination in the delivery of public services, via the procedural/structural mechanisms embedded in their business that ensure stakeholders have a say in how the contract is delivered, right through to the point of delivery.<sup>32</sup> The state proceduralises the delivery and evolution of the public contract. It details outcomes (the changes the state wishes to see in the relevant community), but leaves flexibility on issues such as the concrete activities, instruments and stages of delivery, relying on the BfV's procedural guarantees to ensure performance meets the specified outcomes. These gaps and ambiguities are accepted on the basis that through experimentation and adaptation, the BfV provider can respond to contractual risks and uncertainty (wicked problems or "unknown unknowns"), taking account of the interests of its stakeholders. Measures in corporate law and corporate governance to enforce the procedural mechanisms internal

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<sup>31</sup> See K Hall, R Miller and R Millar, 'Public, Private or Neither? Analysing the publicness of health care social enterprises' *Public Management Review* (2015) 1-19; L Frith 'Social enterprises, health-care provision and ethical capital' *Social Enterprise Journal* (2014) 10(2) 105 – 120; R Millar, K Hall and R Miller, *Increasing the Role of Social Business Models in Health and Social Care: An Evidence Review*, Public Policy Institute for Wales, January 2016, available at <http://ppi.wales.gov.uk/files/2016/06/Social-Business-Models-in-health-and-social-care.pdf> (accessed 20 June 2017).

<sup>32</sup> See also UK Government, *Open Public Services White Paper*, July 2011, available at <https://www.gov.uk/government/publications/open-public-services-white-paper> (accessed 5 June 2017).

to the BfV enterprise, are co-opted into the public service model as an additional enforcement safeguard.

Politically, in this model, there is no full transfer from the public to the private realm. Rather, control is transferred from the public realm (the state subject to democratic control) to the societal realm because the ongoing delivery of the contract is shaped by the society in which the BfV is embedded (via the procedural/structural mechanisms built into the BfV enterprise that ensure it considers the impacts of its business on its stakeholders) and not exclusively by the private interests of its shareholders, with the state 'harnessing the assets and resources of users and communities to achieve better outcomes and lower cost.'<sup>33</sup> In a traditional procurement situation, the state cedes control over contract delivery to market actors (or charitable providers) and seeks to specify goods and services sufficiently tightly to ensure that the contractor delivers what the state needs. In this model, on the other hand, the contract can be deliberately underspecified to allow for some ongoing adaptation, experimentation and learning and control is ceded not over delivery itself (in the hope that the contract covers all eventualities), but instead to society via the procedural mechanisms that align the delivery of what is being procured for with the interests of all the stakeholders in that delivery, right through to the point of delivery. The model is more accurately a socialisation than a privatisation of a public service, that nevertheless harnesses the entrepreneurialism and market-orientation of the BfV, including its access to capital (although often through social investment rather than capital markets). But it differs also from the charitable provision of public services because unlike charities, BfV providers are subject to market discipline. Indeed, the state's decision to procure from BfV enterprises provides incentives for charitable providers to become more entrepreneurial and to establish BfV enterprises as trading charities.<sup>34</sup> Doing so also enables charitable organisations to attract the professional talent of those who would otherwise reject working for the voluntary sector.

There is win-win in enabling the state to procure from BfV enterprises while showing these enterprises how they can access more public contracts. Initially at least, BfV relies on the largesse of the state (payment for public service delivery) as a form of incubation so that by delivering public contracts, BfV forms grow capacity to enable them to deliver private contracts and to participate in and to shape the wider economy. By providing this nurturing, a public procurement model that relies on long-term relationships with BfV enterprises therefore socialises not only public service delivery but also, in the longer term, contributes to the development of new enterprise forms and enables the transition to an alternative form of capitalism that is accountable not for shareholder value but for the impact of economic activity on its stakeholders.

