

WINNERS AND LOSERS?

The social marketisation
of civil society.



Scoping the impact of Commissioning and Procurement on civil society services and advocacy: public employment services, community development, domestic violence and housing first.

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APPENDIX 1

Strategic Action Fields

Fligstein and McAdam's (2012) 'general theory of fields' attempts to account for dynamics of change in relationships between collective social actors or grouping of individuals, organisations and institutions. When change happens, actors compete to re-establish common sets of understandings about what 'makes sense' including positions, hierarchies and the rules for legitimate behavior. Strategic Action Fields (SAFs) allow us to observe key actors including incumbents, challengers, invaders and governance units, and to examine the social skills of such actors as 'entrepreneurs'. SAF approaches include analysis of 'proximal' fields, which may be the source of exogenous shocks as causes of 'episodes of contention' after which the SAF returns to stability. They theorise that in each field actors are in constant competition with each other and that each SAF may well be embedded in a wider environment, some overlapping and some more distant (like a Russian doll). Fligstein and McAdam (2012, 58) see the SAF as a 'web of interconnections' where relationships can be dependent, hierarchical, interdependent or reciprocal, and where providers compete with one another for position, power and resources as the state mediates and disrupts relationships in each field by reforming policies, reallocating resources, commissioning and procuring through quasi-markets. For Fligstein and McAdam (2012:9) each SAF is sometimes stable but often dynamic and in flux, subject to periods of contention, unsettlement and 'routine, rolling turbulence' and even crisis (2012, 19). We are particularly interested in the idea of 'field actors jostling for position and attempting to shape the rules of the game, promote their interests and ensure their access to resources' (Taylor et al, p257).

Three sets of dynamics between actors are evident. *Incumbents* hold a greater share of the field's resources and greater control over field rules and symbolic meanings that help to support their interests. They have sway with the SAF's governance units who are oriented to supporting the dominant (incumbent-friendly) logic of the field. *Challengers* have less influence over the field's operation; they play the game while seeking opportunities to redefine the field or logic to their own advantage. Change can also come from external or exogenous shocks where *'invaders'* from other fields can generate 'destabilizing change processes'. These can develop within proximate state or non-state fields' (Fligstein and McAdam (2012), 3).

Changes can reshape the flow of resources to incumbents or undermine the legitimating ideas underpinning the SAF. These crisis or *episodes of contention* mean uncertainty within the field while actors (*incumbents, challengers and invaders*) mobilise to advance their interests. While incumbents are often able to cultivate support from *governance units* or state actors, in some cases challengers can redefine the field (rules, power relationships and frames). A particularly important capacity is the skill of any one social actor to frame their particular 'story' or view of the field and their position within it or to develop oppositional frames.

