
Preface

The regulation of public procurement in the European Union has multiple dimensions. As a discipline of European law, it is directly relevant to the fundamental principles of the internal market. Public procurement regulation is a necessary component of the principles of free movement of goods and services, the right of establishment and the prohibition of discrimination of nationality grounds. It is also a policy instrument. The identification of public procurement as a major non-tariff barrier has revealed the economic importance of its regulation.¹ Procurement by Member States is often susceptible to a policy that favours indigenous undertakings and national champions at the expense of more efficient competitors. The policy dimension of public procurement regulation aims at market integration across the EU. Through the principles of transparency, non-discrimination and objectivity in the award of public contracts, it is envisaged that the regulatory system will bring about competitiveness in the relevant product and geographical markets, will increase import penetration of products and services destined for the public sector, will enhance the tradability of public contracts across the common market, will result in significant price convergence and finally it will be the catalyst for the needed rationalization and industrial restructuring of the European industrial base.

The regulation of public procurement has been a priority for the European Union since the 1986 Single European Act, a legislative framework which paved the way for the conclusion of the Maastricht Treaty on European Union. The White Paper for the Completion of the Internal Market² and the Single European Act represented the conceptual foundation of the regulation of public markets of the Member States. The identification of public procurement as a significant non-tariff barrier has offered ample evidence on the economic importance of its regulation.³ Savings and price convergence appeared as the main arguments for liberalizing the trade patterns of the demand (the public and utilities sectors) and supply (the industry) sides of the public procurement equation.⁴ The regulation of public procurement exposes an economic and a legal approach to the integration of public markets in the European Union. On the one hand, the economic approach to the regulation of public procurement aims at creating an

¹ See Commission of the European Communities, *The Cost of Non-Europe, Basic Findings, Vol.5, Part.A; The Cost of Non-Europe in Public Sector Procurement* (Luxembourg: Official Publications of the European Communities 1988). Also the Cechinni Report 1992 *The European Challenge* (Aldershot, Wildwood House 1988).

² See European Commission, *White Paper for the Completion of the Internal Market* (COM) 85 310 fin. (1985).

³ See Commission of the European Communities, *The Cost of Non-Europe, op.cit.* Also the Cechinni Report *op.cit.*

⁴ The European Commission claimed that the regulation of public procurement could bring substantial savings of €20 billion or 0.5% of GDP to the European public sector. See European Communities, *The Cost of Non-Europe, op.cit.*

integral public market across the European Union. Through the principles of transparency, non-discrimination and objectivity in the award of public contracts, it is envisaged that the public procurement regulatory system will bring about competitiveness in the relevant product and geographical markets, will increase import penetration of products and services destined for the public sector, will enhance the tradability of public contracts across the common market, will result in significant price convergence and finally it will be the catalyst for the needed rationalisation and industrial restructuring of the European industrial base.⁵ A combination of legal and economic objectives project upon public procurement regulation principles of public sector management such as transparency, accountability, fiscal prudence and competition and make public procurement regulation a necessary ingredient for the EU integration process. The commonly accepted assumption is that public procurement is not subject to the same commercial pressure or organisational incentives for sound management as private sector procurement which is underpinned by the foundations of strong competition. This has prompted the imposition, not only by the EU but by many international jurisdictions, of legal and regulatory disciplines to encourage the better use of public financial resources, to introduce greater efficiency and to reduce the risk of favouritism or corruption in public purchasing. EU public procurement rules exist in order to introduce a regulatory discipline in the relevant markets. Legislation, policy guidelines and jurisprudence have all played their role in determining the need for integrated public markets in the European Union, where sufficient levels of competition influence the most optimal patterns in resource allocation for supplying the public sector as well as the public utilities with goods, works and services.