These look like promising possibilities for public procurement, but is there enough flexibility in the legal regime to allow the state to procure in this way? BfV enterprises depend on public contracts to grow and establish themselves in the wider economy, but the state requires discretion within public procurement rules to be able to target BfV contractors over traditional shareholder corporations where they are presumed by the arguments set out above to have something specific to offer to the delivery of public services.<sup>35</sup> Building flexibility into the law, to encourage open-ended procurement

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<sup>33</sup> T Bovaird and E Löffler, 'From Engagement to Co-production: how users and communities contribute to public services' in V Pestoff, T Brandsen and B Verschure (eds.), *New Public Governance, the Third Sector and Co-Production*, Abingdon: Routledge, 2012 p. 36.

<sup>34</sup> R Ridley-Duff and M Bull, *Understanding Social Enterprise: Theory and Practice*, 2<sup>nd</sup> ed., SAGE Publishing, 2015, chapter 2.

<sup>35</sup> See in this context the references at fn. 27, 30 and 31 \*, and growing practice- and policy-oriented research into collaborative, co-productive and cooperative approaches to commissioning and procurement, e.g. J Slay and J Penny, New Economic Foundation, *Commissioning for Outcomes and Co-production*, available at

and collaboration, and to reward longer-term societal value, improves the chances of BfV enterprises tendering successfully, but these considerations must be balanced against basic procurement principles, including the need for equal treatment of all tendering bodies and for transparency.

## Public Procurement Law

Unless the state procures exclusively from in-house providers,<sup>36</sup> tendering is subject to national and European public procurement law. The current procurement regulatory framework in England combines policy guidance and detailed legislative provisions, with EU and national-level initiatives complementing one another.<sup>37</sup> The primary legal sources are now contained in the new EU Public Contracts Directive,<sup>38</sup> recently transposed in the new Public Contracts Regulations 2015.<sup>39</sup> The rules are detailed and technical and, despite the Government's efforts to supply training materials and information, they are subject to further calls for guidance. They are also subject to ongoing change, driven by evolving European and domestic case law, European Commission communications, and cyclical review of the existing legislation.

National legislation also contains a range of further general and sector-specific rules<sup>40</sup> that are supplemented by overarching policy guidance. The Government requires all public authorities to attain 'value for money' in their public procurement, usually by acquiring goods and services through 'fair and open competition'.<sup>41</sup> Value for money in this context is defined by reference to price, effectiveness and quality, in other words: 'securing the best mix of quality and effectiveness for the least outlay over the period of use of the goods or services bought. It is not about minimising up front prices.'<sup>42</sup> Specific further legal obligations apply to, amongst others, local authorities who are required by law to attain 'best value' through their commissioning, based on 'a combination of economy, efficiency and effectiveness.'<sup>43</sup>

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<http://www.neweconomics.org/publications/entry/commissioning-for-outcomes-co-production>, June 2014 (accessed 2 May 2017); T Blume and A Randle, Collaborate and Transition Institute, *Social Value: A Commissioning Framework, Pt. 1: Lessons from Lambeth*, available at <https://tobyblume.wordpress.com/2013/12/05/social-value-commissioning/>, 2013 (accessed 7 June 2017); D Boyle and M Harris, *The Challenge of Co-Production*, NEF and NESTA Discussion Paper, available at <http://www.nesta.org.uk/publications/challenge-co-production>, December 2009 (accessed 7 June 2017); H Kippin and A Randle, Collaborate CIC, *From Cooperative Councils to Cooperative Places*, available at <https://collaboratecic.com/from-co-operative-councils-to-co-operative-places-4f8ace5e4511>, February 2017 (accessed 7 June 2017).

<sup>36</sup> See Article 12, Directive 2014/24/EU.

<sup>37</sup> The following discussion focuses on the English (and to some extent UK) context although parallels with other jurisdictions, where similar national provisions are in place, should be obvious.

<sup>38</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC ('EU Public Contracts Directive' or the 'Directive').

