

Reformation or Deformation of the EU Public Procurement Rules

Edited by Grith Skovgaard Ølykke and Albert Sanchez-Graells

Published by Edward Elgar Publishing, 2016, pp. 426+xii

ISBN 978 1 78536 180 7 (hardback)

ISBN 978 1 78536 181 4 (ebook)

reviewed by Ioannis Alex. Tzionas*

I. The government procurement sector has always been at the focal point of concern for central and regional governments, contracting authorities, the EU, as well as a great number of economic operators. Hence, government procurement rules acquire utmost importance and continuous topicality for all actors involved in the relevant market.

In the aftermath of the economic crisis of 2008 two landmark initiatives took place at international and EU level. As far as the former is concerned, the 1994 WTO Government Procurement Agreement (GPA) was reformed twenty years after its initial adoption (the revised Agreement came into effect in April 2014). Regarding the latter, the EU enacted the so-called “2014 Public Procurement Package” consisting of three Directives (Directive 2014/23 on concession contracts, Directive 2014/24 on government procurement and Directive 2014/25 on utilities procurement).

The 2014 Public Procurement Package was intended to coordinate EU rules with international obligations that were part of the 2014 WTO’s GPA, to overhaul existing rules and to consolidate general principles of EU public procurement law.

In this context, the book aptly examines whether the 2014 Public Procurement Package constitutes a reformation or a deformation of EU public procurement rules. The book is a collective work of 16 essays/chapters, divided into five parts, which cover a wide range of aspects of the subject matter. The body of the work is concluded with an excellent index.

* Ioannis Alex. Tzionas, Professor of European and International Economic Law, University of Macedonia, Thessaloniki, Greece.

II. The introductory part presents the rationale of the book and is jointly authored by the editors, followed by the first chapter on the legislative process of the EU approached from a political science perspective and, written by Doreen Allerkamp.

III. The second part examines the reforms introduced by the Commission. Chapter 2, titled "*The evolution of EU public procurement rules and its interface with WTO: SME promotion and policy space*", by Kamala Dawar and Monika Skalova, assesses the legal interface between the 2014 Directive and the WTO GPA concerning policy space available to the EU so that it may pursue its objective of promoting SMEs participation in procurement markets.

Chapter 3, titled "*A deformed principle of competition? – the subjective drafting of Article 18(1) of Directive 2014/24*", by Albert Sanchez-Graells, provides a thorough examination of the legislative historical background of Article 18(1) of Directive 2014/24 and the author argues that the incorporation of a subjective element regarding the contracting authority's 'intention' to artificially restrict competition may make the provision incompatible with CJEU case law.

In Chapter 4, titled "*E-procurement between EU objectives and the implementation procedures in the Member States-Article 22(1) of the 2014 Directive*", Petra Ferk, after a presentation of the legislative evolution, takes the view that, by introducing Article 22 into the 2014 Directive, the Commission achieved its original purpose of establishing 'fully' mandatory e-procurement with the qualifications of transposition deadline set for 18 October 2018.

In Chapter 5, titled "*Division into lots and demand aggregation – extremes looking for the correct balance?*", its author, Ignacio Herrera Anchustegui, discusses the incorporation of a provision in the 2014 Directive allowing contracting authorities to award contracts in separate lots and to strengthen demand aggregation techniques.

Chapter 6, titled "*The provision on abnormally low tenders: a safeguard for fair competition?*", by Grith Skovgaard Ølykke, discusses the novelty introduced by the amended Article 18(2) of the 2014 Directive, which requires verification and rejection of tenders that are abnormally low in order to ensure fair competition.

Illegal direct awards constitute the main obstacle to building an internal market in public procurement. In this respect, author Pedro Cerqueira Gomez argues, in Chapter 7, titled "*A lost proposal in the 2014 Public Procurement Package: is there any life for the proposed public procurement oversight bodies?*", for the necessity of building a more pro-active system of monitoring, with the creation of an independent decentralised authority, as part of the EU legal framework.

