1. Introduction

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1. INTRODUCTION

This book covers the implementation of the new Public Procurement Directive (Dir 2014/24 EU) in a large selection of Member States. The selection covers the largest Member States but also some of the smallest, such as Slovenia, Estonia and Denmark. The national chapters will give the reader a qualified idea of the diverse challenges and approaches at national level. In some countries there is notable fear of corruption and distrust in the integrity of the contracting authorities. As a consequence of this, regulations are restrictive and limit the discretion of the contracting authorities to a great extent. In other countries levels of corruption are markedly lower and trust higher, and in these countries there is a much higher level of flexibility in the national regulation of public procurement.

The core of the set of authors in this book comprises members of the research group behind the European Procurement Law Series but, due to the extended number of countries covered, several authors are not members of the research group. Nevertheless, all authors specialize in public procurement law.

All authors of the national chapters have followed the same basic structure, whereby section 1 is an introduction to the implementing legislation and national legal system. Section 2 covers gold-plating (overimplementation) and questionable implementation in general. Section 3 covers selected issues of implementation that have been considered of particular importance, while section 4 considers various options given to the Member States. Section 5 addresses areas in which the Directive has simply specified the aims to be reached without detailing the legal rules or regulatory options to be applied in order to achieve these aims.

Unlike previous volumes from the European Procurement Law Group, this book does not include several comparative chapters, but only a concluding comparative chapter by the editors. This is because the authors were requested to provide crossreferences to the other national chapters pointing out similarities or questioning the interpretations in other Member States or by other

authors. It can be added that comparative activity is sometimes part of the implementation procedure as such.¹

The leading idea behind this book is indeed not just to offer a plain description of the implementation procedure in each Member State, but rather to highlight the most problematic and questionable issues in the transposition of the Directive and to analyse possible alternative solutions. Since some of the authors have been active as government consultants or in other relevant positions in the process of transposition, the book will offer fresh information and comments as well as hints regarding possible future developments.

This introductory chapter proceeds as follows. Section 2 briefly outlines the characteristics of the Directive, section 3 considers gold-plating and questionable implementation, section 4 addresses selected issues of implementation and section 5 discusses options and aims to be pursued in the national implementing laws.

2. THE PUBLIC PROCUREMENT DIRECTIVE AND THE CHALLENGES IT RAISES²

The primary objective of the revision of the EU public procurement regime, including the new directive,³ was the simplification and so-called flexibilization of the regime.⁴ The intention was to overhaul the regime, to make significant changes to existing obligations and to introduce important new requirements.

The European legislator essentially did not succeed in simplifying the regime.⁵ The complexity and volume of regulations increased once again and the Directive remains a lawyer's paradise. The number of recitals

¹ See for example the Italian law 11/2016 that delegated the implementation of the Public Procurement Directives to the government and specified that implementation should also take into consideration the best practices of other Member States (even if this suggestion was not followed by the government). The implementation procedure in Denmark included comparison of the approaches and experiences of a few selected Member States.

² The analysis in this section is based on Steen Treumer, 'Evolution of the EU Public Procurement Regime: The New Directive' in Francois Lichère, Roberto Caranta and Steen Treumer (eds), *Modernising Public Procurement: The New Directive* (DJØF Publishing 2014) 9.

³ Directive 2014/24/EU of 26 February 2014.

⁴ See COM(2011)896 final, 2011/0438 (COD). Proposed procurement directive. Explanatory Memorandum section 1.

⁵ See also Sue Arrowsmith, 'Special Issue – The New EU Procurement Directives: Part I; Editors Note', (2014) 23 PPLR 81, which emphasizes that the European legislator introduced many significant changes and many new requirements, thereby again greatly complicating the system despite the stated aim of simplification.

has increased to 138, taking up numerous pages in the Official Journal of the European Union. Furthermore, the European legislator has consistently inserted statements in the recitals that ought to have been a part of the substantive provisions because they contain obligations or consider concepts or other issues of essence for the interpretation of the new public procurement regime. This tendency, and its background, is considered in further detail in section 2.1 of this chapter. The national legislators have therefore faced considerable challenges in implementing the Public Procurement Directive.

