SOCIAL AND ENVIRONMENTAL POLICIES IN EC PROCUREMENT LAW

New Directives and New Directions

Edited by
SUE ARROWSMITH
and
PETER KUNZLIK



CONTENTS

Contributors to the volume page xv
Preface xvii
Chronological table of cases xxiv
Table of European legislation xxxi
Table of UK legislation xxxix

Editors' Note – the decision in Rüffert v. Land Niedersachsen 1

Public procurement and horizontal policies in EC law: general principles 9

SUE ARROWSMITH AND PETER KUNZLIK

- 1. Introduction
- The concept of horizontal policies, the equal status of horizontal policies and the issue of terminology
 12
- Purchasing autonomy, the market mechanism and the internal market 15
- Government as purchaser and government as regulator under
 FC law 21
- Horizontal policies and the objectives and competences of EC procurement regulation
 29
 - 5.1. Introduction 29
 - 5.2. EC law and the discretion of Member States 30
 - 5.3. The EC's role in promoting or requiring use of horizontal policies 37
- 6. The impact of EC law on Member States' discretion: principles of interpretation 46
- 7. The relationship between primary and secondary Community law: using the directives to interpret the Treaty? 50
- 8. Conclusions 53

2	EC	C reg	ulation of public procurement 55
	st	JE A	RROWSMITH AND PETER KUNZLIK
	1.	Intro	oduction 55
	2.	Proc	turement outside the scope of the Treaty 55
	3.		urement within the Treaty but outside the procurement
			tives 56
		3.1.	'Negative' obligations 57
			3.1.1. Free movement of goods 57
			3.1.2. Freedom of establishment and freedom to provide
			services 77
			3.1.3. Conclusion 80
		3.2.	The positive obligation of transparency 82
		3.3.	Development of a general principle of equal treatment in public
			procurement 85
	4.	Proc	urement within the scope of a directive 88
		4.1.	The history and nature of the public procurement
			directives 88
		4.2.	Horizontal policies under the directives: legislation,
			jurisprudence and soft law 92
		4.3.	Overview of the Public Sector Directive and its main
			obligations 98
			4.3.1. Introduction 98
			4.3.2. Coverage 98
			4.3.3. The general principles 100
			4.3.4. The permitted procurement procedures and techniques 101
			4.3.5. Specifications and other contract requirements 4.3.6. Exclusion and selection of tenderers 104
			4.3.7. Award criteria 106
			4.3.8. Information obligations 107
3	Α -	tavan	nomy of horizontal policies in public
3			•
	-		
			RROWSMITH
	1.		duction 108
	2.		ies limited to compliance with general legal requirements
			policies that go beyond legal compliance 109
		2.1.	Policies limited to compliance with general legal
		2.2	requirements 109
		2.2.	Policies that go beyond compliance with general legal

requirements 116

CONTENTS vii

3.	Polic	ies confi	ined to performance of the contract being aw	arded	
				21	
	3.1.	Introdu	action 121		
	3.2.	Policies	s confined to contract performance 122	!	
	3.3.	Policies	s that go beyond contract performance	125	
4.	Mech			27	
5.		lusion	146		
A j	pplica	tion of	f the EC Treaty and directives to hori	izontal	
po	olicies	: a crit	ical review 147		
sτ	JE AR	ROWS	MITH		
1.	Intro	duction	147		
2.	Horiz	ontal pe	olicies and the EC Treaty: introductory rema	rks 14	8
3.		-	licies and the EC Treaty 148		
4.		_	vironmental policies and the EC Treaty	158	
	4.1.		luction 158		
	4.2.	The d	ecision to purchase or not to purchase and th	ne decision	
			at to purchase 159		
	4.3.		actual requirements laid down by the purcha	ser 15	9
			Requirements confined to contract performa		
		4.3.2.	Contractual requirements going beyond co		
		2.0.2.	performance 177		
	4.4.	Packa	ging and timing of orders 182		
	4.5.	Set-as			
	4.6.		sion from contracts for non-compliance with	government	t
	,,,,	policie		80.0111111	•
		4.6.1.	Provisions limited to compliance with gene	eral legal	
			requirements 184		
		4.6,2,	Provisions that go beyond compliance with	general lega	ı
		1.0.2.	requirements 185	8	-
	4.7.	Prefer	ences in inviting firms to tender 188		
	4.8.		l criteria 188		
	2	4.8.1.	Award criteria confined to contract		
			performance 188		
		4.8.2.	Award criteria that are not confined to con	tract	
			performance 190		
	4.9.	Measu	res for improving access to government contra	cts 191	ı
	4.10.		ng compliance with social and environmental		
	4.10.		the EC Treaty 191		
	4.11.		•	92	
5.	_		olicies and the Public Sector Directive: introd		
	remar	-	192	/	
	10,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,	****	~~~		