IV. The third part examines the reforms introduced by the Council.

In Chapter 8, titled "*The provision on services of general economic interest in the 2014 Directive – pure reiteration of the obvious?*", co-authors Cecilie Fanøe Petersen and Grith Skovgaard Ølykke take the view that the inclusion of the provisions of Article 1(4) and 1(5) in the 2014 Directive should be characterized as a deformation of the public procurement rules, given that these provisions should not change the current state of law.

Chapter 9, titled "*Clarification or missed opportunity? The provision of framework agreement in the 2014 Directive*", by Marta Andrecka, examines the amendments to the provisions on framework agreements, under the 2014 Directive, and its consequences. The author critically assesses whether the EU legislator introduced necessary clarification to the framework agreement provisions in the new revision of procurement rules or failed to do so.

In Chapter 10, headed "*Requesting additional information – increase of flexibility and competition?*", author Carina Risvig Hamer thoroughly explains that by adopting Article 56(3) of the 2014 Directive, the Council reformed the public procurement regime towards more flexibility, thereby striking the right balance between competition and equal treatment.

Chapter 11, titled "*Exclusion and self-cleaning in Article 57: discretion at the expense of clarity and trade?*", by Sylvia de Mars, examines whether the discretion granted to contracting authorities by virtue of Article 57 of the 2014 Directive to disqualify certain economic operators will make the bidding regime clearer compared to its prior Article 45. The author concludes that the provision on exclusion is arguably deformed.

In Chapter 12, titled "*Modification of contracts during their term: principle of exception? – a view from the perspective of negative externalities*", author Tim Bruyninckx examines the novelty introduced by Article 72 of Directive 2014, whereby, for the first time, a public procurement directive lays down provisions that govern modifications to existing contracts.

V. Part four of the book deals with the reforms introduced by the Parliament or resulting from a European Citizen's Initiative.

Chapter 13 titled "*Subcontracting matters: Articles 43 and 71 of the Directive*", by Richard Graven, discusses two new provisions (Article 43 on labels and Article 71 on subcontracting) designed to address transparency and accountability concerns associated with subcontracting chains to better enable social procurement.

In Chapter 14, titled "*The magic of five in the duration of concessions: refining corollaries in the Concessions Directive*", author Johan Wolswinkel considers that Article 18 of the Concessions Directive codifies existing CJEU case law and provides a reformation of the Concessions Directive.

Chapter 15, titled “*Public goods, special rights and competitive markets: Right2Water and utilities procurement regime*”, by Eleanor Aspey, provides an articulate analysis of the new legal framework for concessions contracts, previously covered only by the basic Treaty requirements in the utility sector, and the removal of the water sector from the Concessions Directive.

VI. As an epilogue, in Part IV, the editors jointly screen the 2014 Public Procurement Package under a political magnifying glass, make their overall evaluation of all preceding single contributions and conclude that the EU public procurement rules were rather deformed in 2014. Hence, there is plenty of scope for further future reform aimed at streamlining the regulation of such an important field of EU economic law.

The reader will much appreciate the appendix hereto, containing a background map (consisting of five tables) of the issues covered in the book.

VII. The book provides a coherent and comprehensive analysis of the 2014 Public Procurement Package in an inter-disciplinary approach, predominantly from a legal perspective.

It offers its readers a valuable insight to the legislative background leading to the 2014 Public Procurement Package, which is a useful tool for understanding the evolution of the EU government procurement legal framework. In this respect, several contributions criticise inherent shortcomings during the legislative process on the way for the adoption of the 2014 Package, reflecting inter-institutional competing interests and different approaches. However, the book’s asset is the articulate presentation of the current state of EU government procurement law in the light of its evolutionary background (legislative and case-law).

The book is meticulously written and offers valuable insights in EU government procurement law. Thus, it is clearly a useful companion for lawyers, political scientists and economists (scholars and practitioners).

The contributors’ research is supported by rich bibliography and by reference to extensive original sources.