Foreword

We are proud to present the latest book based on the work of the European Procurement Law Group. As was amply illustrated in a previous book from the same group, *Modernising Public Procurement: The New Directive* (DJØF Publishing, 2014), public procurement reform was not limited to cosmetic changes. It involved substantial changes in many areas of the law. The deadline for the implementation of the 2014 Public Procurement and Concession Directives expired in April 2016. Due to the complexity of the task and, at times, to specific internal circumstances, many Member States were late in implementing the reform package. Some of them only adopted national legislation in late 2017, while a number of the first movers had to amend mistakes due to hasty work.

This new volume analyses the implementation of Directive 2014/24/EU in 12 Member States, both large and comparatively small, in all parts of the EU, and belonging to both the civil and the common law traditions. The Directive is a huge piece of legislation spanning hundreds of pages in the Official Journal of the European Union, and the implementing legislative texts are correspondingly thick. Choices had to be made to avoid national reports being too shallow. The reports focus first of all on general issues concerning implementation, giving indications as to the different approaches followed in the jurisdictions covered, including with regard to gold-plating, and looking into how the Member States have taken advantage – or not – of the margins of discretion left to them by the Directive.

A selected number of specific issues reflecting substantial novelties and of utmost relevance in practice have also been targeted for specific analysis: exclusion, competitive procedure with negotiation and changes that can lead to a duty to retender. Economic operators may be disqualified from taking part in the procedure in accordance with numerous exclusion grounds of high complexity. One of the most important novelties in the Directive was the remarkable widening of the scope of the competitive procedure with negotiation, and the limitations that remedy the increased risk of discrimination are therefore of particular interest. The elaborate regulation of changes that can lead to a duty to tender in Article 72 is of utmost importance, yet unclear on various points. All of this is considered and the book concludes with a comparative analysis written by the editors.

We thus stay true to our original idea. The European Procurement Law Group was born in 2008 when a small group of public contract law experts decided to meet regularly to discuss relevant aspects of the law and practice in this area. Members of the Group held the comparative law approach to be both valuable and necessary to understand how public procurement law is developed and applied – or misapplied – in the EU and in its Member States.

Both convergences and divergences send important signals to EU and domestic lawmakers, including the Court of Justice of the European Union. Comparative knowledge may inspire new approaches and help avoid mistakes in applying what are in the end the same principles and basic – and, at times, detailed – rules. Moreover, it is of value for practitioners in the Member States to be aware of practice, regulations, case law and interpretations of public procurement law throughout the EU, as this can assist them both in understanding the rules as applied in their own jurisdiction and in developing best practice.

Furthermore, as the same Court of Justice reminds us on its official website, the courts of the Member States are courts of the EU, as ‘the ordinary courts in matters of European Union law’. National courts and review bodies where present may, and in some cases must, refer questions to the Court of Justice. However, with more and more Member States having joined the EU and ensuing delays in the preliminary reference procedure under Article 267 TFEU, national courts and review bodies increasingly have to look elsewhere for best practice and, possibly, guidance. Precedents of national courts and review bodies of other EU Member States giving application to the same common EU rules should be a precious source of inspiration for those having to defend and decide public procurement cases.

The Court of Justice itself is aware of the comparative approach and some of its rulings are influenced by developments and trends in the regulations or practice in some Member States. Increased comparative knowledge of the case law of the different Member States may alert the Court of Justice to the difficulties national courts and review bodies are facing in giving full effect to EU law, including in terms of insufficient understanding of the law as it is. The reference to a decision by the Danish Complaints Board for Public Procurement in Advocate General Wathelet’s opinion in *Ambisig* Case C-46/15 is an obvious example of the value of dialogue between the Court of Justice and national courts.

In the end, a comparative approach makes EU institutions aware of the possible developments of common trends in the Member States. This itself points to a spontaneous convergence towards workable solutions which may give rise to a *jus commune* which would be better guided than opposed, or, worse, ignored.

This is obviously the more important issue with regard to implementation of a new legislative package rich with novelties. The national courts will start

from limited precedents in their own jurisdictions. Courts elsewhere may instead have already decided one issue, and looking to their judgments might not only help them to take their decision, but might also reinforce comity among courts in the EU and coherence in their case law. The Court of Justice in turn will benefit from this dialogue among national courts and might take heed of possible convergences in the domestic case laws giving effects to EU law.

In publishing our first book with Edward Elgar, we want to thank our former publisher DJØF and a number of different people in Copenhagen for what has been around a decade of smooth and fully satisfactory collaboration. The output from the group over this period has grown not just in the number of volumes, but also in the number of Member States covered and, more importantly, in the quality of the comparative effort. Also we want to thank Edward Elgar Publishing for their help in the production process.

Finally, the group would like to thank Professor Mario Comba for hosting us in Turin to discuss the implementation of Directive 2014/24/EU and for agreeing to co-edit the present volume.

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