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Against All Odds? Explaining Local Government Influence on the Exemptions for Public-Public Cooperation in the 2014 Public Procurement Directives

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Introduction

Since the 1990s, there is hardly a policy domain of local government which has *not* been affected by European legislation to some extent (Goldsmith, 1993; John, 2000; Callanan, 2012). Our paper focuses on one of the prominent examples of this impact: the European Public Procurement regime regulating the acquisition of works, services and supplies above certain thresholds by means of a public contract (Wiggen, 2011; Wauters, 2015). In 2014, the EU revised the old procurement acquis (2004) adopting three directives: the Classic Directive (Directive 2014/24/EU), the Utilities Directive (Directive 2014/25/EU) and the Concessions Directive (Directive 2014/23/EU). One of the central elements of the revision was the exemption for ‘public contracts between entities within the public sector’ (i.e. different forms of public-public cooperation, hereafter: PPC) incorporated in all three directives (see Annex 1)¹.

Nowadays, PPC covers numerous domains of public service delivery on the basis of public contracts or ‘contract-like mechanisms’ between agencies involved (Wiggen, 2011; Wauters, 2015). In local government it has originated from the quest for improved efficiency and effectiveness as prompted by declining revenues and rising public expectations over service delivery throughout Europe in the 1990s (Caulfield & Larsen, 2002; Kersting & Vetter, 2003)². The widespread practice of PPC-arrangements has yielded a multi-coloured patchwork of modern local service delivery ever since, involving single authorities, inter-municipal

¹ Even though the Concessions Directive was drafted by a different team (EC unit and rapporteur/shadow rapporteurs) than the Classic and Utilities Directives, the exemptions for PPC were negotiated in parallel across the three directives and have been incorporated in identical wordings (i.e. Article 12 for the Classic Directive, Article 28 for the Utilities Directive and Article 17 for the Concessions Directive).

² Often new cooperative structures and/or arrangements of internal decentralization were created to avert more far-reaching municipal restructuring, inspired by the same functional logic but implying a more substantial loss of autonomy and control over service provision (e.g. privatization, outsourcing or amalgamation).

companies, municipal agencies and non-institutionalised cooperation between public authorities at the local level.

Drafting the PPC-exemption was meant to settle the debate as to whether (and under what conditions) PPC is subject to EU public procurement law. The aim of our paper is to examine how local government was able to influence this exemption. Indeed, via the formal exemption from the Directives local government succeeded in safeguarding most of its PPC practices despite, amongst others, its weak reputation when it comes to EU lobbying, the Commission's aim to instrumentalize the public procurement acquis for the internal market, the vast economic importance of public procurement for the European market (accounting for nearly 20% of EU's GDP) and the obvious concern of the private sector competing for contracts on the same market of public service delivery.

Local government attempts to influence EU decision-making, classified under the umbrella of 'regulatory mobilization' (Callanan & Tatham, 2013) or 'bottom-up Europeanization' (Van Bever et al., 2011), are part of the territorial dimension of EU interest group politics (Greenwood, 2011). Empirical evidence on the success factors of these attempts remains scarce, however (Goldsmith, 2011; Callanan & Tatham, 2013). Such lacuna stems from several reasons. First, most studies of interest group politics have scrutinized the strategic choices in the lobby process, rather than conditions of success (Dür & De Bièvre, 2007; Beyers et al., 2010). Second, studies who have taken up the challenge of measuring (mostly private actor) lobby influence and its determinants have generated diverging conclusions depending on the particular research context and design (Beyers et al., 2010; Dür, 2010; Klüver, 2013). Third, regulatory mobilization of local government has often been eclipsed by its regional counterpart and the perspective of financial mobilization (i.e. seeking access to EU funding) (Callanan, 2012; Marks et al., 2002; Marshall, 2005) while it has been rarely explicitly linked to interest group research.

Our aim is to fill a part of this empirical lacuna. By using theory-building process-tracing and drawing on insights from the literature on interest group politics, the paper reconstructs a causal model of a successful local government lobby in EU decision-making under unfavourable circumstances. In the following section we set out the theoretical framework guiding this research. Afterwards, we explain the research methods and data collection before unfolding our causal model step by step in section four. General conclusions are presented in the final section.

Local government interest representation in the EU

In order to assess the conditions of local government influence in EU decision-making we apply the theory of (EU) interest group politics. To some extent local government interest representation is a distinct case of the latter (Greenwood, 2011). While local authorities can convey public interests as much as private sector demands, they may profit from a democratic surplus as elected government in doing so. Furthermore, local government enjoys a special status in EU decision-making, e.g. through an institutionalized voice in the Committee of the Regions or potential dual office holding of its representatives in the European Parliament or

Council in some countries. On the other hand, however, local government and interest group scholars agree that when local authorities specifically engage in regulatory mobilization, we may consider them “*interest organisations that are equivalent to interest groups*” (Beyers et al., 2010: 6).

Interest groups are primarily concerned with influencing policy-making processes to achieve an outcome as close as possible to their ideal position (Klüver, 2013). Following Dür (2008: 561) we accordingly define (interest group) influence as “*an actor’s ability to shape a decision in line with her preferences.*” To exert influence interest groups may use several strategies such as litigation, voice and access. The latter strategy is known as ‘inside lobbying’ and delineates the context of our empirical research. Interest representation in this context is conceived as a market of supply and demand in which information is exchanged for access and/or influence between interest groups and EU access points, namely the Commission, Parliament and Council, via several routes (Bouwen, 2004; Hauser, 2011). Local authorities may for instance directly contact EU-officials, either individually or via national associations or local conglomerates (e.g. inter-municipal companies). Additionally, they can mobilize via European organisations such as thematic networks (e.g. Eurocities, Eurotowns, EGTCs), umbrella associations (e.g. CEMR) or formal institutions (e.g. CoR, CLRAE). Finally, a national route leads to Europe via contacts with national (or in some federal states: regional) government, contacts and associations (Van Bever et al., 2010; Greenwood, 2011).