<sup>39</sup> The Public Contracts Regulations 2015 (SI102/2015) (the 'Public Contracts Regulations' or the 'Regulations'). Transposition in Scotland is subject to a different regime.

<sup>40</sup> Recent legislative additions include the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 (SI 500/2013); Localism Act 2011; Public Services (Social Value) Act 2012; and the Small Business, Enterprise and Employment Act 2015.

<sup>41</sup> HM Treasury, *Managing Public Money*, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/212123/Managing\\_Public\\_Money\\_AA\\_v2\\_-\\_chapters\\_annex\\_web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212123/Managing_Public_Money_AA_v2_-_chapters_annex_web.pdf), July 2013 with Annexes revised as at August 2015, Annex 4.6 on Procurement (accessed 2 May 2017).

<sup>42</sup> *Ibid.* para. A4.6.3; see also National Audit Office, *Assessing Value for Money*, available at <https://www.nao.org.uk/successful-commissioning/general-principles/value-for-money/assessing-value-for-money/> (accessed 2 May 2017).

<sup>43</sup> UK Local Government Act 1999, section 3(1).

The purpose of the EU procurement rules is to open up the public procurement market to EU providers and to ensure its competitiveness so as to maintain the free movement of goods and services in the EU.<sup>44</sup> They also however reinforce the UK domestic value for money criteria.<sup>45</sup> Authorities are compelled under the Directive, as implemented in the Regulations, to award public contracts on the basis of ‘the most economically advantageous tender [MEAT] assessed from the point of view of the contracting authority.’<sup>46</sup> MEAT may include price or cost, or a price-quality ratio assessed on the basis of qualitative, technical and sustainable (economic, social and environmental) aspects of the tender. These can (subject to certain conditions) include social and environmental factors which may be considered as performance clauses, selection or award criteria (discussed further below). The assessment may take account of all stages of the life cycle of the product or service in question.

Different procurement rules apply, depending on the type of services, works or supplies that are being contracted, as well as the overall value of the contract. The full procurement regime set out in the Directive and Regulations - including advertising and publication requirements in the Official Journal of the EU and detailed procedures, selection and contract award criteria - applies to contracts above a certain value threshold, unless they qualify for specific exclusions (e.g. national security). Contracts for social and health services and certain other services, on the other hand, are subject to a more flexible “light touch” regime, and again only if their value exceeds the relevant threshold (EUR 750,000). The “light touch” regime leaves the state considerable flexibility in terms of award procedures but does require that tenders are advertised and publication of award notices in the OJEU.<sup>47</sup>

Contracting authorities are further required to comply with the basic EU Treaty principles of transparency, equal treatment, non-discrimination, mutual recognition and proportionality whenever they consider that a contract will or might attract interest from suppliers outside the UK. The principles apply to all contracts with a cross-border relevance, including those regulated under the “light touch” regime as well as those that fall outside the scope of the Directive and Regulations altogether (e.g. those that are sub-threshold).<sup>48</sup> In practice, they compel the state to advertise a contract in such a way that is commensurate to its scale and value, and to make sufficient information about the contract available, so as to ensure no disadvantage for potential suppliers from other Member states arises. The Government’s position further is that value for money should be attained in all procurement, not just for those contracts covered by the Directive, and that this usually requires some degree of advertising and a competitive tendering for all or the great majority of contracts.<sup>49</sup> Reflecting this position, the Regulations include specific rules that require authorities to advertise all public contracts, including those below the EU thresholds but above certain other thresholds, via the online platform “Contracts Finder”.<sup>50</sup>

### Flexibility within the Law

Despite the level of regulatory detail in the rules, both EU and national public procurement law leave the state considerable discretion in the substantive design, procedural award and follow-on

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<sup>44</sup> EU Public Contracts Directive, Preamble, Recital (1).

<sup>45</sup> Crown Commercial Service, *A Brief Guide to the New EU Public Contracts Directive (2014)*, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/338055/Handbook\\_Final.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/338055/Handbook_Final.pdf), October 2016, para. 3.1 (accessed 2 May 2017).