The degree and level of importance of public procurement in the European Union and the constant evolution of its regulation which reveals indissoluble links with European law prompted the review of the substantive public procurement Directives.⁶ The financial stakes for public procurement regulation in the EU and the Member States are high. Currently, the total public expenditure directed by the Member States in procuring goods, works and services accounts for over €2 trillion. Public procurement in the Member States is a highly fragmented and complex process, notably in relation to the extent of centralization or decentralization which varies amongst Member States as a function of the organization of their public administration. There is a large and heterogeneous range of over 250,000 contracting authorities across the EU which annually undertake in excess of 2 million procedures for the award of public contracts.⁷ The vision and aspirations of European Institutions towards a Single Market Act⁸ have

⁵ See Commission of the European Communities, *Statistical Performance for keeping watch over public procurement*, 1992. Also the *The Cost of Non-Europe*, *op.cit.*

⁶ See *Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market* COM (2011) 15/47.

⁷ An approximate 20% of total public expenditure on goods, works and services is covered by the EU public procurement directives. The estimated value for these contracts is €420 billion in 2009–10. Three-quarters of the value of procurement advertised in accordance with EU rules is for construction work and services. Supplies make up only a quarter of all procurement.

⁸ See European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act* COM(2010) 608 final.

identified public procurement reforms as the most essential components of competitiveness and growth⁹ and as indispensable instruments of delivering public services.¹⁰

Public procurement regulation is an essential component of the single market¹¹ because public procurement has been identified as a considerable non-tariff barrier and a hindrance to a genuinely competitive single market. Economic justifications for its regulation are based on the assumption that by introducing competitiveness into the relevant markets of the Member States, their liberalization and integration will follow. This result, in theory, would increase import penetration of products and services destined for the public sector, would enhance the tradability of public contracts across the common market and would bring about significant savings and price convergence. However, Member States retain substantial discretion for the regulation of public procurement outside the scope of the EU Directives.¹² Several Member States regulate public procurement below EU thresholds within the same act as the contracts covered by the EU Directives and also require the use of open, fair and competitive procedures, which have similar features to those laid down in the Directives. There are areas where national rules and procedures are often similar for contracts above and below the EU thresholds, such as rules for qualitative selection, evaluation of tenders, award criteria, abnormally low tenders, technical specifications, framework agreements and electronic procurement. Other Member States provide a lighter regime for contracts below the EU thresholds, which may take the form of administrative guidance rather than formal legislation and offer shorter time limits for submission of applications and tenders and less demanding rules for publication and for selection of tenders.

The legal approach to the regulation of public procurement reflects on a modality which facilitates the functions of the common market. In parallel with the economic arguments, legal arguments have emerged supporting the regulation of public procurement as a necessary ingredient of the fundamental principles of the Treaties, such as the free movement of goods and services, the right of establishment and the prohibition of discrimination of nationality grounds.¹³ The legal significance of the regulation of public procurement has been well documented through the Court's jurisprudence. The liberalization of public procurement indicates the need to eliminate preferential and

⁹ See European Commission, Communication, Europe 2020, *A strategy for smart, sustainable and inclusive growth*, 3 March 2010, COM (2010) 2020 final.

¹⁰ See European Commission, *Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest*, 7 December 2010, SEC(2010) 1545 final. See European Commission, *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement*, SEC(2010) 1258, final.

¹¹ See European Commission, *Towards a Single Market Act*, *op.cit.*

¹² Large amounts of public expenditure on goods and services to provide health, education and social services (over 6% of GDP) are spent in ways which are not covered by the EU public procurement Directives. Also, public contracts below the EU thresholds fall outside the scope of the EU public procurement Directives but they are of significant importance. Below-threshold procurement was estimated at around €250 billion in 2008 or around 2% of EU GDP.

