

Public Procurement and the EU Competition Rules

Second Edition

Albert Sánchez Graells

*Reviewed by Pedro Cerqueira Gomes**

1. Introduction

We all acknowledge that public procurement and competition law are crucial cornerstones of the European project and, consequently, have a great impact on the internal market growth. Nevertheless, these fields of law are often addressed by academics and practitioners as autonomous fields of law with no connections or intersections between them. Therefore, these two fields have been described as opposite poles of the EU legal and economic framework, with one particular exception, the State aid law.

A. Sánchez Graells, in his *Public Procurement and EU Competition Rules*, tries to overcome this tendency by exploring the interactions of public procurement and competition law at EU level and sets up a pro-competitive path for public procurement. According to the author, this new path towards competition will prevent distortions of competition generated by the anti-competitive behaviour of public buyers.

It is also important to note that A. Sánchez Graells' application of the principle of competition to the universe of public procurement and public markets, based on a thorough analysis of the EU rules and the case law of the CJEU, has shaken and *revived* the academic debate regarding the main objectives of EU public procurement regulations. This can be seen on the *author's note to the second edition* where he engages on a provocative academic dialogue with S. Arrowsmith and P. Kunzlik, concerning the objectives of EU regulations for public procurement. The author claims in that context that, despite the criticism appointed by some doctrine (S. Arrowsmith and P. Kunzlik), the approval of the new public procurement Directives (2014) has strengthened his position.

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2. Book

The *second edition* of *Public Procurement and the EU Competition Rules* is well organized and is divided into five parts and eight chapters. Furthermore, the *timing* of the publication is aligned with the publication of the new EU Public Procurement Directives, namely Directives 2014/23/EU; 2014/24/EU; 2014/25/EU.

Part One:

The author starts by formulating the legal and economic premises that supported his study and the research question behind it “...*How can and should publicly generated competitive distortions in the public procurement field be addressed under EU Economic Law and particularly, under the general framework of competition and public procurement law*”. In addition, Part One also sets out the methodology, the delamination of the study and the normative assumptions that should be raised, according to the author.

Part Two:

Part Two is split into two chapters (chapters 2 and 3 of the book). The first one (chapter 2) offers an economic toolkit to address the phenomenon of public procurement and provides a better understanding of the author's fundamental premises – public procurement regulations and practices can be a source of *market failure*. It gives a complete and detailed explanation of a possible taxonomy affecting the public markets and the economic dimensions of public procurement viewed as an expense tool, a working tool and a sectorial regulation tool. Subsequently, it is argued that market behaviour of the public buyer created by public procurement regulations has a negative impact on the economy and social welfare. As a result, there is a need for a more competitive regulatory approach in order to tackle pathogenic agents rising from regulation, such as the *waterbed effects*; *bidder collusion*; and *price signalling*.

The third chapter sustains that both public procurement and competition rules share, in the internal market, the same umbilical purpose – correction of *market failures*. Therefore, this strong link between the two regulations demands for a common approach, which forces public procurement goals to disregard horizontal/secondary policies (e.g., social considerations) over economic efficiency and social welfare. In A. Sánchez Graells' understanding, economic efficiency and social welfare are core goals of both competition and public procurement law.

Part Three:

Part three contains two chapters (chapters 4 and 5). Following the reasoning of parts one and two, the main aim was to assess in which way EU competition rules represent efficient instruments against distortions or restrictions generated by public procurement practices. However, the restrictive and formalistic case law of the CJEU on the concepts of *undertaking* and *economic activity* (*FENIN-Selex* cases) and the State Action Doctrine forces A. Sánchez Graells to conclude in chapter 4 that the EU competition law does not reach the European public buyer.

In order to overcome the difficulties of turning public procurement into a subject of competition law, the author continues throwing his *competition web* on chapter 5, by examining the competition elements in the context of EU public procurement rules. The recent EU public procurement Directives seem to build a bridge with the competition era. For the first time, the principle of competition is expressly embedded into Article 18(1) of Directive 2014/24/EU, which opened up the doors for a more pro competition legal interpretation of the procurement provisions.

On the first edition of this study it was argued that this umbrella principle was already integrated into the previous Directive, based on the fact that the competition principle is a general principle of EU Law present in the European Treaties. That dimension was also fully recognized by Advocate General Stix-Hackl in the *Sintesi* case. Stix-Hackl advocated that one of the dimensions of competition within EU public procurement legal framework was the protection of competition as an institution.

