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Public Procurement Law Review

2011

Publication Review

Social and **Environmental Policies** in EC Procurement Law: New Directives and New Directions

Edited by Sue Arrowsmith and Peter Kunzlik

Reviewed by Dee **Davenport**

Subject: Public procurement. **Other related subjects:** European Union

P.P.L.R. 175* As the title "Social** and **Environmental Policies** in EC Procurement Law" indicates, Sue Arrowsmith's and Peter Kunzlik's book examines two important aspects of EU "horizontal" policy which seeks to embed **social** and **environmental** considerations into the public procurement process. The aim of the book is to present a series of debates which examine current developments and fresh perspectives relating to two key components of horizontal policy. **Social** and **environmental** issues have become increasingly significant on a global scale as we seek to address the challenges of sustainable development, climate change and the engagement of workforces from developing countries.

The editors open the book with a chapter that examines general principles of public procurement in the context of the 2004 procurement directives and a debate which focuses on the way in which EU horizontal **policies** may limit the discretionary power of Member States to promote and establish procurement policy to address local **environmental** and **social** needs. The editors then proceed in Ch.2 to give an introductory overview to EU procurement including an examination of the principles of freedom of movement, non-discrimination and transparency and the CJEU case law which has been instrumental in establishing the legal principles associated with these objectives. In examining the directives a particular emphasis is placed on the impact of horizontal **policies** on the procurement process including the main obligations and procedures and the selection of tenderers and award criteria. A taxonomy of horizontal policies prepared by Sue Arrowsmith provides a framework for legal analysis as well as allowing evaluation of their impact upon compliance with legal requirements, performance of the contracts awarded and the appropriateness of mechanisms for their effective implementation.

P.P.L.R. 176* The application of the TFEU and directives to horizontal **policies is critically appraised in the context of a non-discriminatory procurement process which must also allow access to contracts awarded on criteria which includes **social** and **environmental** considerations. Discussion of these conflicts continues in a chapter by Hans-Joachim Priess and Moritz Graf Von Merveldt who present the impact of state aid rules (art.87(1)) on the application of horizontal **policies** in public procurement in the light of CJEU rulings.

Christopher McCrudden examines more closely the ways in which governments may employ public procurement policy to promote **social** equality and non-discrimination through the use of equality linkages which pervade all aspects of the procurement process. New provisions in the 2004 directives include a review and evaluation of provisions of accessibility and disability by Rosemary Boyle and the exercise of Member State discretion in this respect. A focused examination of new provisions on eco-labelling by Dan Wilsher also highlights conflicts which may arise between the objectives of the internal market and the interests of Member States in promoting their use. The issue of green procurement is covered also by Peter Kunzlik who examines the flexibility of EU law interpretation which has the potential to allow Member States to prefer suppliers who use renewable energy or supply products which are manufactured using low energy methods. New subject areas and perspectives which contribute to the debate include an assessment by Nicholas Hatzis of the impact of various EU measures designed to promote the engagement of small and medium enterprises (SMEs) as vital contenders within a competitive market. The growing importance of Corporate **Social** Responsibility (CSR) is examined by Sue Arrowsmith and Colin Maund who call for an open debate upon its impact especially upon a utilities sector which is required to respond to the **environmental** and **social** concerns of its investors and customers within the limitations imposed by a regulatory procurement framework. The exclusion of contractors convicted of criminal offences is explored by Sope Williams who raises the problems of enforcement associated with these new conditions as well as implications of any future classes of exclusions planned by the EU.