However, in many respects the Directive clearly ensures a much more flexible approach.⁶ Some of the most important changes of the new regime ensure increased access to negotiations and dialogue before, during and after the tender procedure. The Directive does not remove the ban on negotiation or soften its consequences when a contracting authority applies the open procedure or the restricted procedure. Increased flexibility is instead ensured through the introduction of the new ‘innovation partnership’ procedure, and, more importantly, by a truly remarkable widening of the scope of the flexible tender procedures for the competitive procedure with negotiation (covered in section 3 of each national chapter) and competitive dialogue.⁷

2.1 Important Shortcomings of the Public Procurement Directive

The European legislator has, in the adoption of the Directive, frequently confused substantive provisions and recitals in the Directive’s preamble. Furthermore, it appears to have frequently used the legal technique of ‘constructive ambiguity’ in order to strike compromises.

As for the confusion of substantive provisions and recitals, several recitals ought to have been a part of the substantive provisions because they contain obligations, concepts or very clearcut elements of relevance for the interpretation of substantive provisions in the new Public Procurement Directive. In other words, several considerations in the recitals are provisions in disguise. As an example, the European legislator specified in Recital 94 that contracting authorities that make use of the possibility provided in Article 67(2)(b)⁸ should

⁶ See section 3 of Steen Treumer, *supra* note 2.

⁷ See Pedro Telles and Luke R.A. Butler, ‘Public Procurement Award Procedures in Directive 2014/24/EU’ in Francois Lichère, Roberto Caranta and Steen Treumer (eds), *Modernising Public Procurement: The New Directive* (DJØF Publishing 2014) 131. See also J. Davey, ‘Procedures Involving Negotiation in the New Public Procurement Directive: Key Reforms to the Grounds for Use and the Procedural Rules’, (2014) 23 PPLR 103.

⁸ The possibility of considering the organization, qualifications and experience of staff assigned to performing the contract in the award phase mentioned earlier in this

ensure, by appropriate contractual means, that such staff can only be replaced with the consent of the contracting authority, which can verify that the replacement staff affords an equivalent level of quality. Recital 94 outlines an obligation that ought to have been part of the substantive provisions as originally suggested by the European Commission.⁹ The implementation of this recital is covered in section 3 of each national chapter in this book.

A second example concerns one of the exceptions to the duty to retender outlined in Article 72(1)(c) on unforeseen circumstances. The condition or notion of unforeseen circumstances has only rarely been put to the test in the case law of the Court of Justice. National case law interpreting this condition also seems to be limited. It would therefore have been relevant to outline the content of the notion in the substantive provisions of the directive. Instead the legislator chose to elaborate extensively on the subject matter in Recital 109 of the Directive. The need for clarification was evident; the placement in the recitals was quite the contrary. The implementation of this recital is also covered in section 3 of each national chapter in this book.

The manifest tendency to implicit regulation through the recitals has allegedly been promoted by certain stakeholders in the legislative process. This approach seems to have been considered as a tool to ensure that the substantive provisions did not become too lengthy, and thereby that the legislator lived up to the promised simplification. This is definitely a misunderstanding. In fact, it only made the Directive more difficult to interpret and the state of law more blurred. First, the practitioner has to seek and find the ‘hidden regulation’ in the recitals. Once this is identified, the next challenge arises: How are you supposed to handle, for instance, obligations or other substantial elements contained in the recitals? According to the case law of the Court of Justice, a recital may cast light on the interpretation to be given to a legal rule but it cannot in itself constitute a legal rule: cf. Case C-215/88, *Casa Fleischhandels-GmbH*.¹⁰ The controversial approach of the European legislator has posed problems for the Member States in the transposition of the Directive, as will follow from the national chapters, and as will be commented upon in the concluding chapter of this book.

The European legislator also appears to have frequently used the legal technique of ‘constructive ambiguity’ in order to strike compromises. The legislation is adopted with an intended lack of clarity and the technique appears

chapter.

