

# Preface

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The 21st century has begun with European Institutions striving for competitiveness and growth in the European Union. One of the most important drivers for both competitiveness and growth in the Member States is the regulation of public procurement.

The regulation of public procurement in the European Union has multiple dimensions, as a discipline of European law and policy, directly relevant to the fundamental principles of the common market and as a policy instrument in the hands of Member States. Its purpose is to insert a regime of competitiveness in the relevant markets and eliminate all non-tariff barriers to intra-community trade that emanate from preferential purchasing practices which favour national undertakings. The regulation of public procurement represents best practice in the delivery of public services by the state and its organs and facilitates the observance of well-embedded principles such as accountability for public expenditure, avoidance of corruption and political manipulation.

This book aims to provide the reader with a comprehensive analysis of the law and jurisprudence which have shaped the landscape of the regulation of public procurement in the European Union and its Member States.

In Chapter 1 public procurement is positioned within the context of the single market in the European Union. The objective of this chapter is to provide the necessary links between the regulation of public procurement and the remit of European law. This chapter reveals the concept of public markets and the economic policy dimension in the regulation of public procurement. It also points out the policy rationale of the relevant legal structure and the overall framework of Community and national competence. Chapter 1 examines the anti-trust dimension in public procurement regulation and justifies the influence of neo-classical economic theory upon the integration of public markets. This finding also reflects on the public policy dimension of public procurement and the interplay of public purchasing with state aid. As a result, the industrial policy dimension in public procurement emerges and the remit of public procurement regulation demonstrates its flexibility and complementary relation with other policies in the European integration process.

Chapter 2 covers the applicability of the public sector rules, the coverage and scope of the new Public Sector Directive, the requirements for adver-

tisement and publicity of public contracts, the process of qualitative selection of tenderers and candidates, the use of award procedures and award criteria. Chapter 3 reflects on the applicability of the utilities rules, the coverage and scope of the Utilities Directive, the activities which are covered and the activities which are excluded from the Utilities Directive, publicity and advertisement requirements, qualification and qualitative selection systems, award procedures, framework agreements and award criteria.

Chapter 4 deals with legal redress and compliance with the public procurement *acquis* in the Member States and reflects on remedies available to individuals at national level and access to justice in public procurement disputes. The objective of this chapter is to assess the progress made by Member States to decentralize enforcement of public procurement rules by creating the appropriate legal frameworks that encourage aggrieved contractors to seek redress and justice. This chapter covers the applicability and principles of the Remedies Directives, which supplement the application of the substantive Public Sector and Utilities Directives.

Chapter 5 addresses the doctrines and principles of public procurement regulation which have emerged through its evolution. The doctrines of public procurement regulation refer to the mechanism for the applicability and engagement of the relevant rules and provide for different notions and definitions which are necessary for the harmonization of national legal and political systems with a view to integrating their respective public markets. The principles of public procurement regulation include the principle transparency and accountability and their surrogate principles of non-discrimination and objectivity. The chapter provides for a comprehensive analysis of the interplay of these principles and the way they have influenced the evolution of public procurement regulation. Chapter 6 deals with the notion of contracting authorities as instrumental concept for the traction of the public and utilities procurement rules. The analysis in the chapter offers a codified approach of the concept of contracting authorities under the Court's jurisprudence and its recent developments, their relation with private sector undertakings, the conditions for pursuing services of general interest as part of public procurement contracts, especially the criteria for defining bodies governed by public law and the tests used by the Court to define the existence of state control over an entity which is construed as contracting authority. Chapter 7 covers the notion of public contracts as instrumental concept for the traction of the public and utilities procurement rules. The chapter offers a comprehensive analysis of jurisprudential developments relating to the notion of public contracts and deals with the notions of public contracts in cases of public service concessions, vertical procurement and subcontracting, procurement and state aid, procurement and services of general

interest, needs in general interest and contracts financing public services. Chapter 8 reflects on the process of awarding public procurement contracts and covers the selection and qualification of tenderers and candidates, where it examines jurisprudence on technical standards, selection and qualification requirements, consortia participation in tendering procedures, reliance of tenderers on other sources substitution of consortia members, and reasons for exclusion and disqualification of tenderers. In addition, the chapter examines award procedures and award criteria in public procurement. The objective of this chapter is to focus on the reasoning of the Court in its attempt to provide a dynamic analysis of the procedures applicable to the award of public contracts. It demonstrates the nature and characteristics of the award procedures, as viewed by the Court and their utilization by contracting authorities. It elaborates upon the restrictive interpretation of the negotiated procedures and attempts to define the framework for their utilization, the grounds for their legitimate use, and the justification and causality requirements for negotiated procedures without prior publicity, practically the use of negotiated procedure for technical reasons or reasons of extreme urgency, or as a result of repetition of similar works within three years. The chapter finally investigates the Court's case law in relation to award criteria and presents a comprehensive analysis of the two criteria laid down in the Public Procurement Directives. It provides for the conditions under which contracting authorities award public contracts. The Court has many opportunities to pronounce on the features of the award criteria, namely the lowest price or the most economically advantageous offer. The chapter explores the Court's views in relation to the following topics: the meaning of abnormally low offers, the compatibility of mathematical matrixes, the evaluation of the lowest offer, the factors included in the most economically advantageous offer and policy considerations, such as employment, protection of the environment as part of the award criteria.

Chapter 9 covers the evolution of the phenomenon of public-private partnerships and provides for a comprehensive analysis of the structure of remedies and access to justice at national level and the jurisprudence of the Court relating to compliance issues of public procurement regulation. The chapter evaluates the relation between public procurement and public-private partnerships and the surrogate development of public-public partnerships and concessions as instruments for delivering public services. It appraises recent legal, policy and judicial developments that have emerged as a result of the involvement of the private sector in the delivery of public services and in particular their financing. The concept of public-private partnerships is gaining momentum across the common market and policy makers are keen to see the relevant model as a credible and effective delivery mechanism. The chapter demonstrates that the

procurement of partnerships must adhere to the enshrined principles of transparency, objectivity and non-discrimination that underpin the public procurement regime and provides for a detailed analysis of legal developments in the field of concessions.