Foreword

Public and utilities procurement in the European Union (EU) represents a staggering 13.5% of the EU Gross Domestic Product (GDP), which in turn translates to a trillion Euro on an annual basis.

There are two main reasons for the regulation of public procurement in the European Union. The first reason reveals the importance of public and utilities procurement for the proper function of the common market and the attainment of the objectives envisaged by European Union law. The second reason reflects the need to bring respectively public sector and utilities procurement markets in parallel operation to that of private markets. Jurisprudence, policy making and academia have recognised the distinctive character of public markets.

Intellectually, public procurement regulation draws support from neo-classical economic theories. The assumption has been that enhanced competition in public markets would result in optimal allocation of resources within European industries, rationalisation of production and supply, promotion of mergers and acquisitions, elimination of sub-optimal firms and creation of globally competitive industries.

Purportedly, one of the most important surrogate effects of public procurement regulation is to yield substantial purchasing savings for the public sector. The price of goods, services and works destined for the public sector will converge as a result of the liberalisation of and competitiveness in the relevant public markets.

The regulation of public procurement reveals two diametrically opposite dynamics. On the one hand, the influence of neo-classical economic theories has given a community-wide orientation to the regulation process and has taken the relevant regime through the paces of liberalisation within the European Union and with reference to the World Trade Organisation (WTO). Anti-trust has played a seemingly important role in determining the necessary competitive conditions for the interface between public and private markets. However, we have seen the emergence of a sui generis market place where the mere existence and functioning of anti-trust is not sufficient, on its own, to achieve the envisaged objectives. Public markets require a positive regulatory approach in order to enhance market access. Whereas anti-trust and the neo-classical approach to economic integration depend heavily on price competition, public procurement regulation requires a system which primarily
safeguards market access. Such a regulatory system could be described as public competition law. There is strong evidence that the emergence of competitive conditions within public markets would render public procurement regulation inapplicable. This development denotes the referral of public markets to anti-trust as the ultimate regulatory regime.

On the other hand, public procurement has been traditionally viewed as the main driver of national industrial policies. Preferential purchasing patterns, strategic development of national champions and interestingly, an increasing influence of ordo-liberal theories have placed public procurement as an instrument of policy not only at national level, but also at European level.

Public procurement regulation is an essential requirement for the proper functioning of the common market and the envisaged fundamental freedoms. It is also a valuable source of international trade law in its attempts to integrate public sector markets. The new generation of legal instruments intend to simplify and modernise the regime and bring in synergies with the acquis communautaire, as well as with the WTO regime.

The purpose of this book is to provide for a comprehensive analysis of the legal regime of EU public procurement and its interrelation with European and national policies. The Introduction provides a conceptual framework of public procurement within European Union law. It further examines the thrust and parameters of public procurement regulation and it concludes by exploring the notion of public markets.

In Chapter 2, the development of a public procurement framework is depicted in chronological order. The chapter provides a detailed analysis and critique of the first generation of public procurement acquis, right up to the completion of the first transitional period of the European Communities in 1969. It then proceeds to examine the second generation of public procurement acquis and the evolution of the GATT (General Agreement on Tariffs and Trade) Agreement on Government Procurement and the enactment of the Remedies Directives. After the completion of the internal market project in 1992, the third generation of public procurement acquis and the WTO Government Procurement Agreement took the public procurement regulation a step deeper into the integration process of the public markets. The chapter elaborates on the consolidated Directives and the first Public Services Directive, which were enacted after the completion of the internal market in 1992. Finally, the fourth generation of public procurement acquis with the enactment of the new Public Sector and Utilities Directives is investigated. Future developments such as the procurement of public private partnerships and the revision of the Remedies Directives are finally examined.

Chapter 3 reflects on the principles of public procurement regulation and in particular the public nature of the contracting authorities, the principle of transparency and its effects, the de minimis principle and the dimensionality of...
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public procurement in the European Union, the principle of fairness, the principle of non-discrimination and the principle of objectivity.

Chapter 4 examines public sector procurement and the new Public Sector Directive. It analyses the principles of the Public Sector Directive, its substantive applicability, its monetary applicability and concludes by exposing the new concepts in public sector procurement.

In Chapter 5, the advertisement and publicity requirements in public sector procurement are explained. In particular, the requirements of publication of notices, deadlines for receipt of requests to participate and for receipt of tenders, the inclusion of technical standards and specifications, the contractual performance stipulated under the Public Sector Directive and finally the obligation to provide information and feedback to candidates and tenderers are fully explored.

Chapter 6 provides a detailed analysis of the qualitative selection in public sector procurement. It examines disqualification grounds and reasons for automatic exclusion. It analyses the economic and financial standing of economic operators, as well as requirements relating to their technical and professional ability. It investigates the function of official lists of approved economic operators, as well as exclusion and rejection of economic operators mentioned in those lists. Finally, it provides an insight into consortia and group procurement.