4

viii CONTENTS

6.	The principles of equal treatment and non-discrimination
	in the directive 195
7.	The decision to purchase or not to purchase and the decision on what
	to purchase: impact of the directive 198
8.	Contractual requirements laid down by the purchaser: impact
	of the directive 198
	8.1. Requirements confined to contract performance 198
	8.1.1. Requirements limited to compliance with general legal
	requirements 198
	8.1.2. Requirements that go beyond compliance with general
	legal requirements: introduction 200
	8.1.3. Requirements that go beyond compliance with general
	legal requirements: technical requirements 201
	8.1.4. Requirements that go beyond compliance with general
	legal requirements: special conditions 206
	8.1.5. A third category: social and environmental conditions
	that may not be included as contract requirements
	('prohibited requirements') 212
	8.1.6. Classification of social and environmental
	requirements that go beyond legal compliance:
	technical requirements, special conditions or
	prohibited requirements? 215
	8.2. Contractual requirements going beyond contract
•	performance 226
9.	Packaging and timing of orders: impact of the directive 227 Exclusion from contracts for non-compliance with government
10.	policies: impact of the directive 227
	10.1. Introduction 227
	10.2. Exclusion for non-compliance with general regulatory
	requirements 228
	10.3. Exclusion for non-compliance with standards that go beyond
	regulatory requirements 232
11.	Set-asides: impact of the directive 234
12.	Preferences in inviting firms to tender: impact
	of the directive 234
13.	Award criteria: impact of the directive 235
14.	Conclusions: impact of the directive on Member States' discretion 244
15.	Obligations to use procurement as a policy tool: impact
	of the directive 245
16.	The impact of the Government Procurement Agreement and other
	international trade agreements 247
	-

CONTENTS ix

5		ne impact of the EC state aid rules on horizontal policies
		public procurement 249
	H	ANS-JOACHIM PRIESS AND MORITZ GRAF
	V	ON MERVELDT
	1.	Introduction 249
	2.	The concept of state aid 250
	3.	The case law of the European Courts and the case practice
		of the Commission 250
		3.1. The case law of the ECJ 251
		3.2. The case law of the CFI 251
		3.3. The case practice of the Commission 253
	4.	Horizontal policies as state aid? 254
	5.	Application of the EC state aid rules on public procurement
		measures 255
		5.1. Relevant procurement situations 256
		5.2. Determination of the market price 257
		5.2.1. The 'market economy test' 257
		5.2.2. What would a private purchaser do? 258
		5.2.3. Which private investor? 260
		5.2.4. Which horizontal criteria? 261
		5.2.5. Which benchmark? 262
		5.2.6. Which procedure? 264
	6.	Conclusions 268
5	FC	public procurement law and equality linkages: foundations
•		r interpretation 271
		•
		IRISTOPHER McCRUDDEN
	1.	
	2.	1 /1
	3.	Equal treatment as the basis of EU status equality law
		and procurement law 274
		3.1. Conceptions of equality and non-discrimination 277
		3.1.1. Equality and equality as 'rationality' 277
		3.1.2. Equality and equality as protective of other 'prized
		public goods' 278
		3.1.3. Equality as preventing 'status-harms' arising from
		discrimination on particular grounds
		3.1.4. Equality as proactive promotion of equality of opportunity between particular groups 280
		3.2. Equal treatment in Community law 280
		5.2. Equal freatment in Community law 200