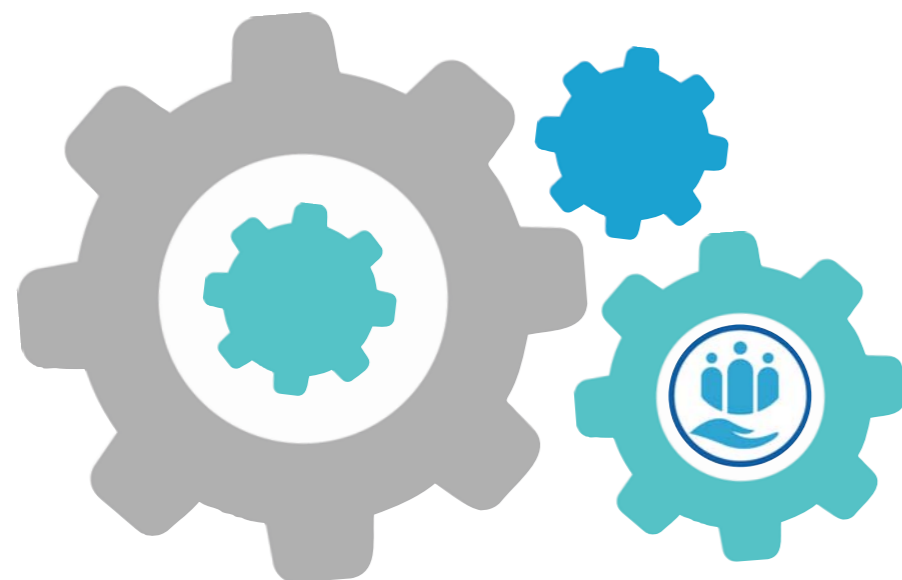
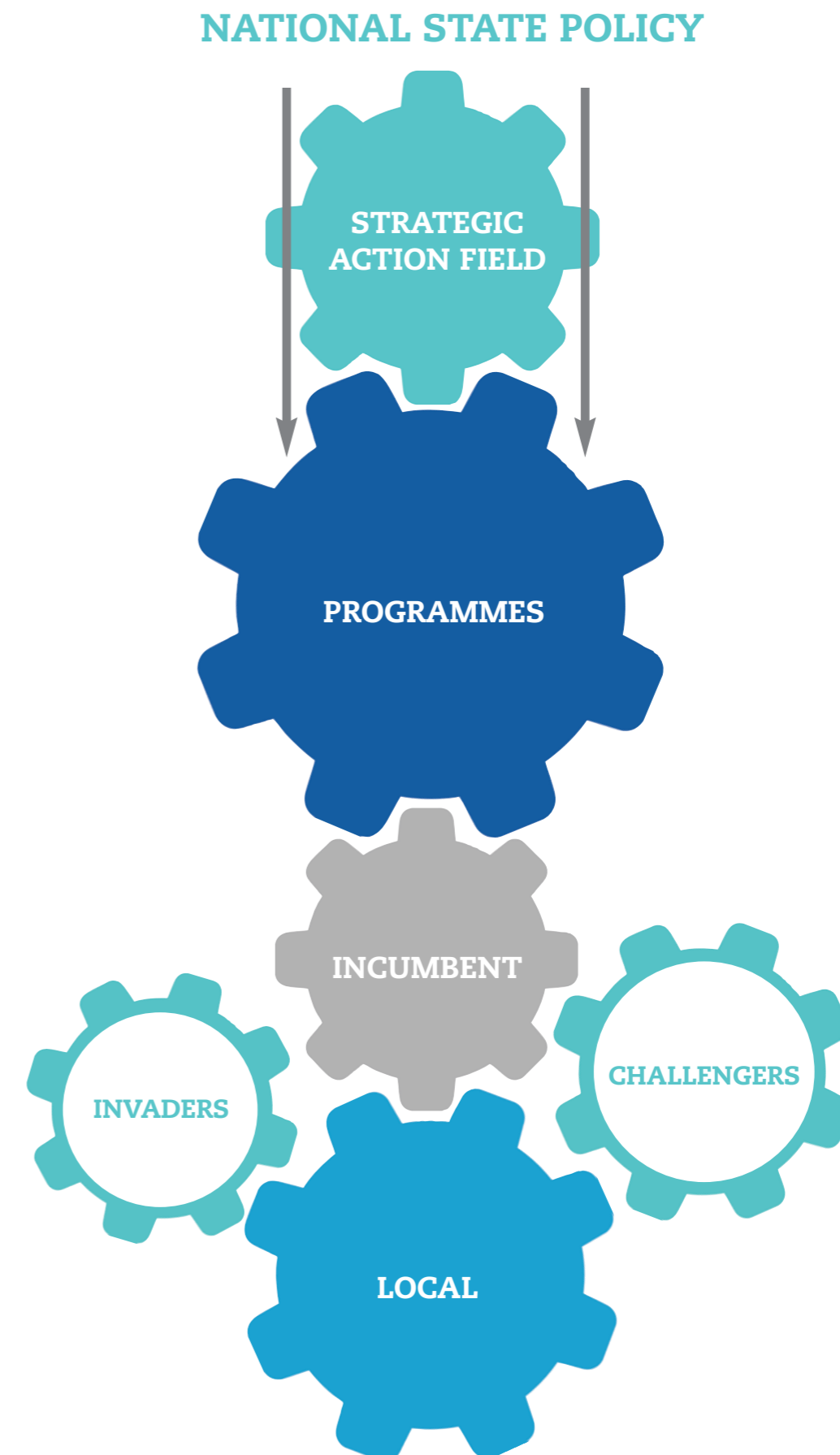


Figure one: Strategic Action Field



APPENDIX 2

The EU Procurement Directive(s)

The EU (Award of Public Authority Contracts) Regulations 2016 (SI 284/2016) (Public Contracts Regulations) transposed the EU law on procurement in Ireland. The Office of Government Procurement was created in 2014 to take full responsibility for procurement policy and procedures in Ireland and for sourcing all goods and services on behalf of the public service together with Health, Defence, Education and Local Government sectors. It operates as an office of the Department of Public Expenditure and Reform. This new model was a move from a decentralised to a centralised model of procurement¹⁶².