⁹ Regulation of the issue was moved from the material provisions to the considerations. Compare with Art 66(2)(b) of the Commission’s draft proposal from December 2011.

¹⁰ C-215/88, *Casa Fleischhandels-GmbH v Bundesanstalt* [1989] ECR I-2789. See para 31. The concrete case concerned a regulation and not a directive.

to be applied rather frequently in negotiations leading to EU legislation.¹¹ The background for this phenomenon is that stakeholders in the legislative process have disagreed about the regulation of the issue in question. Nevertheless, they did agree to regulate the issue and settled on an unclear provision/regulation in order to strike a compromise. The French Supreme Court – the Conseil d'État – has phrased this elegantly with a remark along the following lines: Where lawyers seek precision, diplomats practice the not-spoken and do not avoid the ambiguous.¹²

The use of constructive ambiguity ensures that issues are regulated in spite of disagreement and the fact that unclear legal sources can often lead to different interpretations. The latter is crucial as the legal source can therefore legitimize the upholding of a questionable national practice or regulation of the issue. It can also be interpreted as implicit acceptance on the part of the European legislator. Furthermore, the outcome can also be presented as a diplomatic victory, even though the reality is that the issue remains unsettled.

In some instances the unclear wording will be part of a substantive provision. Another variant that is frequently seen is where the legislator deliberately avoids regulating the issue in the substantive provisions of the directive, or where considerations are included that are very difficult to combine with the regulation in the substantive provisions of the Directive. It is possible to identify a range of issues where, in the adoption of the Directive, the European legislator has presumably settled a disagreement through the application of constructive ambiguity.¹³

The legal uncertainty caused by the use of constructive ambiguity increases the transaction costs for contracting authorities and tenderers alike. There is also a considerable risk of the unclear legal sources remaining unaltered after future revisions of the EU Public Procurement Directives. The negative implications of the use of constructive ambiguity tend to be overlooked. However, they are significant, and one of the reasons why EU public procurement law remains a lawyer's paradise even after the implementation of the Directive.

¹¹ See Steen Treumer, 'Konstruktiv uklarhed – om tilsigtet uklar EU-lovgivning og dens negative konsekvenser' in Jens Hartig Danielsen (ed.), *Max Sørensen 100 år* (Jurist- og Økonomforbundets Forlag 2013) 347.

¹² See Conseil d'État, Rapport Public 1992, Etudes no 44, where it is stated 'Là où les jurists cherchent la précision, les diplomats pratiquent le non-dit et ne fuient pas l'ambiguïté'. See also Niels Fenger, *Forvaltning & Fællesskab – Om EU-retten's betydning for den almindelige forvaltningsret: Konfrontation og frugtbar sameksistens* (Jurist- og Økonomforbundets Forlag 2004) at 439, quoting the report from CE.

¹³ See the various examples mentioned in Steen Treumer, *supra* note 2 at 22–5.

3. GOLD-PLATING AND QUESTIONABLE IMPLEMENTATION

The authors of the national chapters were asked to identify the main cases of questionable implementation of the Directive. This is one of the most interesting features of the book, and the approach was chosen in order to increase the degree of analytical rigour and avoid the danger of the book being merely of a descriptive character. Several authors were involved in the legislative process of implementation or in verification of the correct implementation of the Directive which followed that process (their role is mentioned in the first footnote of their chapter). This can have a double effect: on one hand, it could taint assessment of whether the legislation is questionable or not; on the other, it can offer fresh information and comments, as well as hints regarding possible future developments. The reader will have to judge, but we can assure them that every single report was accurately – and sometimes also heatedly – discussed during the meeting we had in Turin, Italy in order to prepare this volume, and that the review activity after the meeting was also very intense. The discussion was highly useful in order to highlight possible cases of questionable implementation in other jurisdictions and it tested the utility of a serious comparative method, which does not just involve a description of a foreign legal system but must go deeper into the analysis of similarities and differences through an informed discussion and crossfertilization.