Literature broadly classifies determinants of interest group influence in three categories (Dür & De Bièvre, 2007; Dür, 2010; Klüver, 2013). The first refers to the structural/institutional context since political institutions and their decision-making rules often define the room for interest group access and influence in the decision-making process. A second category is comprised of characteristics of the policy issue at stake. In substantive terms, influence is expected to be more likely regarding technical issues, issues with a confined scope or in cases of ‘low politics’. Influence is also likely to increase when the salience of, and conflict on, an issue is less profound. Third, interest group properties seem to matter. Resources such as knowledge, legitimacy, advocating a specific rather than a diffuse interest and, most importantly, information are an obvious surplus. Additionally, interest group strategies (sometimes mentioned as a distinctive category, e.g. Dür, 2010) are of key importance. Choices between voice or access, using the national, direct or European route to Europe, selecting the best phase in the policy process and deploying a strong lobby coalition are among the most prominent elements of the lobby strategy.

Compared to the usual suspects of EU interest group politics, local government is not deemed very influential (John, 1994; Greenwood, 2011). Trailing behind in terms of financial resources and personnel devoted to EU lobby work local government usually represents diffuse interests as well, which tends to bring about problems of collective action (Heinelt & Niederhafner, 2008; Klüver in Lowery et al., 2015). In the local context this diffusion spans (potential) cleavages between local and regional interests, the urban/rural divide or specific versus general interests. Furthermore, the generic term local government encapsulates an eclectic composition of national traditions across Member States. Nonetheless some studies hinted at potential success exploring local government lobbying in a particular context (e.g. John, 1994; Bomberg

& Peterson, 1998; Schultze, 2003; Heinelt & Niederhafner, 2008; Callanan, 2012; Callanan & Tatham, 2013). The proposed conditions for success largely coincide with general insights from interest group research as outlined above. Furthermore, some determinants might be of particular importance in the specific context of local government. One relates to the latter's structural position in the state (e.g. constitutional power and competencies), whereby more powerful domestic actors seem more likely to be successful. The other refers to the access route local authorities deploy. Whereas EU-institutions offer local authorities opportunities to bypass central government (i.e. bypassing paradiplomacy), working in close harmony with national government (i.e. cooperative paradiplomacy) could be a better way forward (Tatham, 2010).

In this study we investigate how local government was able to influence the issue of PPC in the new Public Procurement Directives despite the fact that several of these conditions were clearly disadvantageous at the start of the lobby process.

Methods and data

To answer our research question we use process-tracing, identified as a proper method to detect the intervening causal process between independent variables and the outcome in within-case analysis generally (Vennesson, 2008: 224; also George & Bennett, 2005; Beach & Pedersen, 2013), as well as interest group research studying influence in particular (Dür, 2010). In our case we aim to unravel the causal mechanism through which local government (X) could influence the exemptions for PPC in the Procurement Directives (Y) despite several unfavourable scope conditions (S).

We use theory-building process-tracing because the current academic state of the art is still fragmented and inconclusive, and theoretical models therefore underspecified (George & Bennett, 2005). Moreover, this particular method is expedient when we know a correlation between X and Y exists, but we are in the dark about the causal mechanism linking both (Beach & Pedersen, 2013). Our choice implies the ambition to design a parsimonious causal model of influence on EU decision-making in the particular case setting. Since this setting represents a successful local government lobby under unlikely circumstances (as set forth by the literature on interest group politics), our study classifies as a 'passed least-likely case' (Rohlfing, 2012). According to George and Bennett (2005: 215), such "*process-tracing of deviant cases offers an opportunity to differentiate and enrich the general theory.*"

After defining the key theoretical concepts (X, Y) and the scope conditions (S), theory-building process-tracing involves three basic steps (Beach & Pedersen, 2013). First, data were gathered in a cumulative process in order to collect sufficient evidence that allows to exclude alternative causal mechanisms. We triangulated four main data sources: official legislative documents, scientific accounts of PPC and the Directives, stakeholder communication (position papers, press releases, etc.) and 33 semi-structured expert interviews. Interviewees were selected through non-probability sampling, i.e. drawing a sample via purposive and snowball selection comprising the most important actors (on the basis of positional and reputational criteria) that

participated in the political process under study (Tansey, 2007). The sample included three clusters: 5 external experts on public procurement law (i.e. professors and lawyers), 16 stakeholder groups (i.e. local government actors, other public actors pursuing the same goals, opposing stakeholders) and 12 EU decision-makers (i.e. officers and/or politicians from Parliament, Council and Commission) (Annex 2).

Second, we inferred the existence of certain manifestations from the collected evidence. This inferential leap followed from theory (e.g. interest group politics, local politics, etc.) and observations of the case. In this analytical phase theory was used to distinguish systematic patterns in the empirical data whilst the iterative connection to previous observations allowed to gradually focus the picture. Only insofar as different sources (across our data clusters) yielded evidence in a similar vein was the inferential leap from data to manifestations finally made. The ultimate step of the process was to make the second inferential leap by organizing the observable and theorized manifestations into an inclusive underlying causal model that explains how local government was able to influence the PPC-exemption in the new Public Procurement acquis. This model is set out in the following section.

Causal model of a successful local government lobby in EU decision-making

Beach and Pedersen (2013) suggest a mechanistic conceptualization of causal models in process-tracing research. These models include different, individually insufficient yet necessary, interlocking parts representing entities that engage in activities. Even though each part is thus indispensable to produce the outcome of the process, it is only in relation to each other and under given scope conditions that they generate influence. Moreover, the theory-centric ambition requires the parts of the mechanism be theorized in a parsimonious fashion so as to allow for sufficient generalization beyond the particular case – yet within the given scope conditions. The latter form the starting point of our analysis.

