Foreword

We are proud to present the tenth volume in the Series (and the third one with Edward Elgar). In the previous volumes we covered remedies, a number of substantive issues (in house, sustainable public procurement, contracts outside or at the margins of the procurement directive, selection and qualification, award criteria, transparency) and analysed both the 2014 Classic Procurement Directive and its implementation in the Member States. PPPs and concessions were a natural candidate for our research. In 2014 a new directive (2014/23/EU) was specifically dedicated to concessions, including service concessions. Following the Court of Justice judgment in *Telaustria*, it was confirmed that the latter concessions fell outside the scope of EU secondary law. Works and services concessions are now covered under Directive 2014/23/EU but its applicability to PPPs is uncertain. The two legal concepts overlap to a relevant extent, but neither the new directive nor the case law give enough indication as to their differences and potential differences in their regulation.

The uncertainties in EU law superimpose themselves on a highly varied panorama in the Member States. The concept and treatment of PPPs and concessions vary significantly from Member State to Member State, as proved by the content of this book. In Member States like France or Italy the legal concept of concession is hundreds of years old. In other Member States, the notion of concession was not used until after the implementation of the 2014 directives. PPPs have long been a hot topic in economic and governance sciences, but legal analysis has been scarce. In the past few decades, PPPs in their various shapes have come to complicate the legal framework in different Member States. Notwithstanding these uncertainties, large and small public infrastructures and increasingly health and other services are indeed often delivered through PPPs and concessions. Whatever their much discussed merits in terms of economic efficiency and effectiveness, PPPs (and concessions) need to be studied according to the legal specificities of each jurisdiction rather than as universal categories. This makes for a very interesting comparative law study, such as the one we decided to embark upon based on a solid analysis of national laws and experience.

Ten is somewhat of a milestone. We still stay true to our original idea: EU law needs comparative law! The European Procurement Law Group was born in 2008 when a small group of public contract law experts (among them Martin Burgi, Roberto Caranta, Mario Comba, Steen Treumer and Martin Trybus) decided to meet regularly to discuss relevant aspects of the law and practice in this area. Along the way we have added new and often younger members to the EPLG, widening the number of Member States covered and adding significant expertise. To us the comparative law approach is 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 both 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 recalls 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 with 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 testimony to the increasing value of this type of exchange of information across EU jurisdictions.

Moreover, 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 Concession Directive, 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 only 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 effect to EU law.

Even after Brexit, we Europeans will still need the insights from and experiments tried across the Channel. And they might still benefit from experiences accrued in the largest public procurement market in the Western world. In this vein, our friends from the UK will stay full members of EPLG and continue to provide excellent EU and comparative law research.

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