As will be further outlined in the concluding chapter, the questionable issues of implementation of the Directive were often the result of typical national features, notwithstanding the European legislators' efforts to standardize legislation. A couple of examples illustrate this. Legislation on subcontracting in Italy is very complex and sometimes, probably, also contrary to EU law (which forbids subcontracting more than 30 per cent of the value of a contract) due to the traditional Italian anti-mafia legislation, while in Sweden the tradition of welfare legislation has imposed an implementation which is probably contrary to EU procurement legislation in the field of social clauses.

While questionable implementation of EU directives can be (relatively) easily detected on the basis of a simple comparison between EU and national legislation, gold-plating is a much more controversial notion. We nevertheless decided to introduce it in the questionnaires delivered to national reporters because it is an interesting test of how EU law is perceived in Member States. Gold-plating is commonly considered as a negative practice (except in Romania), but even with this same starting point, almost every Member State has a different definition – or nondefinition – of it, in the sense that in several jurisdictions it was not possible to find a commonly accepted definition of the practice.

Without anticipating here what will be better explained in the concluding chapter, it can be said that our experiment with including gold-plating in the questionnaire was interesting and fruitful because it helped to highlight the consequences of different implementation techniques. In Member States where EU directives were implemented with the copy-out method (such as, for example, the United Kingdom), gold-plating was obviously not an issue; in Member States where the Directive was implemented through an elaborate legislative process, leading to new pieces of legislation, gold-plating was a real issue, even if not always perceived as such. In any case, it must be clearly stated that gold-plating is not per definition coincident with questionable implementation since it does not imply an implementation contrary to an EU directive, but rather a case of overimplementation, whatever this expression may mean. It is not an implementation *contra*, but rather an implementation *ultra legem*. The question is how much further this overimplementation can go without becoming contrary to the *ratio* of the Directive and its underlying principles.

4. SELECTED ISSUES OF IMPLEMENTATION

We have chosen to consider three areas of particular interest: exclusion, competitive procedure with negotiation and changes that can lead to a duty to retender. The background for this is that the regulation of these issues contains substantial novelties and is of utmost relevance in practice.

The Member States and contracting authorities are allowed a wide discretion when it comes to establishing the requirements for exclusion. However, the Directive also contains a range of rules that clearly represent a move towards intensified regulation and harmonization.¹⁴ The grounds for both discretionary and mandatory exclusion of economic operators have been extended, with several new ones added in Article 57. Lack of payment of taxes or social security contributions becomes a mandatory ground for exclusion, although there are still exceptions to this rule.¹⁵ It is also very important to be aware

¹⁴ See in further detail Martin Burgi, Martin Trybus and Steen Treumer (eds), *Qualification, Selection and Exclusion in EU Procurement* (DJØF Publishing 2016) and Albert Sánchez-Graells, 'Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24' in Francois Lichère, Roberto Caranta and Steen Treumer (eds), *Modernising Public Procurement: The New Directive* (DJØF Publishing 2014) 97.

¹⁵ See Art 57(3) that provides that Member States may provide for derogation from the mandatory exclusion for overriding reasons relating to the public interest such as public health or protection of the environment. The same provision authorizes Member States to make derogation where exclusion would be clearly disproportionate.

that the scope for exclusion based on corruption has been extended beyond the EU definition of this offence, as Article 57(b)(1) refers to the national law's definition of the contracting authority or the economic operator. This can lead to extraterritoriality in the application if national laws cover instances in third countries. Particularly interesting is the creation of a new ground for exclusion based on infringement of competition law in Article 57(4)(d) and a new ground for exclusion of poor past performance by the economic operator in Article 57(4)(g). It now also follows from Article 57(4)(a) that contracting authorities can exclude or can be required by Member States to exclude economic operators that have not complied with social, labour and environmental law. This development increases the focus on exclusion of economic operators, forces the contracting entities to allocate more time to exclusion and will be demanding in practice, as the issues to be considered are very complex. It is likely that this will lead to an increase in court or complaints cases on exclusion both at the national and the European level.