Scope conditions (S)

The scope conditions of a case designate the particular context in which the causal mechanism operates, hence define the model's generalizability. In our case several elements of this contextual specificity suggested local government influence would be most unlikely at the outset.

First and foremost, the lobby issue is highly salient, discordant and political. The discussion on the PPC-exemption arises from the 'make-or-buy decision' of a public authority, i.e. the choice to deliver public services using own administrative resources (in-house delivery) or call upon an external third party to do so (Manunza & Berends, 2013; Janssen, 2014)³. The latter option

³ The make-or-buy decision as such is considered a matter of a government's political discretion and has been explicitly reaffirmed in the Directives (e.g. Article 1.4 of Classic Directive, also Article 106(2) TFEU). Still some authors advocate regulating this pre-procurement phase as well in order to objectify the make-or-buy decision in a transparent fashion and maximize the efficiency of public spending, e.g. by comparing the state and market performance on the basis of pre-set criteria (Manunza & Berends, 2013; Janssen, 2014). The mere transfer of a public service task is exempted from the procurement acquis as well (e.g. Article 1.6 of Classic Directive).

requires a formal public tendering procedure as established by the procurement rules to select the external service provider in a transparent and competitive manner. In between these two basic options, however, lies a grey zone of public service delivery through different forms of PPC. These forms are broadly classified as either institutionalised (i.e. quasi in-house or vertical cooperation between a contracting authority and its controlled entity, e.g. cooperation between a municipality and a municipal agency or inter-municipal company) or non-institutionalised (i.e. horizontal cooperation between public authorities on the basis of a contract, e.g. cooperation between municipalities or different government levels outside a formal institutional structure). The stakes of the lobby case were exactly to define (and codify) under what circumstances (i.e. on the basis of what criteria) these forms of PPC are exempted from the procurement rules, which apply to forms of PPC as a general rule of thumb. As local authorities consider PPC an extension of their internal service provision structure, they aspired to secure operational autonomy by maximizing the exclusion. Yet in practice PPC has not been devoid of criticism. Considering the vast proliferation of PPC arrangements, several scholars contend that “*such actions and decisions may (...) hinder access to markets and/or distort free competition*” (Wauters, 2015: 220; also Manunza & Berends, 2013; Schutyser & Miclotte, 2013; Sanchez Graells, 2015). Additionally, some authorities were quite creative setting up a jumble of structures and deploying market activities that sometimes stretched beyond the legitimising quasi in-house and cooperative doctrine. Private business stakeholders, denouncing ensuing unfair competition, cross-subsidies and market distortions, consequently advocated an opposite, restrictive approach in order to stop the erosion of the procurement acquis and foster competitive markets of public service delivery. The above contraposition thus epitomizes a debate on the fundamentals of the EU and was crystallized in the quest for a fair balance between the organisational freedom of the Member States on one hand and the EU’s internal market on the other (Wiggen, 2012). It cannot surprise that the revision of the procurement acquis was therefore acknowledged as one of the major records of the 7th legislature, with PPC being one of the most significant and controversial elements thereof (Janssen, 2014; Wauters, 2015)⁴.

A second reason to temper expectations of local government influence relates to the characteristics of the interest groups involved. Even though interest group research has disqualified claims on the all-embracing impact of business groups in EU decision-making, these groups are still regarded as influential stakeholders overall (Lowery et al., 2015). Since local government is classified amongst the less influential interest groups generally (cf. supra), local authorities seemingly were up against a tough opponent. Furthermore, they represented a diffuse interest in this case because of clearly distinct national traditions of public service delivery in the EU (Janssen, 2014). Whereas delivering public services through PPC-schemes is a widespread and legitimate practice in some member states (e.g. Germany; Burgi, 2014), for instance, in-house procurement fuels the ingrained fear of corruption in public service delivery in others (e.g. Lithuania; Kanapinskas et al., 2014).

⁴ PPC was contested until the very last minute of negotiations. Other controversial elements were the access for SMEs to public procurement, the social and environmental criteria (e.g. the procurement principles, Article 18) and the award criteria (Article 67). Besides, the (need for a) Concessions Directive as such has been hugely contested and in this context the exclusion from drinking water caused much controversy as well.

Finally, the institutional context would have curbed one's enthusiasm about local government influence beforehand. From its first Directive (71/305/EEG) in 1971, the European public procurement acquis has been envisaged to fit in with the EU's ambition to establish an internal market and promote competition in public markets to stimulate economic efficiency (Bovis, 2012; Fiedziuk, 2013; Wauters, 2015). The earmark also undergirded the 2014 revision which took place in the aftermath of the economic crisis (Manunza & Berends, 2013; Caranta, 2015). Furthermore, the revision figured as one of the twelve levers of the 2011 Single Market Act and aligned with the EU 2020 strategy. Withdrawing public contracts from the market based on an extensive use of PPC-arrangements thus goes against the global spirit of the EU procurement regime. Additionally, EU decision-makers generally tend to legislate exemptions from general rules in a restrictive manner. And despite a cautious (but failed) attempt in the previous revision of the procurement rules (2004), legislating PPC was novel in 2014, hence attracted much attention from different opposing stakeholders⁵.

Still this does not imply that local authorities operated in a legal wasteland deploying their PPC activities before 2014. In fact, the issue of (quasi) in-house provision had already become one of the most elaborated pieces of ECJ case law since the landmark *Teckal-judgment* in 1999 (Burgi & Koch, 2012; Schutyser & Miclotte, 2013). In *Teckal* in-house cooperation between public entities (i.e. vertical or institutionalised cooperation) was exempted from public procurement law for the first time. This exemption rested upon two cumulative criteria: the contracting authority must exercise a control over the contracted authority similar to the control it exercises over its own departments ('control criterion') and the controlled entity must exercise the essential part of its activities for the contracting authority ('essentiality' or 'activity criterion'). For some this judgment opened a back door in the general procurement regime, however (Fiedziuk, 2013; Janssen, 2014). Having its roots in different circumventions of the in-house doctrine, subsequent case law therefore further delineated and specified the *Teckal*-criteria, and above all the control criterion (Hausmann & Queisner, 2013; Wauters, 2015). And even though more recent case law re-widened local authorities' scope of action to a certain extent, the quasi in-house doctrine remained a narrow and above all practical exception from procurement law (Wiggen, 2011; Schutyser & Miclotte, 2013). The horizontal (non-institutionalised) cooperation between public authorities, on the other hand, was only tackled by one influential case at that time, the *Hamburg-judgment*, leaving much uncertainty as to whether, and on the basis of what criteria, procurement law was to be applied to these forms of PPC (Caranta, 2015).