¹³ See C. Bovis, 'Recent Case Law relating to Public Procurement: A Beacon for the Integration of Public Markets' (2002) 39 *Common Market Law Review* 1025–56.

discriminatory purchasing patterns by the public sector and create seamless intra-community trade patterns between the public and private sectors. Procurement by Member States and their contracting authorities is often susceptible to a rationale and a policy that tend to favour indigenous undertakings and national champions¹⁴ at the expense of more efficient competitors (domestic or Community-wide). As the relevant markets (product and geographical) have been sheltered from competition, distorted patterns emerge in the trade of goods, works and services destined for the public sector. These trade patterns represent a serious impediment in the functioning of the common market and inhibit the fulfilment of the principles enshrined in the Treaties.¹⁵

The European Court of Justice has viewed the public procurement legal framework through two approaches: a positive one, revealing the flexibility of the regulatory regime and at the same time a restrictive one reflecting on the interpretation of the regime. The Court's approaches provide intellectual assistance to the efforts of European institutions in order to strengthen the three principles (non-discrimination, objectivity and transparency) underlying the regulation of public procurement.¹⁶ The positive approach of the Court comprises its attempts to eliminate discrimination and non-tariff barriers in the fields of technical standards (product specification and standardization) and the selection procedures (quantitative and qualitative suitability criteria). The Court's judicial positivism through the observance of non-discrimination and objectivity principles epitomizes the integral role of public procurement in the attainment of the fundamental principles of the Treaty, specifically the right of establishment and the freedom to provide services. On the other hand, the Court's restrictive approach serves the principle of objectivity, with particular reference to the use of the award procedures for public contracts.

The above pattern also reflects on a strategic goal of the European judiciary: to vest the public procurement regime wherever possible with direct effect. Arming the public procurement rules with direct effect will enhance access to justice at national level, improve compliance, increase the quality of the regulatory regime and finally streamline the public procurement process across the common market by introducing an element of uniformity. By conferring direct effect upon the public procurement directives and inviting national courts to play a prominent role in future public

¹⁴ The term *implies* a firm with more than a third of its turnover made in its own country and which has enjoyed formal or informal government protection. The term has been defined by Abravanel and Ernst, 'Alliance and acquisition strategies for European national champions' (1992) 2 *The McKinsey Quarterly* 45–62.

¹⁵ See Communication from the European Commission to the Council, the European Parliament, the Economic and Social Committee, and the Committee of the Regions, 'Working together to maintain momentum' 2001 Review of the Internal Market Strategy, Brussels, 11 April 2001, COM(2001)198 final. Also European Commission, Commission Communication, Public procurement in the European Union, Brussels, 11 March 1998, COM (98) 143.

¹⁶ See the recital of Directive 89/440, [1989] OJ L210/1 amending the original works Directive 71/305 concerning co-ordination of procedures for the award of public works contracts, stating that '... it is necessary to improve and extend the safeguards in the directives that are designed to introduce transparency into the procedures and practices for the award of such contracts, in order to be able to monitor compliance with the prohibition of restrictions more closely and at the same time to reduce disparities in the competitive conditions faced by nationals of different Member States'.

procurement litigation, the Court has hinted towards its preference for a decentralized enforcement of the public procurement regime. However, the most important lesson law and policy makers have learnt from the Court's approaches to public procurement is the potential of its regulation with regard to policy formulation at both national and European levels.

In its jurisprudence, the Court has reflected on the relative importance of public procurement to the fundamental freedoms of the common market, namely the right of establishment and the freedom to provide services. The approach taken by the Court has revealed a positive yet restrictive interpretation of the Directives. By conferring direct effect upon their provisions where appropriate and inviting national courts to play a prominent role in future public procurement litigation, the Court has hinted towards its preference for a decentralized enforcement of the Directives. The Court's jurisprudence has also played an important function in delineating key concepts within the public procurement legal framework, such as contracting authorities and award criteria. This has exposed a significant characteristic of the EU Public Procurement Law: flexibility. The Court developed a *ratione*, which recognizes discretion in the hands of contracting authorities, discretion which is integral to the legal framework, compatible to the attainment of the fundamental freedoms of the common market and complementary with other policies.