Where procurement is deemed to apply, the legal basis in the EU is provided in the Procurement Directives. The one most relevant is Directive 2004/18/EC, soon to be replaced by Directive 2014/24/EU, which opens up more opportunities for greater emphasis on innovation, environmental and social aspects in public procurement bids. Procurement is viewed by the EU as being key to the development of an internal market¹⁶³ and all procurement by the state should be consistent with Treaty principles including:

- Non-discrimination on grounds of nationality or locality.
- Transparency of award procedures and related decisions.
- Equal treatment of those wishing to be awarded a contract.
- Proportionality¹⁶⁴.
- Free movement of goods, services and workers.

Where the following pre-conditions are met, a contracting authority¹⁶⁵ must normally advertise the contract in the EU Official Journal and follow the procedural rules set down in the Regulations:

- The body doing the buying is a 'contracting authority'. The definition is wide and includes central government, local authorities, associations formed by one or more contracting authorities and other 'bodies governed by public law'.
- The contract is for public works, public services or public supplies.
- The estimated value of the contract (net of VAT) equals or exceeds the relevant financial threshold established in the EU Directives. The rules expressly prohibit deliberately splitting contracts for the purposes of bringing them below the thresholds¹⁶⁶.

Not all contracts issued by contracting authorities are subject to EU procurement rules, and those that are not (for example, if they fall below a certain threshold) will be subject to national procurement rules. A lighter procurement regime applies to what are referred to as Part B services¹⁶⁷, which include health, education, social, recreation, cultural and other services, and the threshold for Part B services is higher.

¹⁶² 'National Public Procurement Policy Framework' Office of Government Procurement June 2018

¹⁶³ The internal market of the European Union is a single market in which the free movement of goods, services, capital and persons is ensured and in which European citizens are free to live, work, study and do business

¹⁶⁴ That is, not to include contract terms, or technical specifications that are far beyond that needed to deliver the contract

¹⁶⁵ Central government, local authorities, associations formed by one or more contracting authorities, agencies of the State and other 'bodies governed by public law' such as third level institutions

¹⁶⁶ If the value of a contract exceeds a set threshold, full public procurement procedures apply

¹⁶⁷ 'Part A' services are regular services for procurement

APPENDIX 3

Social Clauses and Procurement

Articles 74-77 of the new directive provides for specific conditions for social and other services (similar to Part B services) that are regarded as being of particular national interest including 'administrative social, educational, healthcare and cultural services', and 'other community, social and personal services including services furnished by trade unions, political organisations, youth organisations and other membership services'¹⁶⁸. These are subject to a lighter procurement regime and greater flexibility in the procurement process. Article 19 Reserved Contracts provide the possibility to restrict tendering procedures to sheltered workshops that pursue the aim of the social and professional integration of persons with disabilities. Article 20 of the 2016 directive extends this provision to disadvantaged groups, and provides that 'Member states may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.'

Article 77 of the new directive provides for the right of contracting authorities to award public contracts exclusively for certain health, social, education and cultural services. The lighter procurement regime provides for more attention to quality in public procurement procedures, and also allows for reserved contracts for these services. These reserved contracts are applicable to organisations meeting the following criteria:

- its objective is the pursuit of a public service mission linked to the delivery of the services;
- profits are reinvested with a view to achieving the organisation's objective. Where profits are distributed or redistributed, this should be based on participatory considerations;
- the structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and
- the organisation has not been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years.

This reserved contract provision would particularly apply to social economy enterprises or other similar structures. The use of reserved contracts is limited, however, and contracting authorities cannot reserve contracts for organisations that have been awarded contracts within the last 3 years, and contracts cannot be for longer than 3 years.

Social clauses may be included in the contract terms for successful tenderers under the current and new directives. These provide opportunities for EU member states to make provisions for social considerations in procurement as a means of ensuring that social benefits and impacts are provided within the procurement process. The European Commission has published a guide to social procurement¹⁶⁹ and a number of EU member states have incorporated social considerations into their procurement policies over the years. The new directive clarifies the role of social considerations and is regarded as giving more scope than before. Article 26 of the current directive (conditions for performance of contract) states that:

'Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.'

There has, however, been uncertainty around the extent to which social considerations can be included. Organisations such as the European Platform of Social NGOs and a number of MEPs have called on the European Commission to devise guidelines for member states on the implementation of these provisions¹⁷⁰.

In 2017 the Office Of Government Procurement published 'Public Procurement Guidelines For Goods And Services' which on pages 24-27 outline the updated Irish policy and practice in relation to minimum standards, use of procurement as a strategic policy instrument, facilitation of environmental and social considerations, labour law and reserved contracts. More assistance is needed to maximise the equality and inclusion potential of procurement policy and practice.