The ambition of the Commission was exactly to codify ECJ case law in order to create legal certainty and simplification on the matter – thereby basically reaffirming the ECJ as prime lawmaker of PPC (Bovis, 2012; Wauters, 2015). The Commission took control in 2011 setting up an expert group and organizing a conference and impact assessment on the procurement acquis, publishing a paper with interpretative guidelines on how to apply the ECJ's exemption criteria (e.g. reaffirming *Teckal*; excluding every form of private capital in the controlled entity;

⁵ In 2004 the PPC-exemption was not incorporated in the Commission's first proposal. After being amended by Parliament, the proposition perished in (what already were extremely contested) further negotiations. This was partly due to the Council's lack of agreement (given diverging national traditions) and a lack of ECJ jurisprudence to support the discussion (since the proposal would merely reproduce the innovative *Teckal-judgment* on PPC).

emphasizing the need for a real cooperation between the parties related to the public interest; allowing joint control as this is the case in an inter-municipal company) and issuing the Green Paper concerning the new Directives. These initiatives were met by two Parliamentary reports and resolutions (2010, 2011) and a public hearing (2012) organised by Parliament's IMCO-committee. Together these elements demarcated the playfield of the lobby process beforehand.

Local government (X)

In our study local government (used interchangeably with 'municipal lobby') includes cities, towns and provinces in the EU Member States, all different forms of agencies of, and cooperation between these authorities, as well as their interest associations and networks at national and EU level. Given the widespread use and economic importance of different PPC-arrangements throughout Europe, it is obvious that the stakes were very high in the procurement case. For local government the basic aim was to secure public service provision by means of cooperative horizontal and vertical arrangements through including a flexible exemption for PPC in the Directives. Depending on the particular interest and modus operandi, different actors thereby emphasized different elements of the PPC-discussion. The leading actors of the municipal lobby were (different national associations of) German local authorities and their utility companies. In Germany PPC is very often used as a way of providing local services. Not only did German actors fiercely engage in their national arena, they also took the lead in the European associations such as CEMR (i.e. the European umbrella association of local and regional authorities) and Eurocities (European network of major cities), as well as sector-specific groups on the local public service market who rallied around the issue (e.g. Municipal Waste Europe, CEEP). Other active members of the municipal lobby were France, Austria, the Netherlands, Belgium and the Scandinavian countries.

Influence on EU decision-making (Y)

Assessing the influence of lobby actors in decision-making processes is always a challenge (Dür, 2010). It is important to keep in mind that we qualify influence as a relative concept. Influence in this regard implies succeeding to align PPC-provisions with ones demands generally, without necessarily having to be granted each and every single demand entirely. Moreover, a causal mechanism might just be about preventing opposite demands from coming into force, or preventing rather than bringing about change (Beach & Pedersen, 2013). We assess local government influence by comparing the policy outcome to a triangulation of different sources (official texts, stakeholder communication, legal accounts, interviews) and benchmarks (current PPC-practices, stakeholder positions, case law, the Commission's first proposal and ensuing compromise texts) without going into the technical details of the legislative texts.

The article on PPC includes five paragraphs (Annex 1). The first determines the classic in-house relation between one contracting authority and its controlled entity. Paragraph 2 describes the reverse relation between those parties, and paragraph 3 deals with the collective in-house relation between several contracting authorities and a controlled entity. Horizontal co-operation between public authorities is set forth in paragraph 4 whilst the final paragraph explicates how to determine the activity criterion. On an aggregate level the major points of debate were the

activity criterion (i.e. setting a fixed percentage of activities the controlled entity has to explicitly perform for its controlling authority or authorities, hence also defining the room for market activity outside the in-house constellation), the private capital participation in the PPC-construction, as well as the entire wording of horizontal co-operation (paragraph 4).

The Commission's first proposal (COM(2011) 896 final) received criticism from both public and private stakeholders. The public side, in which local government played a pivotal role, denounced the fact that the proposal framed PPC in a manner which is too restrictive compared to case law and/or existing practice (e.g. setting the activity criterion at 90%, excluding every form of private capital in the PPC-arrangement, prescribing elaborated and strict criteria vis-à-vis horizontal cooperation). It consequently urged for a more flexible approach. Procurement experts, acknowledging the Commission's attempt to codify ECJ jurisprudence, endorsed such argumentation. For instance, many of the criteria laid down in the proposal turned factual circumstances of certain cases into mandatory requirements (Wiggen, 2012). Burgi and Koch (2012) stress that unlike the Commission's normative aspirations, ECJ jurisprudence never used market considerations as an explicit argument. For them the proposal at hand would even put at risk future public service delivery through PPC-arrangements – and Member States in which public authorities frequently use PPC held the same opinion for that matter (e.g. Belgium in Van den Abeele, 2012; Germany in Burgi & Koch, 2012). The private sector, on the other hand, expressed its concern on the 'excessive codification' of the jurisprudence. They advocated including the most stringent PPC-exemption in the Directives (e.g. forbidding every form of private capital in the PPC-arrangement, as well as any activity on the open market; limiting in-house schemes in time and territory; deleting the clause on joint and reverse control), or else even deleting the article on PPC altogether in order to prevent lurking protectionism and market distortions.