<sup>46</sup> Public Contracts Regulations, reg. 67(1).

<sup>47</sup> Public Contracts Regulations, reg. 74 – 77. A significantly higher threshold applies, see reg. 5(1)(d).

<sup>48</sup> Very similar general requirements derive from Art 9 of the UN Convention Against Corruption.

<sup>49</sup> Crown Commercial Service, above fn. 44\*, para. 8.1.

<sup>50</sup> Available at <https://www.gov.uk/contracts-finder> (accessed 2 May 2017).

management of its contracts. The Public Contracts Directive is complex, reflecting the political differences and compromises that surfaced during its enactment, now embedded in the legal text, but it has succeeded in building further flexibility into the EU economic legal regime to accommodate the state's public interest choices when procuring public goods, works and services. This brief discussion considers the flexibility available within national and EU public procurement law to target the specific advantages of BfV enterprises over shareholder corporations in the delivery of public services, with a focus on three particular aspects, namely, first, on the law's permissiveness regarding substantive criteria and contract specifications; secondly, on structural flexibility in the tendering process; and finally, on the (limited) scope to reserve certain contracts for defined BfV providers.

### Substantive criteria

A widely-discussed innovation in the Directive is its express commitment to 'a better integration of social and environmental considerations in public procurement procedures' where it should be 'allowed to use award criteria or contract performance conditions relating to the works, supplies or services, in all aspects and at any stage of their life cycle, even where such factors do not form part of their material performance.'<sup>51</sup> The assessment of tenders based on the 'most economically advantageous' option which the Directive sets out and the Regulations transpose (see above), leaves the state a choice between price- or cost-driven procurement on the one hand and an assessment that balances cost and quality on the other, where social and environmental considerations are permissible (subject to certain conditions) as selection and award criteria and in contract performance clauses.

UK domestic procurement policy and legislation reinforces the flexibility within these rules. The legislator chose to transpose the full test and to retain its flexibility, rejecting calls that the Directive's transposition should be taken as an opportunity to curtail the state's ability to procure on price alone, and should instead make a cost-quality assessment mandatory.<sup>52</sup> At the same time, to ensure the state maximises value-for-money objectives in what the Cabinet Office describes as 'tight economic times', Government guidance encourages public bodies to deliver on their 'best value' obligations by seeking out 'opportunities to secure both the best price and meet the wider social, economic and environmental needs of the community'.<sup>53</sup> These priorities are now enshrined in the Public Services (Social Value) Act 2012 ('the Social Value Act') that expressly requires public bodies to consider economic, social and environmental well-being of the wider community, as opposed to purely commercial value for money, before procuring public service contracts with a value above the EU procurement thresholds.<sup>54</sup> The Act does not impose an obligation to act upon these considerations, but by requiring them to reflect on social, environmental and economic outcomes, rather than narrow commercial service outputs,<sup>55</sup> it encourages an approach to public procurement that builds on

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<sup>51</sup> Recital 97, EU Public Contracts Directive.

<sup>52</sup> See Cabinet Office, *Government Response to the Consultation on UK Transposition of new EU Procurement Directives*, available at <https://www.gov.uk/government/consultations/transposing-the-eu-procurement-directives-utilities-contracts-regulations>, pt. 128 (accessed 2 May 2017).

<sup>53</sup> Cabinet Office, Efficiency and Reform Group, *Procurement Policy Note: Public Services (Social Value) Act 2012*, available at <https://www.gov.uk/government/publications/procurement-policy-note-10-12-the-public-services-social-value-act-2012>, first published 20 December 2012 and updated 7 January 2013, p. 2 (accessed 2 May 2017).

<sup>54</sup> UK Public Services (Social Value) Act 2012, section 1(3). For a discussion of the scope and effectiveness of the Act, see N Boeger, 'Reappraising the UK Social Value Legislation', *Public Money & Management* (2017) 37(2), 113 – 121.