As mentioned in section 2 of this chapter, increased flexibility was partly ensured by a remarkable widening of the scope of the flexible tender procedures regarding the competitive procedure with negotiation and competitive dialogue.¹⁶ We have chosen to focus on the competitive procedure with negotiation, considering a range of questions that have arisen in procurement practice and in some Member States during the implementation of the Directive.

Finally, relatively recent case law from the Court of Justice made it painfully clear that substantial changes of contract covered by the EU public procurement rules can imply that a contracting authority must retender the contract,¹⁷ even though it is frequently uncertain whether such a duty has materialized. This far-reaching consequence of the EU public procurement rules has previously been overlooked or denied by many in theory and practice, for various reasons. It is extremely complex and controversial to regulate contract changes that lead to a duty to retender. However, as the abovementioned development in the case law received considerable attention, the European legislator decided to regulate the issue in more detail in order to decrease legal uncertainty. The result is a new and elaborate provision on the issue in Article 72 of the Public Procurement Directive. We have selected several issues to be considered,

¹⁶ See Pedro Telles and Luke R.A. Butler and Jonathan Davey, *supra* note 7.

¹⁷ See in particular *pressetext Nachrichtenagentur GmbH v Republik Österreich* (C-454/06) ECR I-4401. For an analysis of the development in the case law of the Court of Justice see Jan M. Hebly and Paul Heijnsbroek, 'When Amending Leads to Ending: A Theoretical and Practical Insight into the Retendering of Contracts after a Material Change' in Gustavo Piga and Steen Treumer (eds), *The Applied Law and Economics of Public Procurement* (Routledge 2013) 163.

including how the national legislators have implemented Recitals 94 and 109, which are provisions in disguise.

5. OPTIONS AND AIMS TO BE PURSUED IN THE NATIONAL IMPLEMENTING LAWS

In certain cases, the Directive only sets out the aim to be achieved by the Member State, without specifying the specific legal rules or regulatory options to be applied in attempting to reach these aims (which, by the way, should be the normal method by which directives operate). We have only found seven such cases in the Directive – mostly concerning aims of secondary relevance – which leads us to think that the Directive is much more similar to a regulation than to other directives, as it only leaves a small space for Member States to choose the method they will use to reach the goals selected at EU level.¹⁸ The seven cases detected in the Directive concern the duty for Member States to take appropriate measures to ensure: (1) that in the performance of public contracts, economic operators comply with applicable obligations in the fields of environmental, social and labour law (Article 18(2)); (2) that all communication and information exchanges under this directive, in particular electronic submission, are performed using electronic means of communication (Article 22(1)); (3) that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators (Article 24); (4) that the information concerning certificates and other forms of documentary evidence introduced in e-Certis established by the Commission is constantly kept up to date (Article 61(1)); (5) that contracting authorities are able, at least under the following circumstances and under the conditions determined by the applicable national law, to terminate a public contract during its term, where certain conditions apply (Article 73); (6) that national rules for the award of contracts are put in place in order to ensure that contracting authorities comply with the principles of transparency and equal treatment of economic operators and that contracting authorities take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services; the specific needs of different categories of users, including disadvantaged

¹⁸ As will be seen by reading the chapters on implementation in the various Member States, several have implemented the procurement directives using a copy and paste technique, which clearly implies a high level of detail in the text of a directive in order for it to immediately be transposed without the need for the Member State to use its legislative discretion in choosing between different ways to reach the goals settled by the directive.

and vulnerable groups; and the involvement and empowerment of users and innovation, and to provide that the choice of the service provider shall be made on the basis of the tender presenting the best price–quality ratio, taking into account quality and sustainability criteria for social services (Article 76(1)); and (7) that at least the tasks set out in this Article (Art 83) are performed by one or more authorities, bodies or structures, and indicate to the Commission all authorities, bodies or structures competent for those tasks (Article 83).

The authors of the chapters on implementation in the Member States were required to describe how the states decided to implement these goals, specifying what legal tools were chosen and, if necessary, offering a critical assessment of these choices.