During trilogue negotiations the Commission's proposal has been altered significantly, even up to the very end (Wauters, 2015). Arguably, most of these changes went into the direction of the public side: the activity criterion has been lowered from 90 to 80% (widening the margin for economic activity outside the cooperative arrangement), private participation has been allowed in some specific circumstances, and criteria for horizontal co-operation have been reduced and softened substantially. PPC-demands of the private side, on the other hand, did not find their way into the final text. Official reactions from both antagonists, applauding 'the clear recognition of PPC' on one side and 'expressing discontent with the outcome' on the other, echo this revision.

Amongst external observers agreement on the substance of the adaptations is not carried further in terms of appreciation of their implications either. Taking a public sector perspective, some welcome the 'reasonable improvements' which will give sub-central authorities more liberty and flexibility as "*most points of criticism regarding the proposed provision have thus been omitted from the provisions now in force*" (Burgi, 2014: 65). Others however alert to the possible negative effects on competition in the internal market the changes could provoke (Caranta, 2015; Sanchez Graells, 2015). In any case the 2014 revision has clearly shifted the balance between Member States' organisational freedom and the EU's internal market in favour

of the former whilst the scope of the PPC-exemption has been extended in comparison with previous case law as well (Janssen, 2014; Wiggen, 2014; Wauters, 2015).

The remaining sections of the paper reconstruct the three-legged causal mechanism that induced these changes. The parts of the mechanism are reconstructed by interpreting theory and contextual knowledge to turn empirical observations into evidence. Without making any claims to be exhaustive in doing so, various observations and evidence, corroborated by multiple sources and actor groups, aim at guaranteeing the validity of these conclusions.

Part I: strategic lobby

The strategic lobby campaign launched by local government constitutes the first part of the causal mechanism. This lobby campaign alerted decision-makers to the issue of PPC, and ultimately convinced them to follow the public sector line of thinking. Within the wide array of lobby influence conditions (cf. supra), the lobby strategy concerns the most actively and consciously controlled condition by interest groups.

Several elements played a significant role in the municipal lobby campaign. Despite diverging national traditions when it comes to public service provision at the local level (i.e. diffuse interests), the municipal lobby succeeded in setting up a unified coalition. This coalition did not act as a monolithic bloc since different (groups of) authorities emphasized their specific points of interest. Nevertheless, no truly dissonant voices were heard amidst a coalition in which members with a vibrant tradition of local public service delivery were most active (e.g. France, Austria, the Netherlands). The coalition was moreover led by the German local authorities, which are not only a very extensive group. They are also part of a very influential Member State in which they occupy a strong constitutional and functional position from a comparative point of view (Hesse & Sharpe, 1991).

Third, the municipal lobby was characterized by a pinpoint focus and massive commitment. Although the Procurement Directives contain numerous provisions, some of which local government had a clear interest in as well (e.g. procurement light regime, delegation of services, central purchasing bodies), PPC was unanimously depicted as the single most important issue for the municipal lobby. From the early agenda-setting phase (position papers, press releases, involvement in public hearings) throughout the legislative process (inviting Commission officers, organising meetings with decision-makers, writing amendments to legislative texts), most of the latter's attention was consequently devoted to influencing the PPC-issue. This enduring and strong focus rendered local government an authoritative voice in the PPC-discussion.

The pivotal stakeholder position in the decision-making process was enforced by the strategic use of one of the most critical assets in the lobby process, i.e. information. The municipal lobby incorporated a mixture of general principles (e.g. local self-government, subsidiarity, fear of forced privatisation) and specific arguments (best practices, concrete examples of service provision that require flexible exemptions). German authorities also connected the PPC-discussion to the (fiercely debated) issue of the exclusion of drinking water from the Concessions Directive. Meanwhile, demands and amendments were tailored to the specific

propositions that were on the table during the legislative process in order to maximize chances of success. These tactics were deployed as part of the final decisive element inferred from our evidence, multilevel venue shopping (MVS). MVS denotes “*the development of influence strategies at (...) different levels* [of government, T.V.]” (Beyers & Kerremans, 2012: 264). In the case at hand local government followed different routes to approach the entire spectrum of EU decision-makers involving both cooperative and bypassing para-diplomacy. While EU actors (Commission, national MEPs) were approached by national associations directly and via national government (up to the highest echelons) indirectly, European umbrella associations served to get in touch with other MEPs as well as EU officials. Together these strategic actions created a very powerful municipal lobby. Nevertheless, two additional parts were indispensable to propel the causal mechanism.

Part II: external opportunity structure

We apply the concept of the external opportunity structure to distinguish the second part of our causal model. According to Merton (1996: 153), an opportunity structure “*designates the scale and distribution of conditions that provide various probabilities for individuals and groups to achieve specifiable outcomes.*” We call this part ‘external’ because it denotes conditions that occurred outside the European decision-making arena as such. In our model the external opportunity structure contains a political and legal component. Following Andersen (2006), the former includes a) access to the formal institutional structure, b) the presence of allies and/or opponents, c) the configuration of power and d) the underlying political culture. In the latter the legal stock is added, i.e. the issue framing as it has been developed by different kinds of law.

In our case the balance between allies and opponents was certainly not disadvantageous for local government. Several interest groups, such as the French social housing companies and the CEEP (European association of public service employers and enterprises), were quite active advocating (specific elements of) broader exemptions for PPC. Besides, different PPC structures not only characterize service provision at the local level, but occur at regional or central state level as well. This mutual interest further enabled the municipal strategy of cooperative paradiplomacy. On the opposite side of the spectrum, some actors were surprised at the relatively weak lobby effort from private businesses on this issue. In a way the private business lobby was antipodal to its public opponent. Even though some of the private stakeholders did provide detailed and frequent information on PPC, others had to spread their attention over numerous salient aspects of the Procurement Directives (some of which were lobbied successfully indeed). There was no strong, unified lobby coalition either and claims on PPC were less flexible or too demanding (e.g. requesting the PPC-exemption to be deleted, setting the activity criterion at 100%, limiting in time the PPC-arrangement).