The new Article 18(1) of Directive 2014/24/EU and, consequently, the reception of the principle of competition lack consistency, as already highlighted by P. Trepte on the foreword of the *second edition*. Nonetheless, A. Sánchez Graells sustains that the negative dimension of the principle of competition is present in the Directives, i.e., in order to avoid distortions of competition, procurement rules have to be interpreted in a pro-competitive fashion. However, he also recognizes that the letter of the law (Article 18(1) of Directive 2014/24/EU) seems to connect distortions of competition with a subjective element of “intent” limiting their scope of application.

Finally, the author fails, in our perspective, to prove that equal treatment is not the main rule in a EU public procurement context.

Part Four:

Based on the doctrine of *consistent interpretation* of EU law, Part Four applies an *in dubio pro concurrentia* (in the words of the author) principle of interpretation to the 2014 procurement Directives. Chapter 6, therefore, exhaustively focuses on restrictions and distortions of competition triggered by public buyers in the public procurement universe. The author starts with an analysis of the rules that create unnecessary access restrictions to the procurement process, leading to some criticism regarding the *apparent* freedom to engage in public-public or in-house cooperation mechanisms; excessive costs for participation on procurement procedures for tenders (specially SME's); more flexible rules for the composition and changes of consortia; awareness for the potential abuse of the exclusion of economic operators by contracting authorities; lack of competition in the procedures; and the dangers of a non-proportional duty to divide contracts into lots.

Secondly, the focus goes to restrictions raised by the evaluation of the bids and the award phase. A. Sanchez Graells asks for a pure, technical neutrality and *tender* specific award criteria. In our opinion, this contravenes the recent flexibilization of the *Lianakis* jurisprudence, promoted by the European legislator in Article 67(2)(b) Directive 2014/24/EU and the "life cycle cost analysis" criteria, recently introduced. Thirdly, the author targets those restrictions of competition which take place during the execution of contracts, mainly due to the excessive guarantees of performance bonds; absence of a pro-competitive system for contractual extensions and award of additional works; the need to ensure the existence of effective bid-protest mechanisms and remedies.

Finally, this chapter ends with two examples of potential distortions of competition derived from the exercise of public entities' market power: (i) contracting authorities should refrain from *squeezing* suppliers in order to obtain disproportional advantages; and (ii) contracting authorities should be cautious when acquiring IP rights.

Chapter 7 encompasses *lege ferenda* proposals to help EU public procurement rules to achieve a competition-oriented system that can be summarised as follows: (i) limitation or avoidance of publicly originated restrictions of competition through reinforcement of the dynamic character of procurement activities; (ii) use of a dual sourcing system to avoid or reduce dependence on single suppliers; (iii) extension of the market economy buyer test to procurement areas to ensure value for money; (iv) use of mandatory

reporting by contracting authorities of suspected violations of competition law associated with a debarment system and the mandatory duty to report infringements to national competition authorities; (v) creation of the *competition advocate* figure.

Part Five

In the final chapter (chapter 8) A. Sánchez Graells presents a summary of the views expressed in the previous chapters, firmly supporting the complementary relation of EU public procurement and competition law and prompting, in that way, a more competition-oriented implementation and interpretation of EU public procurement rules.

3. Conclusion

Nowadays, the value of *Public Procurement and the EU Competition Rules* is undeniable. The book provides a holistic understanding of the EU economic legal framework and it is, therefore, considered by many, including academics, practitioners and students, an essential tool in the field of public procurement.

The impact of this work among scholars is remarkable, since it has *revived* the academic debate regarding the objectives of EU public procurement rules.

However, the author's premises and conclusions are not fully aligned with the *agenda* of the European legislator and the CJEU case law. It is not clear that the main goal of new EU public procurement regulations is economic efficiency. In fact, horizontal policies have now a greater acceptance in the procurement Directives and case law (see, *Max Havelaar* case). This shows that the European project is composed not only of EU competition policies, but also of EU social and environmental policies that must be seen as equal and legitimate objectives. In addition to that, there is no clear judgment from the Court establishing a hierarchy of EU public procurement goals that favours economic efficiency over other goals.

Finally, in our perspective, the EU legislator should examine more thoroughly some of the proposals in part four in order to improve the efficiency of EU public procurement provisions, namely those concerning (i) modifications and extensions of contracts; (ii) the use of a dual sourcing system to reduce the dependence on a single supplier; (iii) and more effective bid-protest mechanisms and remedies.

Bibliography

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