The Court gradually abandoned the formality test in determining the relationship between an entity and the state and instead adopted the functionality and dependency tests to define contracting authorities. In addition, dualism and the dual capacity of contracting authorities are irrelevant to the applicability of public procurement Directives. The Court inferred that commerciality and competitiveness might render the public procurement rules inapplicable. The Court accepted, in principle, the complementarity of relevant policies of the European integration process, such as social policy and the protection of the environment, by conferring discretion to contracting authorities to award public contracts by reference to employee protection as well as socio-economic and environmental considerations.

The influence of neo-liberal economic theory on public procurement regulation has taken the relevant *acquis* through the paces of liberalization within the European Union and with reference to the World Trade Organization. Anti-trust and its remedies have played a seemingly important role in determining the necessary competitive conditions for the supply side to service the public sector. However, we have seen the emergence of a *sui generis* market place where the mere existence and functioning of anti-trust is not sufficient to achieve the envisaged objectives. Public markets require a positive regulatory approach in order to enhance market access. Whereas anti-trust and the neo-liberal approach to economic integration depend heavily on price competition, public procurement regulation requires a system which primarily safeguards market access. Such regulatory system could be described as public competition law. The above represents the first departure from the *stricto sensu* neo-liberal perspective of public procurement. A policy orientation has emerged mainly through the jurisprudential approach of the regime and the willingness of the Court to expand on the element of flexibility that is inherent in the public procurement Directives.

The neo-liberal versus the *ordo* approach reflects the frequently rehearsed debate about the origins of anti-trust law and policy *per se*. The European integration has

benefited from a system where the neo-liberal approach has contributed to the functioning of an environment of workable competition. However, consistently the rigidity of the neo-liberal influence has been diluted with policy considerations, often attributed to national policy requirements. The reflection of the above picture is presented in public procurement regulation, although there are certain differences: the Court has allowed for a flexible policy-oriented application of public procurement, where in anti-trust the Commission has eroded the strict neo-liberal approach of competition rules with the plethora of policy considerations. Nevertheless, the similarity of balancing an economic exercise with policy choice is remarkable.

Subsequent generations of legal instruments which regulate public procurement in the EU have intended to simplify and modernize a regulatory regime which aims at establishing gradually a public market in the European Union. This regulatory regime seeks to accomplish unobstructed access to public markets through transparency of public expenditure relating to procurement, improved market information, elimination of technical standards capable of discriminating against potential contractors and uniform application of objective criteria of participation in tendering and award procedures. The public procurement regulatory regime has three principal objectives: simplification, modernization and flexibility.

The objective of simplification has materialised through the codification of supranational administrative law in the form of an EU Directive which covers all public sector procurement. The objective of modernization is met by introducing a number of regulatory innovative concepts. The ability of bodies governed by public law to tender for public contracts alongside private undertakings is a significant development. The use of framework procurement could assist in bringing the public sector closer to a seamless supply chain management. The introduction of electronic procurement and the use of information technology in public purchasing could process the logistics of public sector purchasing faster and more efficiently. The introduction of the competitive dialogue envisages facilitating the award of complex projects such as public-private partnerships and trans-European networks.

The objective of flexibility is demonstrable through the relaxation of the competitive tendering regime, and the disengagement of the public procurement rules in industries that operate under competitive conditions in the utilities sectors indicates the links between procurement regulation and anti-trust. The non-applicability of the regime to telecommunications entities is an important development indicative of the future legal and regulatory blueprints.

The regulation of public procurement reflects on two opposite dynamics: one of a community-wide orientation and one of national priorities. The influence of neo-liberal economic theory on public procurement regulation has taken the relevant regime through the paces of the liberalization. However, the emergence of a *sui generis* market place where the mere existence and functioning of anti-trust is not sufficient to achieve the envisaged objectives is evident. Public markets require a positive regulatory approach in order to enhance market access. Whereas anti-trust and the neo-liberal approach to economic integration depend heavily on price competition, public procurement regulation requires a system which primarily safeguards market access. Such regulatory system could be described as public competition law. The above scenario

represents a departure from the *stricto sensu* neo-liberal perspective of public procurement. A policy orientation has emerged mainly through the jurisprudential approach of the regime and the willingness of the Court to expand on the element of flexibility that is inherent in the public procurement Directives. The Court has allowed for a flexible policy-oriented application of public procurement, where in anti-trust the Commission has eroded the strict neo-liberal approach of controlling market power with the plethora of policy considerations.