¹⁶⁸ These are specified in Annex XIV of the directive

¹⁶⁹ European Commission (2010). Buying social: a guide to taking account of social considerations in procurement. Brussels: DG Employment, Social Affairs and Equal Opportunities and DG Internal Market

¹⁷⁰ GPP News Alert: Interview: Revision of the Public Procurement Directives: The potential for GPP, Issue 38, January 2014. Available online: http://ec.europa.eu/environment/gpp/pdf/news_alert/Issue38_NewsAlert_interview.pdf

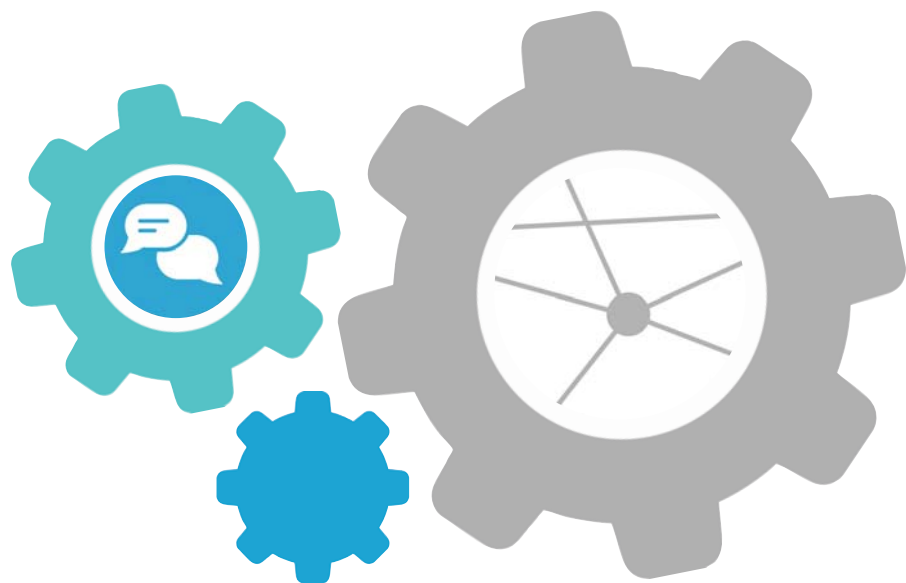
APPENDIX 4

Gender equality and the procurement process

NWCI¹⁷¹ argue gender equality must run through all aspects of the procurement process, making the case that “A Public Procurement Policy, which does not explicitly account for the gender dimension... is unlikely to be gender neutral¹⁷², and advocating for genuine engagement with gender equality, not as an optional add on but as a central objective of public procurement policy and practice. NWCI distinguish between ‘mandatory labour rights’ and ‘social considerations’, arguing both should clearly reflect gender equality. Legislative requirements, mandatory obligations and established commitments in the area of gender equality include both National and European equal status and equality legislation, important new obligations in relation to positive duty for public bodies as well as commitments under the National Strategy for Women and Girls 2017-2020, Europe 2020 and the national anti-poverty strategy should also be fully reflected in transposition.

NWCI argue gender impact assessment should be conducted prior to the making of any decision to open any new area up to public procurement. ESRI research has found that women are disproportionately impacted by changes within the public service. Contracting out of certain key services could significantly undermine gender equality standards within a particular sector. Positive duty is a particularly important consideration in this regard. Gender impact assessment should also consider women and men as service users and ensure that vulnerable service users in particular and not disadvantaged by and proposed measures.

Gender equality requirements, both mandatory and best practice, should also be clearly reflected in the social considerations around how, when and what procurement is conducted. Gender equality should be reflected and suitably weighted in the social criteria attached to and actively considered in the selection or exclusion of candidates. Contract social clauses should include gender equality and clauses should be monitored and reflected in the performance of the contract. Provision needs to be made to promote and support gender equality amongst those applying for procurement contracts. Proactive measures and supports to encourage a greater gender balance within SMEs and social enterprise have been introduced across Europe and may be appropriate in the procurement context also. Women also predominate in the community and voluntary sector which may face particular obstacles such as comparatively low turnover when seeking to tender. It is also essential to ensure ongoing gender sensitive consideration and consultation that engages with women as key users of public services. A gender balance should be maintained in the membership of the (Interim) Procurement Reform Board (which oversees the implementation of the public procurement reform programme, in particular, the programme’s structures, practices and policies on centralised procurement, and advises, where appropriate, on how to address any gaps).



171 National Women’s Council of Ireland (2016) Submission to Public Consultation on Public Procurement Dublin NWCI

172 Commonwealth report on “Why Does Gender Matter in Public Procurement”

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