Regarding the configuration of power, the upcoming European elections in 2014 played a role in the sense that the (attributed) political ambitions of Commissioner Barnier led him to actively pursue an agreement on the Directives before the elections. The ensuing pace of the negotiations was denounced by the private lobby. For some the elections were also the reason why the Commission decided to exempt drinking water from the Concessions Directive, an issue that had provoked the first Citizens’ Initiative in 2012 and was connected to PPC by the German

local lobby. The configuration of power in some Member States determined the access for local government to the upper-state levels as well. A significant element in this respect were the 2013 federal elections in Germany taking place in the middle of negotiations. The German municipal lobby used the build-up to the elections to put Merkel under heavy public and political pressure (e.g. via partisan mayors), stressing the risks for public service provision (and acclaimed forced privatisation) if the broad exemptions for PPC and drinking water would not be approved. In the end the pressure proved to be an important lever to persuade German federal government, a coalition of Christian-democrats and liberals, to change position and support municipal claims.

To a lesser extent the political culture played a role as well. Basically, public service provision through PPC belongs to the sphere of Member States' internal organisation – a reason for which the attempted codification of PPC failed in 2004. Some Member States accordingly feared that restrictive exemptions for PPC would eventually provoke the privatisation of public services. The formal recognition of the principles of local self-government and subsidiarity in the Lisbon Treaty and the EC White Paper on Governance somehow underlined the legitimacy of the public sector's claims (and impacted on subsequent case law, Manunza & Berends, 2013; also Schultze, 2003; Greenwood, 2011; Callanan, 2012), while the economic crisis might have put the discussion between public and private service delivery in a new perspective (e.g. reflected by the re-municipalisation of public services in some Member States).

The final element in this overview, the legal stock, was certainly of high importance. As we have outlined above, before the 2014 revision the discussion on PPC was mainly settled through ECJ jurisprudence. Even before the formal start of the legislative process, specific judgments and arguments were often used by stakeholders in their lobby campaign as well as the Commission in their assessments and interpretative and legislative texts. Then, right in the middle of the legislative process in 2012, a new influential case on horizontal cooperation was issued (the *Lecce-judgment*). Whereas the municipal lobby had always denounced the Commission's proposed criteria on horizontal cooperation until then, as they were based on the factual circumstances of but one single case (*Hamburg-judgement*), the 'eagerly anticipated' *Lecce-judgment*, and soon after the *Piepenbrock-judgment* (see Hausmann & Queisner, 2013), provided welcome arguments to mitigate these criteria. Given the Commission's ambition to codify the ECJ jurisprudence in the Directives, the legal stock served as an important link in this part of the causal mechanism.

Part III: EU decision-making arena

The third and final part of the causal model is the decision-making arena of our case at EU-level. We analyse this part through the lens of Scharpf's (1997) actor-centred institutionalism, a framework that explains policy as the outcome of interactions between actors that are structured by the overarching institutional setting. Institutions here refer to the formal and informal rules structuring actors' actions. The latter possess specific capabilities, perceptions and preferences while interacting in particular constellations on the basis of certain modes of interaction.

In his evaluation of the changes to the Public Procurement Directives, Caranta (2015: 392) rightly concluded that “*the institutional dynamics of EU law-making matters*”. Several formal and informal rules structuring EU decision-making in our case substantiate this claim. The Commission used its right of initiative to initiate the revision of the Procurement acquis and settle the PPC-discussion therein, even if some stakeholders and observers considered this too early (as the 2004 Directives had only recently come into force, which bears upon the validity of impact assessments), or unnecessary in the case of PPC (as public/private stakeholders feared codification could curtail/formalize certain practices, or considered ECJ jurisprudence a sufficient guide in practice)⁶. Once the legislative process was initiated, the institutional determinism of EU decision-making kept the ball rolling and impeded the private lobby to withdraw the PPC-provision from the Directives, for instance. In Parliament and Council, the PPC-provision was mainly decided upon in the IMCO-committee (Internal Market and Consumer Protection), coreper and the working party of the Competitiveness Council. As this is increasingly the case in European decision-making, subsequent negotiations took place on the basis of trilogue procedure⁷. According to Roederer-Rynning and Greenwood (2015), the seclusion of the latter and resulting information asymmetries hamper the work of interests groups while trilogues have given Parliament more leverage over Council as well.

Within this institutional setting the actors, actor constellations and modes of interaction formed a markedly receptive arena for the arguments of the local government lobby. The Commission (with the responsible DG Internal Market and Services) was probably most balanced. Whereas the revision of the Procurement rules fitted in with the internal market agenda generally, creating legal certainty by codifying ECJ case law on PPC was an equally important objective. The evolution from the quite restrictive first draft on PPC towards the end product, particularly in terms of horizontal cooperation, reflects this duality (cf. supra).

The Council, secondly, was more inclined to the position of local government. Internal state diplomacy, but also parallel interests, had turned some Member States to endorse municipal claims for flexible PPC-exemptions (cf. supra). Negotiated agreements being the Council’s preferred mode of interaction, Member States which did not have a similar public pressure or public service delivery culture did not obstruct amendments in this direction either. In terms of the Council’s constellation, some actors indicated that the specific composition of the national delegations (i.e. often technical procurement specialists) was beneficial to the public sector position, and local lobbies were deeper involved in negotiating respective national positions. As a result they seemed to have more access to and insight in the proceedings of trilogue negotiations.

Finally, Parliament was the most receptive institution to the grievances of the municipal lobby. In IMCO-committee, many key positions (e.g. shadow rapporteurs, political group coordinators) were occupied by German MEPs. Hence, notwithstanding some obvious personal nuances and ideological differences in the committee, the German lobby cut across party groups

⁶ To refute these complaints, the Commission points toward the broad support for legislative rules on PPC received in the reactions to the Green Paper.