Public procurement is a powerful exercise. It carries the aptitude of acquisition; it epitomizes economic freedom; it depicts the nexus of trade relations amongst economic operators; it represents the necessary process to deliver public services; it demonstrates strategic policy options. Public procurement as a discipline expands from a simple topic of the common market, to a multi-faceted tool of European regulation and governance covering policy choices and revealing an interesting interface between centralised and national governance systems. This is where the legal effects of public procurement regulations are felt most. Litigation and jurisprudential inferences will be extremely important in understanding the thrust of the new regime. The role of the Court has been instrumental in shaping many of the newly introduced concepts and in the future will be invaluable in interpreting the new regime and pronounce on the compatibility of national provisions with *acquis communautaire*.

The strategic importance of public procurement for the European integration process has been recognised by the 2011 Single Market Act¹⁷ which has prompted a series of reforms to the EU Public Procurement *acquis*.¹⁸ These reforms aim at linking public procurement directly with the European 2020 Strategy which focuses on growth and competitiveness. The importance of a liberalized and integrated public procurement regime as an essential component of the Single Market has been clearly established.¹⁹ The conceptual origins of public procurement regulation in the European Union can be traced in policy instruments which identified purchasing practices of Member States as considerable non-tariff barriers and as hindering factors for the functioning of a genuinely competitive internal market.²⁰ Economic justifications for regulating public procurement have pointed towards introducing competitiveness into the relevant markets in order to increase cross-border trade of products and services destined for the public sector and to achieve price transparency and price convergence across the European Union, thus achieving significant savings.²¹ The need for competitiveness and transparency in public procurement markets is also considered as a safeguard to

¹⁷ See European Commission, Communication, Europe 2020, *A strategy for smart, sustainable and inclusive growth*, 3 March 2010, COM (2010) 2020 final.

¹⁸ See Green Paper on the modernization of EU public procurement policy: *Towards a more efficient European Procurement Market*, COM(2011)15/47.

¹⁹ See European Commission, *Towards a Single Market Act op.cit.*

²⁰ See European Commission, *White Paper for the Completion of the Internal Market*, COM (85) 310 fin, 1985; also Green Paper on Public Procurement in the European Union: *Exploring the way forward*, European Commission 1996; also European Commission, Communication on Public Procurement in the European Union, COM (98) 143.

²¹ See Commission of the European Communities, *The Cost of Non-Europe, op.cit.* Also the Cechinni Report *op.cit.*

fundamental Treaty principles,²² such as the free movement of goods and services, the right of establishment and the prohibition of discrimination on grounds of nationality.²³

The current public procurement *acquis*²⁴ has prescribed a different regulatory treatment to public sector procurement and utilities procurement. First, a more relaxed regime for utilities procurement, irrespective of their public or privatized ownership has been justified and accepted as a result of the positive effects of liberalization of network industries which has stimulated sectoral competitiveness.²⁵ Secondly, a codified set of rules, covering supplies, works and services procurement in a single legal instrument²⁶ for the public sector aims at producing legal efficiency, simplification and compliance in order to achieve the opening up of the relatively closed and segmented public sector procurement markets. A decentralized dimension of the public procurement rules has been introduced by the procurement Remedies Directives,²⁷ which nevertheless, suffered from serious deficiencies, as they did not provide for effective review procedures between the stages of contract award and contract conclusion. Thus, the Remedies Directives have been inadvertently promoting direct awards and the so-called 'race to sign' the relevant contract to ensure immunity from any redress, based on the *pacta servanta sunt* principle. In addition, during both pre-contractual and post-contractual stages there were no effective deterrents for breach of either procedural or substantive public procurement rules. These deficiencies were pointed at by the Court in numerous instances, which resulted in the amending Remedies Directive²⁸ introducing new themes such as a clear divide between pre-contractual and post-contractual stages, a balance between effective review of public contracts and need of efficient public procurement, a strict standstill requirement for contract conclusion, including direct awards by contracting authorities and extensive communication and monitoring requirements.