X CONTENTS

7

	3.3.	Status equality and procurement law: the same principle
		of equal treatment? 285
	3.4.	Obligations to promote status equality in the procurement
		directives 286
	3.5.	Equal treatment as an interpretative principle 288
4.	Free	dom of contract and the subject matter of the contract 289
5.	Ove	rall limits of the procurement directives: the limits
	of th	e Treaty 300
6.	Con	clusion 308
Di	isabil	ity issues in public procurement 310
RC	SEM	ARY BOYLE
1.	Intro	oduction 310
2.	Disa	bility laws at European and national level
		in the United States 311
3.	Con	tract compliance – the United Kingdom experience 316
4.	Pre-	existing possibilities for considering disability issues under
	the p	procurement directives 317
	4.1.	Introduction 317
	4.2.	Qualification and selection of firms to tender in restricted
		and negotiated procedures and (admission to) the open
		procedure 318
		4.2.1. Criteria for exclusion 318
		4.2.2. Criteria for selection 319
	4.3.	Specifications 320
		4.3.1. The possibility for specifications relating to accessibility
		and the limits of discretion 320
		4.3.2. Describing accessibility requirements
		to the market 324
		4.3.3. Verification of compliance with accessibility
		requirements 325
	4.4.	A balanced score sheet or pass/fail? 326
	4.5.	Award criteria 327
	4.6.	Compliance with national legislation on disability issues 329
5.		vative provisions in the Public Sector Directive 329
	5.1.	Introduction 329
	5.2.	Technical specifications 330
	5.3.	Contract compliance - the pursuit of social priorities through
		contract conditions 331
	5.4.	Reserved contracts 333
		5.4.1. The context 333
		5.4.2. Overview of the directive's new provisions 336

CONTENTS хi

	5.4.3. The discretion of Member States and procuring entities,
	and the example of the United Kingdom 337
	5.4.4. Obligation to follow the normal tendering rules and to open
	reserved procurements to all Member States 339
	5.4.5. Eligible workshops and programmes 339
6.	Conclusion 343
т	se legality of SME dayslonment policies and an EC
	ne legality of SME development policies under EC
pr	ocurement law 345
N)	ICHOLAS HATZIS
I.	Introduction 345
2.	The role of SMEs 346
3.	Set-asides 348
	3.1. Contracts above Community thresholds 348
	3.2. Equality under the Treaty 349
	3.3. Discrimination and indistinctly applicable measures 352
	3.4. Affirmative action 356
4.	Subcontracting 357
	4.1. Rationale for SMEs' involvement 357
	4.2. Prohibited and compulsory subcontracting 359
5.	The design of the procurement process 364
	5.1. Identifying design defects 364
	5.2. SME-friendly procurement 365
6.	Conclusion 367
TL	260
	ne procurement of 'green' energy 369
PΕ	TER KUNZLIK
1.	Community energy policy 369
2.	The implications of energy policy for procurement 372
3.	The implications of environmental principles
	for procurement 375
4.	Resolving procurement-environment tensions
	in the energy context 376
5.	Community trends that will impact on energy procurement and the
	procurement of energy-consuming goods, works and services 378
	5.1. Community policy on renewable energy 378
	5.2. Energy-use standards 381
	5.3. Energy-use labelling 382
	5.4. A Community horizontal policy on energy? 382
6.	The discretion of contracting authorities to pursue
	environmental objectives 388
7.	Procurement of energy-efficient products 389