⁷ The impact of the position of the Committee of the Regions, supporting the public stakeholders, was deemed of less importance by most interviewees.

to endorse flexible exemptions. Such tendency was further enabled by the party discipline and large impact of a small number of MEPs mastering a given dossier in Parliament generally. Meanwhile, the relatively impact of the liberal party group, who leaned towards more restrictive exemptions, was too weak to change Parliament's state of mind. To most interviewees the local constituency and local political experience (or career outlook) of the MEPs was also key for local government to rally around this highly political issue. In fact, the issue of PPC could have strong implications for the constituency back home. And the two rapporteurs of the Directives held a mayoral office in France and Belgium, which made them at least familiar with the public sector line of thinking. Given the above combination of actors, constellations and interaction modes, it cannot surprise that Parliament sided with the public sector in the end.

Synthesis: the causal mechanism

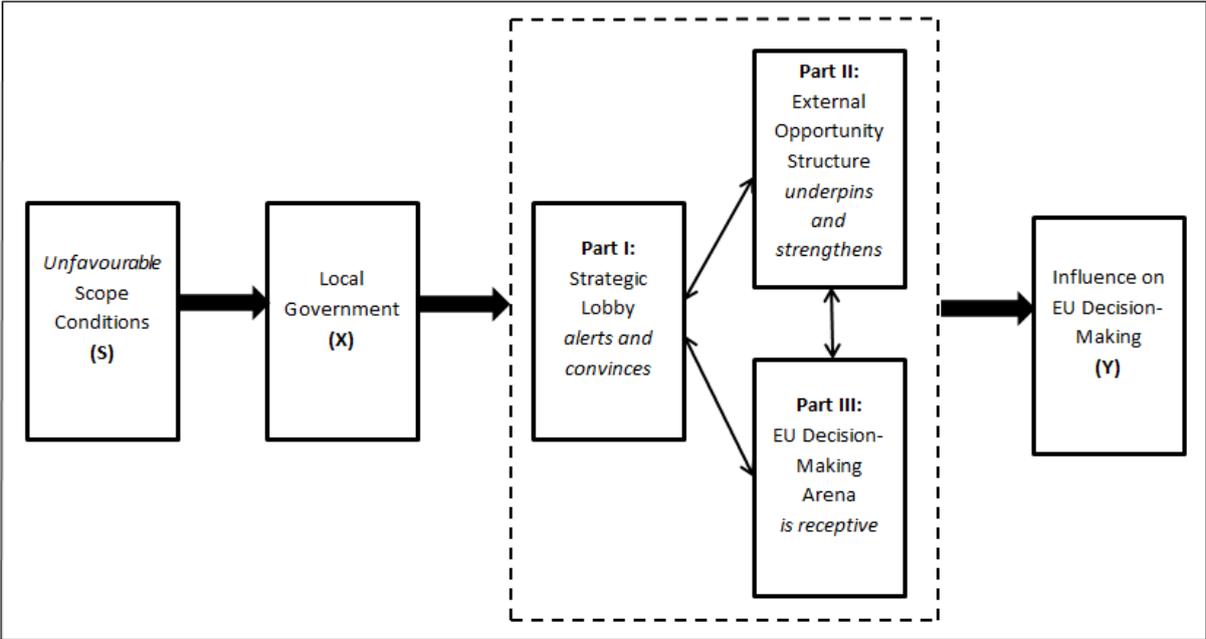
Together the above parts operate as one causal mechanism (Figure 1) in which the strategic lobby sets the mechanism into motion while being invigorated by the external opportunity structure and finding an audience in the EU decision-making arena. The model therefore explains local government influence in EU decision-making under unfavourable scope conditions. Following Beach and Pedersen (2013), we argue that the theoretical earmark of our study does not necessitate each and every single element (or evidence) in order for the model to function. The presence and combination of different elements within the parts is thus largely case-specific. Yet the three major parts as such are systematic and indispensable in explaining the lobby outcome in our case context. Meanwhile, the reciprocity of these parts, resulting from the specific interplay between agency and structure, represents the oil that lubricates the wheels of the engine. Indeed, while many elements of the external opportunity structure and the EU decision-making arena already were in place, it was only insofar as the municipal lobby explicitly and strategically addressed them that the effect on the policy outcome could take place – and vice versa.

Some specific elements of the case exemplify this relation. From the very start of the lobby process, for instance, local government used case law evidence to support its claims. When the *Lecce-judgment* was issued in the middle of negotiations, a perfect opportunity for the municipal lobby arose to convince the Commission, which always had the intention to codify ECJ jurisprudence in a meticulous fashion, to water down its criteria for horizontal cooperation. Upcoming federal elections in Germany were another opportunity local government could seize to gain access to and enable cooperative paradiplomacy with the German state and (co-)determine the German position in Council. The latter, in turn, was influential due to the standard mode of interaction in Council.

Moreover, these mechanisms also worked the other way around. The specific composition of the IMCO-committee allowed the municipal lobby to fine-tune its multilevel venue shopping strategy, e.g. by mandating national members of the CEMR to approach their MEPs, (shadow) rapporteurs, etc. The enhanced impact of Parliament in trilogue negotiations gave more weight to the accordances between Parliament and the municipal lobby afterwards. Besides, private business lobbies, who already had less privileged access to EU decision-makers in this case and focused less exclusively on PPC, felt impeded to systematically intervene on the issue because

of the fast pace of trilogue negotiations. To some this pace was fuelled by upcoming EU elections and personal ambitions in the Commission, even if it is to some extent also inherent to the institutional structure of negotiations in the EU arena through the trilogue procedure.