<sup>55</sup> The New Economics Foundation proposes definitions that make the difference between outcomes and outputs apparent. It defines outputs as 'a quantitative summary of an activity' that 'tells you an activity has taken place, but it does not tell you what changes as a result.' Outcome, on the other hand, is defined as 'the

dynamic efficiency to generate longer term value for money in public services. As the New Economics Foundation points out

‘commissioning for wider public value across the triple bottom line [of economic, environmental and social value] does not necessarily make a service more expensive. It often just requires commissioning for and providing a service in a different way. Even where additional upfront costs are incurred, these should be considered alongside potential cross-departmental and long-term savings which can far outweigh initial investment.’<sup>56</sup>

By allowing for social and environmental considerations to be given weight in procurement decisions, public procurement law leaves, at least in principle, flexibility for the state to target the specific advantages that the procedural/structural commitments of BfV enterprises offer. However, the Directive specifies that only social and environmental considerations linked to the subject-matter of the contract can be legally considered (provided they are non-discriminatory and in compliance with general EU law).<sup>57</sup> As Semple states, the effect of the latter is ‘that specifications, criteria and contract performance clauses must relate to the goods, services or works being purchased, and not concern matters that fall outside the contract at hand.’<sup>58</sup> In particular, any ‘criteria and conditions relating to general corporate policy’<sup>59</sup> do not, according to the Directive, constitute legitimate procurement concerns under the EU rules unless they are in some way linked to the subject matter of the contract (i.e. either to the specific process of production of the goods or services in question, or to a specific process at another stage of their life cycle). Compared to the previous EU regime as derived from the case law of the Court of Justice,<sup>60</sup> the 2014 Directive has extended the requirement in ways that have provoked criticism. Semple for example criticises not only the reasoning underlying the Commission’s proposals for the extension as ‘problematic’,<sup>61</sup> but points out further that the application of the requirement encourages, amongst other things, inefficiency and fragmentation in the Internal Market.<sup>62</sup> Her observations lead Semple to propose that a ‘looser version of the test’ might eventually emerge by way of judicial interpretation which could bring it closer to the general review of procurement measures for proportionality.<sup>63</sup>

But even in the light of these concerns, the ‘link to the subject matter’ requirement is unlikely to present an absolute obstacle for the state when seeking out BfV enterprises that promote the inclusion of, and accountability to, stakeholders involved in or affected by the contract, through to the point of contractual delivery. The current regime still leaves the state flexibility to link the procedural

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meaningful and valued impact or change that occurs as a result of a particular activity or set of activities’, and may be either achieved ‘over a relatively short period of time, or ... longer-term in nature.’ See J Slay and J Penny, New Economic Foundation, *Commissioning for Outcomes and Co-production*, available at <http://www.neweconomics.org/publications/entry/commissioning-for-outcomes-co-production>, June 2014, p. 2 (accessed 2 May 2017).

<sup>56</sup> *Ibid.*, p. 22.

<sup>57</sup> EU Public Contracts Directive, Article 67.

<sup>58</sup> A Semple, ‘The Link to the Subject-Matter: A Glass Ceiling for Sustainable Public Contracts?’ in B Sjøfjell and A Wiesbrock (eds.), *Sustainable Public Procurement under EU Law: new perspectives on the state as stakeholder*, Cambridge: Cambridge University Press, 2016, p. 62.

<sup>59</sup> EU Public Contracts Directive, Recital 97.

<sup>60</sup> Case C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [2002] ECLI:EU:C:2002:495; Case C-448/01 *EVN and Wienstrom* [2003] ECLI:EU:C:2003:651; Case C-368/10 *Commission v. Kingdom of the Netherlands* (‘Dutch fair trade coffee’) [2012] EU:C:2012:284. For discussion of the previous regime see S Arrowsmith and P Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*, Cambridge: Cambridge University Press, 2009.

<sup>61</sup> Semple, fn. 57\*, pp. 61- 65.