Arrowsmith's review of horizontal principles in EU law proposes that the limits on the discretion of Member States in being able to implement this policy supports a restrictive rather than intrusive regulatory approach to public procurement. Within Member States there should be equivalence of the status of horizontal principles and other leading objectives such as value for money. Discretion is desirable at national level to determine horizontal **policies** and to consider them in relation to other key **policies** within each Member State. A doctrine of "excluded buying decisions" which does not scrutinise the nature or terms of public purchases of a national government is seen to exist as illustrated in the **environmental** case of *Concordia Buses*. A taxonomy of horizontal **policies** identifies a variety of mechanisms which enable the application of horizontal **policies** in procurement including the use of set-asides, exclusion for non-compliance with government **policies**, preferences in inviting firms to tender and measures of restriction built into award criteria. There is the possibility of exploiting the local policy strategies of Member States to provide impetus to the embedding of horizontal **policies** and this can be achieved by allowing a wide and consistent interpretation of measures designed to influence the performance and subject matter of contracts including measures concerning production, delivery, disposal or workforce issues. This is entirely consistent with significant CJEU decisions including *Concordia Bus*, *EVN-Wienstrom* and *Nord Pas de Calais*.

In examining the impact of EC state aid rules on horizontal **policies** Priess and Von Merveldt confirm that public procurement principles and state aid regulation are entirely compatible having the objective to prevent distortions in competition. Compliance with the directives excludes the possibility of state aid and an open tender procedure will be construed as a normal commercial transaction outside the remit of state aid if awarded to the economically most advantageous offer. A restricted procedure also will achieve genuine competition whereas a negotiated procedure which involves horizontal criteria and excludes competition is likely to breach the state aid rules.

***P.P.L.R. 177** "Equality linkages" is the term used by McCrudden to describe how nation states promote ideals of **social** justice through equality and non-discrimination. The subject matter of the contract is regarded as the most significant in the assessment of the legality of procurement mechanisms designed to establish equal status objectives. McCrudden supports Arrowsmith's proposal of a broad discretion offered to Member States to promote horizontal **policies** based on, inter alia, a basic principle of equality. It is possible for the public procurement directives to be extended to include a duty for equality provision to be built into the procurement procedure.

The principle of equality is also an important component of Boyle's consideration of the directive's express inclusion of disability and **environmental** issues including the employment of disabled people. Good specifications and award criteria are regarded as the most effective way to achieve disability equality in procurement. Legislators, however, should be cautious about making disability issues a mandatory part of the procurement process since the effects of value and uncertainty must also be considered. Some uncertainties still remain as to what the new provisions permit but the reservation of contracts for sheltered employment (art.19) and the subcontracting of work to be carried out by disabled people in conjunction with provisions prescribing working conditions are likely to provide opportunities for the employment of the disabled.

The right to equal treatment can also be extended to the consideration by Hatzis of the role of SMEs in the public procurement process. SMEs are seen as the "backbone of the European economy" and hence the concern expressed as to their lack of engagement with competitive procurement. Public procurement thresholds have tended to exclude SMEs from the competition arena but public authorities are cautioned not to discriminate in their favour. Hatzis rejects the practice of set-asides and reserving contracts for SMEs by excluding larger companies and also the use of compulsory sub-contracting since it disadvantages potential foreign undertakers and also contractors who may habitually employ subcontractors as in *Commission v Italy* (C-360/89). Measures to facilitate access include the division of large contracts into smaller lots in accordance with the aggregation rules. Contracting authorities

can contribute to SME participation by ensuring that procurement procedures are clear and transparent and that information and training is available to allow SMEs access.

Kunzlik focuses on a specific aspect of horizontal policy, i.e. the procurement of green energy and energy security, regarding the issues as urgent but without a clearly defined legal framework. The CJEU decisions in *Concordia Bus* and *EVN-Wienstrom* have been effective in striking the correct balance between **environmental** and energy considerations and the requirements of the internal market. In this way the Commission's restrictive approach has been rejected. On the question of specifications a court decision which clarifies the specification of renewable energy and disposes of the Commission's obscure references to "invisible" characteristics would be greatly welcomed.