8

9

10

8.	Proc	urement of electricity from renewable sources of energy 390
	8.1.	Contract award criteria in electricity supply contracts favouring
		electricity from renewable sources of energy 390
	8.2.	Electricity supply contracts - specifications requiring electricity
		to be produced from renewable energy sources 391
	8.3.	Special conditions requiring electricity to be supplied from
		renewable energy sources 401
9.		urement of goods produced using electricity from renewable
	ener	gy sources 402
	9.1.	Award criteria favouring products produced using energy from
		renewable sources 402
	9.2.	Specifications requiring that products to be supplied must
		themselves be made using only electricity from renewable
		energy sources 404
	9.3.	Special conditions requiring that products to be supplied must themselves be made using only electricity from renewable
10.	Con	energy sources 405 clusions 406
		ing national autonomy and trade integration in the
COI	ntext (of eco-labelling 408
DA	N WI	LSHER
1.	Introd	luction and overview 408
2.	What	are eco-labels? 410
3.	The ef	ffect of the EC Treaty: is procurement by reference to
	eco-la	bels consumption or regulation? 413
4.		ase law under the old procurement directives 417
	4.1.	Eco-labelling and the case law of the ECJ under the old directives
		and the EC Treaty: a summary of possible approaches 418
		4.1.1. A discrimination test 419
		4.1.2. A mutual recognition/proportionality test 420
		4.1.3. A market access/proportionality test 420
		Conclusions on the EC Treaty 421
5.	Eco-la	belling under the new procurement directives: enabling green
		rement or a super-hurdle? 422
		Eco-labels and technical specifications 423
	:	5.1.1. Meeting the procedural standards for use of eco-labels
		as technical specifications 426
		5.1.2. A practical solution: a presumption of adequacy
		for certain eco-label schemes 430
_		Eco-labels and award criteria 432
6.	Concl	usions 433

CONTENTS xiii

11	CS	SR in the utilities sector and the implications of EC
	pr	ocurement policy: a framework for debate 436
	SU	JE ARROWSMITH AND COLIN MAUND
	1.	Introduction 436
	2.	CSR and its relevance for utilities' supply chain policies 438
	3.	The EC Utilities Directive 441
	4.	The Utilities Directive's impact on CSR policies 444
		4.1. Introduction 444
		4.2. Requirements concerning contract performance: technical
		requirements and 'special' conditions 445
		4.2.1. Permitted requirements 445
		4.2.2. Monitoring and enforcement 449
		4.3. CSR policies that go beyond contract performance 457
		4.3.1. Contract requirements that go beyond contract
		performance 457
		4.3.2. Excluding firms for non-compliance with norms that
		go beyond the contract being awarded 459
		4.3.3. Conclusion 461
		4.4. Exclusion for offences of corruption, money
		laundering etc. 461
		4.5. Other mechanisms 462
		4.6. Evidence for proving compliance with CSR policies 464
		4.7. Issues arising from the use of qualification systems 467
		4.7.1. The use of qualification systems 467
		4.7.2. Legal issues 469
	5.	Utilities' procurement outside the Utilities Directive 471
	6.	The problem of divergent regulatory regimes 472
	7.	Issues for the future 474
12	Co	ordinating public procurement to support EU objectives – a
12		st step? The case of exclusions for serious criminal
		_
	so	PE WILLIAMS
	1.	Introduction 479
	2.	EU policy on serious criminal offences 481
		2.1. Organised crime 482
		2.2. Corruption 484
		2.3. Fraud 486
		2.4. Money laundering 488
	3.	The use of procurement legislation to combat serious criminal
		offences 490

xiv Contents

The procuring entities covered by the provisions 4. 492 The range of contractors subject to the exclusions 492 5. The nature of investigations required 6. Time limits 495 7. 8. Derogations 495 9. The significance of the mandatory exclusions for future EC policy on public procurement 497

Index 499