<sup>62</sup> Semple, fn. 57\*, pp. 66-70.

<sup>63</sup> Semple, fn. 57\*, pp. 73 – 74.



mechanism of a BfV enterprise to the subject matter of contract, and thus to render it a lawful criterion or condition; although it does call for careful drafting of all documentation to ensure that all specifications, criteria and contract clauses are specific to the contractual delivery. In practice, the state must make it absolutely clear that it considers accountability to and input from stakeholders (they may include management, employees, consumers/recipients or those affected by the environmental impact, sub-contractors etc.) as an essential part of how the contract is performed; and that these aspects matter directly for the quality and effectiveness of performance of the contract because the state chooses to design the contract in an open-ended way, building into it a mechanism for experimentation and adaptation. It is useful for the state to define mechanisms that it will pay particular attention to, for example, the composition of management boards or committees that take decisions relating to contract performance; reporting on matters relating to contract performance; reinvestment of surpluses that derive from the contractual performance into matters related to it.

Provided they are well drafted, it is hard to see how these criteria or conditions could be considered too general (a matter of 'general corporate policy') when they target a governance mechanism that directly impacts on decisions and activities during (and specific to) the performance of the contract; especially when, as Semple suggests, there are good arguments for the Court of Justice to continue applying a loose interpretation of the 'link to the subject matter' test.<sup>64</sup> Nor should they be considered discriminatory so as to render them illegal. BfV providers, whose structurally embedded mechanisms are more likely to align with at least some of the state's procedural expectations, are probably going to find it these type of criteria easier to satisfy than shareholder corporations, and they can be an indirect advantage for BfV enterprises. The more deeply these mechanisms are embedded in the business – where they are a constitutional commitment rather than part of a CSR policy to consult – the more likely is for a potential provider to score high in relation to these elements of the contract. But this situation arises directly as a result of the state's structural choice to incorporate elements of proceduralisation into the public contract as a means of delivering best value for its citizens. Faced with these choices, any shareholder corporation is free to make organisational changes, if necessary at a constitutional level, to enhance its chances of convincing the state of its capacity and reliability in delivering these elements of contract as specified. Shareholder corporations may assume the 'face' of a BfV enterprise by formally putting in place mechanisms for voluntary stakeholder consultations when they perform the contract – essentially as a targeted form of CSR – but these will have to compete against the constitutional guarantees that BfV enterprises offer. To the extent that the former are voluntary undertakings, they offer the state less procedural guarantees than the latter in relation to the contractual delivery. But these likely advantages for BfV enterprises over shareholder corporations arise solely because the shareholder corporate model, which businesses adopt by choice, means these competitors are less suited to deliver the specifications of the contract effectively. It is hard to see how, in these situations, the Court of Justice would step in to strike down the state's choice on the ground of discrimination.

### Procedural flexibility

The Directive includes a commitment to supplier diversity by supporting 'the participation of small and medium-sized enterprises in public procurement',<sup>65</sup> and the UK Government has also expressly committed to making the procurement process 'simpler, more open and less bureaucratic – so all

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<sup>64</sup> Support for this comes from the loose test on 'link to the subject-matter' that the Court applied in the Dutch fair trade coffee case, above fn. 59\*, upholding the contracting authority's fair-trade stipulations for suppliers to have 'long-term trading relationships' with producers; a matter which, as Semple remarks, 'by definition goes beyond the immediate needs of the contracting authority'. See Semple, above fn. 57\*, pp. 59-60.

