

Public Procurement and the EU Competition Rules

Albert Sánchez Graells



• H A R T •
PUBLISHING

OXFORD AND PORTLAND, OREGON
2011

Contents

<i>Foreword by Francisco Marcos</i>	v
<i>Table of Cases and Opinions</i>	xiii
<i>Table of Legislation</i>	xxi
Part I: Introduction	1
1 Introduction and Framework for Analysis	3
I. Introduction	3
II. General Approach to the Interrelationship between Competition and Public Procurement Law	12
III. Aim of the Study	13
IV. Structure of the Study and General Overview	14
V. Methodology: An Eclectic and Heuristic Multi-Disciplinary and Functional Approach to EU Law	18
VI. Normative Assumptions	23
VII. Delimitation of the Study: Exclusions and Limitations	25
Part II: Foundations and Principles. The Economic and Legal Basics of Public Procurement and Competition Law	31
2 An Economic Approach to Public Procurement and Competition	33
I. Introduction	33
II. Types of 'Public Procurement Markets'	35
III. Economic Dimensions of Public Procurement	47
IV. The Role of Public Authorities as Purchasing and Contracting Authorities	52
V. Public Procurement as a Market Failure: Difficulties in Recreating a Competitive Scenario and Competition-Restricting Effects	56
VI. Conclusions to this Chapter	72
3 Basics of Competition and Public Procurement Regulation	75
I. Introduction	75
II. Common Principles to Competition and Public Procurement Law as Two Sets of Economic Regulation	76
III. The Goal(s) of Competition Law	83
IV. Goals of Public Procurement	97
V. Conclusions to this Chapter: Common Goals of Competition Law and Public Procurement	110

Conclusions to Part II: Legal and Economic Normative Foundations of a More Competition-Oriented Public Procurement System	111
Part III: General Part—The Building Blocks of a Framework for the Competition Analysis of Public Procurement	113
4 EU Competition Law and Public Procurement—The Inability of EU Competition Rules to Rein in Anti-Competitive Public Procurement	115
I. Introduction	115
II. The Inability of Rules on the Grant of State Aid and Special or Exclusive Rights to Tackle Anti-Competitive Public Procurement	117
III. The Inapplicability of ‘Core’ EU Antitrust Rules to Public Procurement: A Jurisprudentially-Created Gap in EU Competition Law	128
IV. The Insufficiency of State Action Doctrine to Capture Most of the Anti-Competitive Public Procurement Regulations and Practices	136
V. Preliminary Conclusions: The Insufficiency of Current Competition Institutions and Potential Improvements to Achieve Better Results	146
VI. A Revision of Current Doctrine to Achieve Better Results (I): A More Economic Approach to the Concept of ‘Economic Activity’ in the Public Procurement Field	150
VII. A Revision of Current Doctrine to Achieve Better Results (II): Setting the Proper Bounds to the State Action Doctrine	166
VIII. Conclusions to this Chapter	186
5 The Principle of Competition Embedded in the EU Public Procurement Directives	189
I. Introduction	189
II. The Competition Principle Embedded in the EU Public Procurement Directives	190
III. Implications of the Competition Principle for the Shaping of Public Procurement Rules by Member States: The General Obligation to Develop a Pro-Competitive Public Procurement Framework	200
IV. The Principle of Equal Treatment and the Principle of Competition Distinguished	212
V. Conclusions to this Chapter	220
Conclusions to Part III: Sketching a Legal Framework to Discipline the Market Behaviour of the Public Buyer and to Guarantee Undistorted Competition in Public Procurement	221
Part IV: Analysis of Competition Distortions Caused by Public Procurement	225
6 A Critical Assessment of Current EU Public Procurement Directives and their Case Law from a Competition Perspective—Preventing Competitive Distortions by the Public Buyer	227
I. Introduction	227

II. A Competition Appraisal of Potential Distortions Derived from Public Procurement Processes	229
III. Two Examples of Potential Distortions Derived From the Exercise of Public Entities' Market Power	359
IV. Conclusions to this Chapter	364
7 Complementary Proposals for the Development of a More Competition-Oriented Public Procurement Framework	371
I. Introduction	371
II. Complementary Proposals Aimed at Limiting Publicly-Created Restraints of Competition	372
III. Complementary Proposals Aimed at Limiting Privately-Created Restraints of Competition	380
IV. Complementary Measures Aimed, in General, at Strengthening the Relationships between Competition and Procurement Authorities	385
V. Conclusions to this Chapter	389
Part V: General Conclusions	391
8 Conclusions of this Study on Public Procurement and the EU Competition Rules—Towards a More Competition-Oriented Procurement System	393
References	399
Index	455