In Chapter 7, the term of public contracts under public sector procurement is investigated thoroughly. An analysis is provided of the types and categories of public contracts under the Public Sector Directive and also a comprehensive review of the jurisprudence of the European Court of Justice on the notion of public contracts and their constituent ingredients is presented. The chapter provides valuable insights into the interface of public contracts and state aid, services of general interest, needs in the general interest, as well as the notion of public service concessions.

Chapter 8 demonstrates the nature and characteristics of contracting authorities under public sector procurement. It further analyses case law on contracting authorities and in particular the seemingly important test developed by the European Court of Justice to determine contracting authorities and bodies governed by public law. The chapter analyses the functional dimension of contracting authorities and the notion of bodies governed by public law, the dependency test for bodies governed by public law, as well as the requirement for management supervision of bodies governed by public law. It proceeds with a detailed analysis of the test of commerciality and needs in the general interest for bodies governed by public law and investigates the dual capacity of contracting authorities and their effects on the applicability of public procurement regulation. It examines the connection between contracting authorities and private undertakings, and the possibility of private companies,
or semi-public undertakings captured by the definition of contracting authorities, for the purposes of public procurement regulation. Finally, the chapter provides a detailed analysis of the relation between transfer of undertakings and contracting authorities.

In Chapter 9 the award procedures in public sector procurement are fully explained. The chapter provides a detailed investigation of the procedures available and the choice of participants, and in particular open procedures, restricted procedures, competitive dialogue, design contests, framework agreements, dynamic purchasing systems, electronic auctions, public housing schemes, public works concessions and finally negotiated procedures. Finally, the chapter provides a detailed analysis of case-law from the European Court of Justice on the grounds for use of the negotiated procedure with and without prior publication of a contract notice, as well as the weighting criteria for the utilisation of restricted procedures.

Chapter 10 examines the award criteria in public sector procurement by providing an overview of the most economically advantageous tender and lowest price award criteria. It further exposes the Court’s stance on the meaning of the most economically advantageous tender and in particular the use of social and environmental considerations as award criteria and the grounds for rejecting a tender based on its abnormally low offer.

In Chapter 11 utilities procurement is fully explored and the concepts of the new Utilities Directive analysed. The remit of the Utilities Directive, the types and categories of utilities contracts, the types of economic operators and the types and categories of contracting entities are explained with reference to the new regime. Furthermore, the principles of awarding contracts in utilities sectors and the substantive applicability of the Utilities Directive lead to a discussion of the activities covered by or excluded from the Utilities Directive, the monetary applicability of the Utilities Directive, and monitoring and information requirements.

Chapter 12 deals with publicity and advertisement in utilities procurement and examines notices requirements on the part of contracting entities, time limits for the receipt of requests to participate and for the receipt of tenders, requirements relating to invitations to submit a tender or to negotiate, requirements for the determination of technical specifications or variants and finally, requirements concerning contractual performance.

In Chapter 13, the qualification and qualitative selection requirements in utilities procurement are analysed. In particular, the chapter deals with qualification systems and their function and operation, the mutual recognition of qualifications and the applicable criteria for qualitative selection in utilities procurement.

In Chapter 14, the award procedures and award criteria in utilities procurement are exposed in thorough detail. The chapter provides a comprehensive
exposition of award procedures in utilities and in particular of the use of open, restricted and negotiated procedures, framework agreements, dynamic purchasing systems, electronic auctions and design contests. Finally, an examination of the award criteria for utilities procurement is provided by reference to the most economically advantageous tender and the lowest price criteria and the reasons and grounds for rejection of abnormally low tenders.

Chapter 15 reflects on compliance with public procurement rules at national level. It provides a comprehensive analysis of the Remedies Directives and their principles. In particular it exposes the principle of effectiveness, the principle of non-discrimination and the principle of procedural autonomy before proceeding to an analysis of the remit of the Remedies Directives and the requirements for the set aside and annulment requirements of decisions and the award of damages under the Remedies Directives. Finally, the chapter provides an insight into national legal structures and public procurement litigation.

In Chapter 16, the enforcement regime of public procurement at both European and national levels is analysed. In particular, enforcement of public procurement rules at European level covers proceedings before the European Court of Justice, interim measures as well as an analysis of the consequences of a judgment by the Court. Enforcement of public procurement rules at national level reveals a valuable picture for pre-judicial stages in review procedures, interim measures, set aside and annulment conditions, actions for damages, dissuasive penalty payments, and complaints to the European Commission, the conciliation procedure for utilities and finally, compliance with and enforcement of the rules under the WTO Government Procurement Agreement. The chapter includes a valuable codification of the jurisprudence of the European Court of Justice on the review proceedings requirements specified by the Remedies Directives.

Finally, Chapter 17 provides an epilogue and includes a summary of public procurement as a policy instrument. The chapter examines procurement regulation in the light of economic policy, anti-trust, state aid and industrial policy at European Union and national levels.