The European Institutions through the enactment of the 2011 Single Market Act²⁹ have identified public procurement reforms as essential components of competitiveness

²² See Cases C-223/99, *Agora Srl v Ente Autonomo Fiera Internazionale di Milano* and C-260/99, *Excelsior Snc di Pedrotti Runa & C v Ente Autonomo Fiera Internazionale di Milano* [2001] ECR 3605; C-360/96, *Gemeente Arnhem Gemeente Rheden v BFI Holding BV* [1998] ECR 6821; C-44/96, *Mannesmann Anlangenbau Austria AG et al v Strohal Rotationsdruck GesmbH* [1998] ECR 73.

²³ See D. Drijber and H. Stergiou, 'Public Procurement Law and Internal Market Law' (2009) 46 *Common Market Law Review* 805–46.

²⁴ See Directive 2004/18, [2004] OJ L134 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17, [2004] OJ L134 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

²⁵ See C. Bovis, 'Developing Public Procurement Regulation: jurisprudence and its influence on law making' (2006) 43 *Common Market Law Review* 461–95.

²⁶ See Directive 2004/18, *op.cit.*

²⁷ See the Public Sector Remedies Directive 89/665 [1989] OJ L395/33, and the Utilities Remedies Directive 92/13, [1992] OJ L76/14.

²⁸ See Directive 2007/66, [2007] OJ L335/31.

²⁹ See European Commission, *Towards a Single Market Act*, *op.cit.*

and growth³⁰ and as indispensable instruments of delivering public services.³¹ The results of previous public procurement reforms have been registered in a positive manner. The public sector Directive represents a notable example of codification of supranational administrative law. The main influence for the codification of the public sector Directive can be traced in important judicial developments, in particular case-law on the definition of contracting authorities, the use of award procedures and award criteria, and the possibility for contracting authorities to use environmental and social considerations as criteria for the award of public contracts. The modernization objective of the reforms focusing on the ability of private undertakings, which pursue activities of general interests of non-commercial or industrial character to tender for public contracts alongside bodies governed by public law, is a significant development influenced by the Court's rulings. The flexibility objective of the public procurement regulatory regime reflects on the relaxation of the competitive tendering regime and the disengagement of the public procurement rules in industries that operate under competitive conditions in the utilities sectors indicate the links between procurement regulation and anti-trust. The non-applicability of the regime to telecommunications entities is an important development indicative of the future legal and regulatory blueprints.

The Court of Justice of the European Union has inferred where further reforms are needed. The substantive public procurement rules and mainly the public sector Directive suffer from legal porosity as a result of exhaustive harmonisation. Exhaustive harmonisation represents a *de lege lata* approach to public procurement regulation on the part of the European legislature. Such approach has developed certain deficiencies. The effectiveness of the procurement rules is compromised and the Court has applied, through a rule of reason approach, a hybrid transplant of EU legal principles to the public procurement Directives in order to control their porosity. However, this treatment is temporary and not conducive to legal certainty and legitimate expectation.

The reforms of the public procurement regime have been focused mainly upon the way service concessions and contracts awarded by a contracting authority to another contracting authority on the basis of exclusive rights are regulated, in the light of the interface of the public procurement *acquis* with the Services Directive.³² On the other hand, public-public partnerships and in-house contractual relations between contracting authorities or undertakings upon which the former exercise control similar to that exercised over their own departments and the controlled entities are operationally dependent on them link conceptually very well with public contracts awarded by utilities to their affiliated undertakings and public service contracts relating to services of general economic interest and contracts having the character of a revenue-producing

³⁰ See European Commission, *A strategy for smart, sustainable and inclusive growth*, *op.cit.*

³¹ See European Commission, *Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest*, *op.cit.* See European Commission, *Buying Social*, *op.cit.*

³² See Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36).

monopoly, and as such reflect on the positive dimension of inherent flexibility in the public procurement Directives.