Wilsher also examines specific green procurement solutions as exemplified by eco-labelling and concludes that the directives now provide some clarity in an area which was previously uncertain. The use of national eco-labels to prescribe technical specifications is seen as an effective means of promoting green procurement without transgressing EU law. National interests, however, in promoting local products means that it may be difficult to create an EU-wide market and the scheme needs to expand Europe-wide to ensure maximum **environmental** benefits. An interpretative view from the Commission would help to influence cross-border access for all European stakeholders in eco-label interest groups and aid the development of an EU labelling scheme which would reduce the reliance upon national labels. A further aspect of horizontal **policies** is contained in a discussion setting the parameters of debate concerning CSR, which seeks to promote the voluntary integration of **social** and **environmental** considerations into business organisations with the participation of stakeholders. Utilities, unlike other private sector corporations must comply with a number of significant legal restrictions which impact upon the effective management of their supply chains and their capacity to implement CSR initiatives. A new **P.P.L.R. 178* provision in the 2004 Utilities Procurement Directive art.38 allows the inclusion of **social** and **environmental** considerations as a special condition requirement for contract awards. There may be some scope to allow Utilities to require CSR as part of the contract performance criteria but there are restrictions and uncertainties relating specifically to enforcement and whether utilities can reject potential suppliers for likely infringement of special conditions. The new art.38 may in fact be a barrier to the inclusion of measures which go beyond the contract and seek to guarantee the ethical standards of supply chain companies in order to promote the maximum effectiveness of CSR. Again the discretionary limits of the contracting authorities have not been sufficiently clarified and doubts remain as to the flexibility of interpretation and the risk of legal infringement.

The theme of restriction of the discretion of Member States in the public procurement process extends to an examination of the new provisions, art.45 of the Public Sector Directive and

art.54 of the Utilities Directive which exclude all firms previously convicted of crime, fraud, money laundering and corruption. Member States may derogate from mandatory requirements in the public interest but in line with rules already established in EU law the derogations must comply with the principle of proportionality and be non-discriminatory. The mandatory exclusions for criminal offences is identified as evidence of an ideological sea-change in EU policy which originally sought to impose procurement regulation in order to achieve economic or internal market goals but now seeks to achieve a wider implementation of EU objectives extending to horizontal issues which move beyond **social** and **environmental** aspects to aspects of criminal justice.

In examining the issues of horizontal **policies** in EU Procurement Law the editors have been successful in creating a coherent, lucidly written, informative and structured study out of a variety of issues which offer new and fresh perspectives to procurement law. This has been achieved by creating a framework which introduces the reader to the general principles of procurement law as enshrined in the 2004 directives and decisions established in case law but set in the context of the main objective of the book which is especially concerned with **social** and **environmental** considerations. The ensuing debates are then focused on specific and key areas of interests relating to state aid, disability and criminal issues, green procurement, corporate **social** responsibility and SME participation. The discussion is well supported by a taxonomy of horizontal **policies** which provides the framework for a major critical review by Sue Arrowsmith on the application of both the EU Treaty and directives to horizontal **policies**.

The pervading themes include a requirement for EU interpretation which gives more flexibility and discretionary power to Member States when implementing procurement law, the significance of anti-competitive practice, equality and non-discrimination, the integration of horizontal **policies** into wider EU objectives which previously were focused on economic goals only and the continued reliance on the principles of subsidiarity and proportionality to support the process of integration. There is an impressive range of academic and scholarly endeavour contained in the volume with a wealth of sources and materials, invaluable to those who are closely involved in research or practice requiring an in-depth knowledge and appreciation of contemporary developments and future trends in EU procurement law. An important feature of the book is that it has been produced in a timely manner, when policy relating to the objectives of the EU is at a crossroads and seeks to expand beyond the narrow confines of economic considerations to encompass the full range of goals as clearly expressed in art.2¹ of the Treaty of the European Community (EC)--the article which successfully encapsulates the nature of the guiding principles forming the bedrock of EU policy and its strategic objectives.

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P.P.L.R. 2011, 5, 175-178

1.

All Treaty article numbers relate to the post Amsterdam amended Treaty of the European Community (EC) unless otherwise stated.