<sup>65</sup> EU Public Contracts Directive, Preamble, para (2).

businesses, no matter their size, have a chance of success.<sup>66</sup> One of the measures in place to do this is a provision encouraging public bodies to split contracts into lots; or, if they decide not to do so, they must explain why not.<sup>67</sup> While some have argued that the duty to explain is neither clear nor sufficiently strong,<sup>68</sup> the more important point here is that these rules provide flexibility that will allow the state to run its public procurement by scaling down contract sizes as far as possible, to attract tenders from BfV enterprises, many of whom are smaller organisations and financially dependent on the state's nurturing to scale-up their activities. The law makes room for (indeed encourages) procurement bodies to innovate and experiment, particularly to improve supplier diversity by opening more contracts up to smaller organisations, including many BfV enterprises; it is then left to the state to use this flexibility. Other procedural opportunities in the Directive (and the Regulations) underline this point. Pre-tender market engagement for example is one way for public bodies to test (for example) which aspects of a public contract it may leave underspecified, and the legislation enables this engagement provided transparency and equal treatment principles are observed.<sup>69</sup> Preliminary market consultations with suppliers are encouraged, and they give the state the opportunity to publish information to contractors but also to collect their advice on service designs and procurement procedures. It appears that lack of flexibility in the law is not a hindrance to market engagement, but the state's reluctance to creatively use these opportunities might be.

### Reserved contracts

The Directive (and Regulations) also provides that tenders for certain service contracts (mainly in the social and health sectors) can be reserved, for a limited time-period, to a mutual and social enterprise that meets defined criteria – a defined form of BfV enterprise.<sup>70</sup> The reservation requires a competition to be published in the OJEU for those services using the “light touch regime”, that allows only bids from enterprises that satisfy the relevant criteria. Reserved contracts cannot be longer than three years, and the state cannot reserve contracts for enterprises that have been awarded a contract within the last three years by the contracting authority concerned. As with the previous point above, it is true that these legal provisions make room for the state to experiment, by inviting defined BfV forms to provide public services, and it falls on the state to creatively use any flexibility the rules allow for. There are practical difficulties, for example, according to Cooperatives UK:

‘there is a risk that enterprises may attempt to pass themselves off as mutuals even if they do not live up to the fundamental characteristics of mutual enterprise. This will need to be addressed in robust guidance for procurers.’<sup>71</sup>

But more fundamental is the question whether this rule really does enable the state to nurture BfV enterprises as considered in the previous sections. Several commentators are highly sceptical whether

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<sup>66</sup> HM Government, *Consultation Document: Making public sector procurement more accessible to SMEs* (September 2013)

<sup>67</sup> Public Contract Regulations, reg. 46.

<sup>68</sup> For a short but poignant critique, see L Olson, ‘SME access by splitting contracts into lots’, on the Tenders Direct Blog, 29 June 2015, available at: <https://blog.tendersdirect.co.uk/2015/06/29/sme-access-by-splitting-contracts-into-lots/> (accessed 3 May 2017).

<sup>69</sup> UK Public Contracts Regulations, reg. 40.

<sup>70</sup> UK Public Contract Regulations, reg. 77. In addition, the Directive and Regulations allow reservations for sheltered workshops and employment programmes that involve a proportion of disadvantaged and disabled workers.

<sup>71</sup> Cooperatives UK, *Consultation Response: UK Transposition of new EU Procurement Directives (Public Contracts Regulations 2015)* available at: [https://www.uk.coop/sites/default/files/uploads/attachments/uk\\_transposition\\_of\\_new\\_eu\\_procurement\\_directives\\_public\\_contracts\\_regulations\\_2015\\_-\\_co-operatives\\_uk\\_response\\_0.pdf](https://www.uk.coop/sites/default/files/uploads/attachments/uk_transposition_of_new_eu_procurement_directives_public_contracts_regulations_2015_-_co-operatives_uk_response_0.pdf), October 2014, p. 3 (accessed 3 May 2017).

the reserved time-period of three years suffices to grow the defined enterprises to sustainability (some suggest five years would be more realistic), and question also why organisations already under contract are excluded when their existing provision could be nurtured too.<sup>72</sup> Arguably, the rule does not lose the state anything (there was no express option in law to reserve contracts before) but neither should it be taken for granted that this rule plays a significant role ‘in promoting more nurturing partnership arrangements between the social economy and public authorities’<sup>73</sup> in the longer term; unless, of course, the state engages creatively with whatever room it has, to refine the use of reserved contracts and to strengthen the case for how these might be developed as tools that help nurture BfV enterprises more widely.

