Foreword

We are proud to present the latest book based on the work of the European Procurement Law Group. After the volume on the implementation of the 2014 Procurement Directive, we return to our approach of combining country reports and comparative papers to deepen our knowledge of the multiple facets of the principle of transparency as it is part of the law in action in a wide selection of Member States.

The relevance and appeal of transparency made it necessary to contextualise public procurement rules in wider EU and national constitutional discourses. Competing priorities like fighting corruption or unleashing the potential for innovation affect the way transparency is understood and applied in different jurisdictions. The outcome of our collective research shows that disclosure rules still vary significantly across the Member States, and that differences between national rules may even end up creating difficulties for cross-border procurement. Still, besides the usual (if not tedious) rules on advertising in the award phase of the procurement cycle, the Procurement Directives to a large extent leave to the discretion of the Member States the scoping of transparency obligations and the determination of the types of documents susceptible of disclosure to candidates, tenderers and third parties. While this is somewhat unavoidable—given the different priorities arising from the different procurement context found in the Member States—a number of comparative chapters investigate whether and, if so, to what extent, the general principles of EU public procurement law may condition or even limit that discretion from the creation of idiosyncratic transparency regimes at national level.

We thus stay true to our original idea. The European Procurement Law Group (EPLG) 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. EPLG members held the comparative law approach 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 law-makers, 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 practices, regulations, case law and interpretations of public procurement law throughout the EU, as this can assist them in both understanding the rules as applied in their own jurisdiction, and in developing best practices.

Furthermore, as the Court of Justice itself reminds 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 practices 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 is aware of the comparative approach and some of its rulings are influenced by developments and trends in the regulation or practice of some Member States. Increased comparative knowledge of the case law of the Member States may alert the Court of Justice to the difficulties that national courts and review bodies are facing in giving full effect to EU law, including due to an 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. Since March 2017, the promotion by the European Commission of a network of first instance review bodies on public procurement is also a testimony of the increasing value of this type of exchange of information across EU jurisdictions.

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

This is obviously all the more important concerning the implementation of a new legislative package that is rich with novelties. In the interpretation and application of the 2014 Procurement Package, the national courts will start from limited precedents in their own jurisdictions. Courts elsewhere may instead have already decided one issue and looking at their judgments might not just help them take their decisions, but also reinforce comity among courts in the EU and coherence in their case law. The Court of Justice will in turn benefit from this dialogue among national courts and might take heed of possible convergence in the domestic case law giving effects to EU law.

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