Figure 1. A causal model of local government influence in EU decision-making under unfavourable scope conditions



Conclusions

In this paper we used theory-building process-tracing to reconstruct the three-legged causal mechanism by which local government was able to influence the exemption for public-public cooperation (PPC) in the 2014 Public Procurement Directives, despite several elements of the lobby context suggesting otherwise at the very outset. We have shown how the strategic lobby campaign deployed by local government was underpinned and strengthened by the external opportunity structure. Additionally, both could profit from a receptive EU decision-making arena. Elements of particular importance were the pinpoint lobby focus and multilevel venue shopping from local government, the European case law on PPC, upcoming national elections and the composition of the IMCO-committee negotiating the issue in Parliament. The operation of the causal mechanism has yielded a European procurement system in which local authorities have gained more (and formalised) leeway to retain and deploy their public service provision through different schemes of horizontal and vertical cooperation.

Additionally, our study provides conclusions on three levels beyond the particularity of the procurement case. First, it indicates that even in situations where influence is deemed most unlikely on theoretical grounds, local government can be a powerful player in the EU interest system. In fact, several actors involved in the lobby process referred to the procurement case as

the ultimate showcase of the enhanced impact of local authorities in EU decision-making during the past years. The strategic municipal lobby proved to be a powerful instrument to that end. And what's more, the sui generis character of local government as democratically elected interest group might even allow it to be more successful in very challenging cases of high politics which require broad political support, or in intervening at the very end of decision making in trilogue negotiations. Further research will nevertheless have to corroborate whether the specific features of the municipal lobby in our case (e.g. a strong lobby protagonist, the support of a very influential Member State) are a necessary condition to do so.

Second, the potential influence of local government might have implications for the EU interest system generally. In an era in which the technocratic character of EU decision-making, accompanied by the acclaimed overwhelming impact of business lobbies, is often criticized, the active and significant involvement of EU grassroots government has promising potential to enhance the input and output legitimacy of EU policy. Our study has also confirmed the growing importance of Parliament as an access point for interest groups in EU politics. Yet on the other hand, lobby influence of local government does not enhance the overall quality of political decisions per se – as the evaluation of the new procurement rules by some experts, pointing towards possible distortions of the level playing field in the markets of public service delivery, has demonstrated. Besides, cases where different local authorities advocate different, or even opposing, positions could qualify the above claim as well. And as Lowery et al. (2015) point out, influence on policy outcomes is but one of the conditions of an unbiased interest system in the end.

Finally, the theory-centric ambition of our case study implies that its specific causal model of lobby success is to be verified in further interest group research. Such a research agenda could include validating the mechanism in different cases and under different scope conditions. In this respect, one could for instance expect the impact of certain parts (e.g. the external opportunity structure) to be less imperative when the scope conditions of a lobby case are less challenging. Comparative research could meanwhile ascertain the applicability of (some parts of) the model to different interest groups, and disclose the systematic impact of particular elements of the model. Regarding the latter, analysing the impact of the legal stock on a policy issue and the actor constellation at EU level could complement current interest group research. Insights in the longitudinal dimension of municipal lobby impact as well as the effects of multilevel venue shopping, multiple office holding and local government characteristics, on the other hand, could enrich our understanding of the Europeanization of local government. Against this backdrop it is also worthwhile assessing whether general insights from interest group politics that have been confirmed in our study, such as the positive effect of cooperative paradiplomacy, information and coalition building, systematically determine the success of municipal lobbying.

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ANNEX 1: The exemption for PPC in the Public Procurement Directives (Article 12 of Directive 2014/24/EU)

Article 12

Public contracts between entities within the public sector

1. A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

- (a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;
- (b) more than 80 % of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and
- (c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority.

2. Paragraph 1 also applies where a controlled legal person which is a contracting authority awards a contract to its controlling contracting authority, or to another legal person controlled by the same contracting authority, provided that there is no direct private capital participation in the legal person being awarded the public contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

3. A contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a public contract to that legal person without applying this Directive where all of the following conditions are fulfilled.

- (a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;
- (b) more than 80 % of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

For the purposes of point (a) of the first subparagraph, contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled:

(i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;

(ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and

(iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

4. A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

(b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and

(c) the participating contracting authorities perform on the open market less than 20 % of the activities concerned by the cooperation.

5. For the determination of the percentage of activities referred to in point (b) of the first subparagraph of paragraph 1, point (b) of the first subparagraph of paragraph 3 and point (c) of paragraph 4, the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant legal person or contracting authority with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration.

Where, because of the date on which the relevant legal person or contracting authority was created or commenced activities or because of a reorganisation of its activities, the turnover, or alternative activity based measure such as costs, are either not available for the preceding three years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.

ANNEX 2: Interviews

The semi-structured expert-interviews were conducted between October 2014 and December 2015, taking between 30 and 60 minutes on average. Most interviews were carried out face-to-face (N=26), some by mail (N=2) or over the phone (N=5) and anonymity was guaranteed. Commission officers emphasized speaking in a private capacity while two interviewees requested to speak off the record.

The interviewed stakeholders (N=16) represent the following associations (in alphabetical order): BDE (German association of utility companies), CEEP (European association of public service employers and enterprises), CEMR (European association of local and regional authorities), DLT (association of German provinces), EFCA (European association of engineering consultancy industry), Eurocities (network of major European cities), FEAD (European association of private waste companies), FEBEM (Belgian association of private waste companies), FIEC (European construction industry federation), HLM (French association of social housing companies), IOK (Belgian inter-municipal company), Municipal Waste Europe (European association of public waste companies), Overpelt (Belgian municipality responding to the issue of PPC in the Green Paper), UEAPME (European SME umbrella association), VKU (German association of local utilities) and VVSG (Flemish association of local authorities).

The cluster of EU decision-makers (N=12) includes two officers per unit of the Commission negotiating the Directives, one rapporteur, one (assistant of a) shadow rapporteur, one (assistant of an) MEP of the IMCO committee, one officer of the IMCO committee and four delegates involved in Council negotiations (i.e. permanent representation, working groups at EU or national level).