In sum, recent developments at national and EU level indicate that there is room within public procurement law to facilitate the state’s choice to target BfV contractors over traditional shareholder corporations where they are presumed to have something specific to offer to the delivery of public services; provided it ensures compliance with the relevant procedural rules and principles during tendering and when managing the contract. The direction of travel appears to be for procurement law to move away from the traditional conception of competitive tendering that dominated the British (and European) procurement landscape of the 1980s and 1990s, increasingly towards greater permissiveness and rules that give the state more flexibility in developing innovative public service delivery models that are not traditional privatisations. The law has reached a stage where it leaves room to enable the state to support long-term relationships that socialise public service delivery by relying on procedural/structural mechanisms embedded in BfV enterprises, offering the state both the flexibility and the legal tools to do so. Some legal hurdles remain where further tweaks could give more flexibility and/or provide greater certainty, and review is likely to be ongoing. But the practical challenge today is arguably to build up both the skillset and the commitment amongst those responsible for public procurement to ensure they make use of the flexibility available within the legal regime whenever it would be appropriate, and in the citizens’ interest, to do so. The law should not be ‘a convenient (if not always accurate) excuse’ for the state to continue approaches to privatisation that avoid innovation – for example by proceduralising public service models - when it would benefit citizens and taxpayers.<sup>74</sup>

## Conclusion

This chapter characterised BfV enterprises as categorically different from shareholder corporations, even those with comprehensive CSR policies, because their commitments to generating value beyond return on shareholder investment are not just fixed in voluntary codes. These commitments are procedurally/structurally embedded into the business, and while there are different formats for BfV (e.g. B Corps, social enterprises and cooperatives), the commitment to generating value for more than just shareholders, and the concrete procedural/structural guarantees that enshrine this commitment, are what unites all these forms. Part two of the chapter argued that procuring from BfV enables the state to contract in more open-ended ways and to set up a long-term relationship between the BfV enterprise, the state and its stakeholders (widely conceived) that allows ongoing input from stakeholders right through to the point of delivery of whatever was procured for. Where gaps and

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<sup>72</sup> *Ibid.*, p. 4.

<sup>73</sup> *Ibid.*

<sup>74</sup> A Davies and R Schon, *Bridging the Divide: Social Entrepreneurs and Commissioners on Public Sector Contracting*, Young Foundation, available at:

<http://youngfoundation.org/publications/bridging-the-divide-social-enterprises-and-commissioners-on-public-sector-contracting/>, 2013, p. 10.

ambiguities exist in the contract, the state can rely on BfV contractors (though not shareholder corporations) to fill them in a way that it would have done had it anticipated the gap or ambiguity at the time it drafted the contract, relying on the procedural mechanisms that commit the BfV to considering its impacts (value generation) on its wider stakeholders, not just its shareholders. The BfV is nurtured by the largesse of the state (payment for public service delivery) so that by delivering public contracts, BfV forms grow capacity to enable them to deliver private contracts and to participate in and to shape the wider economy. By providing this nurturing, a public procurement model that relies on long-term relationships with BfV enterprises socialises not only public service delivery but it can also, in the longer term, contribute to shaping alternative forms of capitalism and of enterprise. Part three of the chapter concluded that there is room within public procurement law to facilitate these public service models, though to do so will often require careful drafting. The practical challenge today is arguably to generate enough awareness of the flexibility available within the regime and to encourage the state to use it, developing the skills of procurement officers to do so. Public bodies should be aware of the relevant legal boundaries but at the same time might explore ways in which they work creatively within the legal framework to pursue strategies to set-up longer-term relationships that socialise public service delivery, relying on the procedural/structural mechanisms of BfV enterprises, without exposing themselves to legal risks.