Public contracts which fall below the stipulated value thresholds (sub-dimensional contracts) represent the most difficult category for reform. On the one hand, they encapsulate a significant amount of Member States' public expenditure which escapes the clutches of the public procurement *acquis*. On the other hand, the Court is keen to subject these contracts to some form of competition and has supplemented the public procurement Directives with EU law principles which ensure a parallel process of procurement with dimensional public contracts. This development has created uncertainty in the market place and resulted in a dysfunctional application of procurement rules to those contracts. The administrative and procedural burdens on the part of contracting authorities often surpass any potential efficiency benefits resulting from competitively tendering sub-dimensional contracts. In addition, adequately sufficient safeguards against intentional division of dimensional contracts into lots in order to avoid the applicability of the public procurement Directives exist in the current *acquis*.

The Single Market Act relies on a simplified public procurement regime in the EU, which will result from procedural efficiencies and from streamlining the application of the substantive rules. Public procurement regulation will play a pivotal role for the delivery of the European 2020 Growth Strategy.

This research handbook aims to provide the reader with a comprehensive analysis of the law, jurisprudence and regulation of public procurement in the European Union. It is structured into five thematic parts, consisting of 19 substantive chapters.

In the Introduction, public procurement as a discipline within the European economic and legal integration is considered.

Part 1 comprises six chapters which offer the reader a trajectory of the development, evolution and application of the public procurement *acquis*.

Chapter 1 entitled 'The principles of public procurement regulation' presents a thematic overview of the reformed public procurement regime by revealing the new concepts in public procurement regulation relevant to the public sector and also relevant to the procurement of utilities. It also exposes the new dynamics with regard to the new public procurement regime on concessions. Chapter 2 entitled 'Public procurement and contracting authorities' examines case-law relating to the notion of contracting authorities and also provides for a codified approach of the concept of contracting authorities under the Court's jurisprudence, 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 3 entitled 'Public contracts in public procurement regulation' examines the concept of public contracts in public procurement. The Court has dealt with the notion of public contracts in cases regarding 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 4 entitled 'Public procurement and frameworks' has the purpose to offer an exposition of the nature and purpose of the framework agreement at large and to then focus in on the framework agreement as it is defined and conceived for the purposes of European public procurement regime. The

chapter will consider the concept, definition and forms of framework agreement and how frameworks may be operated, established and breaches of them remedied. Finally, this chapter will turn to examine, whether, notwithstanding their wide usage, frameworks are in fact capable in principle and in fact of delivering the efficiencies and cost benefits that they appear to herald while maintaining fairness and transparency. Chapter 5 entitled 'Public procurement and award criteria' 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 6 entitled 'Sub-dimensional public procurement in the European Union' focuses on contracts that fall outside the ambit of the Public Sector Directive – the sub-dimensional public procurement. The analysis applies also to contracts above and below the thresholds set out for Annex XVI services (non-priority services), the latter being only in part subjected to EU law rules anyway.

Part 2 comprises of four chapters which offer the reader a comprehensive approach of strategic procurement.

Chapter 7 entitled 'Innovative and sustainable procurement: framework, constraints and policies' examines cases where no solutions yet exist on the market; innovative procurement enables public purchasers to get technologically innovative solutions developed according to their specific needs. By steering product development upstream in the product development process, public purchasers are better positioned to improve the quality, effectiveness and efficiency of their public services, while the private business sector operates within an increasingly competitive environment. Such an approach contributes to achieving better value for money as well as wider economic, environmental and societal benefits in terms of generating new ideas, translating them into innovative products and services and thus promoting sustainable growth. Chapter 8 entitled 'Innovative public-private partnerships' attempts to identify and analyze what are the available ways in which to procure innovative Public-Private Partnerships under the Public Sector Directive. Chapter 9 entitled 'Strategic EU public procurement and small and medium size enterprises' examines the understanding of SMEs' involvement in public procurement in the EU. The study provides an overview of EU public procurement policy with regard to the facilitation of a wider SMEs' involvement and a description and analysis of the barriers SMEs face in entering the public procurement market and the available countermeasures. Chapter 10 entitled 'Public procurement and services of general economic interest' investigates the role of public procurement in the financing of SGEIs by focusing on the link between the application of the State aid rules and the public procurement framework.

Part 3 comprises of three chapters which offer the reader a comprehensive analysis of the justiciability of public procurement.

Chapter 11 entitled ‘Judicial activism and public procurement’ offers a critical assessment of the impact of the Court’s jurisprudence upon public procurement regulation. The chapter establishes that judicial activism represents the most influential factor in the evolution of the public procurement *acquis* and serves as the prelude to legislative and policy reforms to continuous modality changes in delivering public services. Chapter 12 entitled ‘The Remedies Directive in public procurement’ deals with legal 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 justice. Chapter 13 entitled ‘The role of the European Court of Justice in public procurement’ examines the role of the Court in public procurement law by exploring some areas where the Court’s jurisprudence has been of particular importance for the development of public procurement law, namely concessions, the exemptions for in-house cooperation, environmental considerations, selection processes and the effectiveness of remedies.

Part 4 comprises of three chapters which offer the reader an evaluation of the relationship between public procurement and competition.

Chapter 14 entitled ‘Public procurement and competition: some challenges arising from recent developments in EU public procurement law’ explores the recent OECD push for more competition in public procurement and its role as an influential factor in the 2014 reform of EU public procurement rules. Afterwards, it critically assesses three of the main challenges to keeping public procurement precompetitive: (i) the difficult balance in terms of procurement transparency created by the clash between competition and corruption concerns; (ii) the magnification of the undesired (potential) anti-competitive effects of public procurement that centralized procurement may generate, as well as its increasing use as an improper tool of market regulation; and (iii) the possible competitive distortions and the potential advantages resulting from the generalization of eProcurement. Chapter 15 entitled ‘Public procurement and State aid’ presents an overview of both the public procurements and State aid rules and discusses their interplay in the light of the modernization of EU public procurement which presents certain opportunities to increase convergence between the application of the EU public procurement and State aid rules. Chapter 16 entitled ‘EU public procurement and probity’ deals with the connection between public procurement and corruption; it examines the legal background – including the previous Public Procurement Directives and the current new Directives – to the prevention of corruption and fraud in procurement procedures and concludes that the use of traditional instruments may be inadequate in the struggle for ethical public procurement. Prevention and access to relevant, procurement-related information on the part of the legislator are as much part of the subject matter as the independent audit activity of the contracting authorities and the focus on the real meaning and content of probity.

Part 5 comprises of three chapters which offer the reader an evaluation of the relationship between public procurement and public services.

Chapter 17 entitled ‘The new EU defence procurement regime’ comprehensively covers the procurement of armaments and other security sensitive goods and services. The objective of the chapter is to explain the use of Article 346 TFEU and other

security exemptions in defence and security procurement inside the EU internal market. Chapter 18 entitled 'Public service partnerships' evaluates the relationship between public procurement and public private partnerships. 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. Chapter 19 entitled 'Concessions and public procurement' covers the evolution of the phenomenon of concession and public private partnerships, provides for a comprehensive analysis of the structure of such arrangements and a detailed analysis of legal developments in the fields of concession contracts at Community level and demonstrates that the procurement of public-private partnerships must adhere to the newly adopted concessions Directive which has enshrined principles of transparency, objectivity and non-discrimination that underpin the public procurement regime.