EUROPEAN PROCUREMENT LAW SERIES

QUALIFICATION, SELECTION AND EXCLUSION IN EU PROCUREMENT

Martin Burgi
Martin Trybus
Steen Treumer (Eds.)

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Foreword

Foreword by the Editors of the European Procurement Law Series

We are proud to present the seventh volume in the Series. The qualification phase is one of the most relevant phases in the procurement award procedure. Economic operators may be disqualified from taking part in the procedure according to exclusion clauses in the relevant legislation, or by not being qualified enough to tender due to the minimum requirements laid out by contracting authorities.

The 2014 Directives have significantly changed the rules on qualification; on the one hand, in certain cases, they have made exclusion mandatory; on the other hand, they have offered discretion to the contracting authorities, although this has to be used in compliance with the general principles of the EU. The relevance of these principles for the qualification phase has been clarified in a long list of cases such as *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, *Manova*, C-336/12, *Cartiera dell'Adda*, C-42/13, to mention but a few.

The contributions in this book present EU law and domestic rules and practice in a wide selection of Member States (Denmark, France, Germany, Italy, Portugal, Romania, Spain, and the UK), and also refer to domestic rules that implement the 2014 Directive when already in place. The value of the book is enhanced by comparative reports on exclusion and qualitative selection under public procurement procedures, self-cleaning and electronic qualitative selection. Taken together, the EU, national and comparative chapters provide an analytical picture of the law on qualification in public procurement as it is in Europe, highlighting the persistent divergences, the reasons for divergences, and an evaluation on whether the different solutions developed at domestic level are in line with EU law.

We thus stay true to our original idea. The European Procurement Law Group was born in 2008 when a small party of public contract law experts decided to meet regularly to discuss relevant aspects of the law and practice

in this area. Members of the Group held the comparative law approach both valuable and necessary to understand how public procurement law is developed and applied – or misapplied – in the EU and its Member States.

Both convergences and divergences send important signals to both EU and domestic law-makers, including the Court of Justice of the European Union. Comparative knowledge may inspire new approaches and help to avoid mistakes when applying what are ultimately the same principles and basic – and at times detailed – rules. Moreover, it is of value for practitioners in the member States to be aware of practices, regulations, case law and interpretations of public procurement law throughout the EU, as this can assist them both in understanding the rules as applied in their own jurisdiction, and in developing best practices.

Furthermore, as the same Court of Justice reminds us on its official website, the courts of the Member States are *courts* of the Member States, and therefore "are the ordinary courts in matters of European Union law". National courts and review bodies where present may, and in some cases *must*, refer questions to the Court of Justice. However, with more and more Member States having joined the EU in the past years and ensuing delays in the preliminary reference procedure under Article 267 TFEU, national courts and review bodies increasingly have to look elsewhere for best practices and possible guidance. Precedents of national courts and review bodies of other EU Member States giving application to the same common EU rules are a precious source of inspiration for those having to defend and decide upon public procurement cases.

The Court of Justice is aware of the comparative approach and developments and trends in the regulation or practice in some Member States influence some of its rulings. Increased comparative knowledge of the case law of the different Member States may alert the Court of Justice to the difficulties national courts and review bodies are facing in giving full effect to EU law. The reference to a decision by the Danish Complaints Board for Public Procurement in Advocate General Wathelet's opinion in *Ambisig* Case C-46/15 is an obvious example of the value of dialogue between the Court of Justice and national courts.

In the end, a comparative approach makes EU institutions aware of the possible developments of common trends in the Member States. This itself points to a spontaneous convergence towards workable solutions which may give rise to a *jus commune* which would be better guided than opposed or worse ignored.

Finally, we would like to thank Professors Martin Burgi and Martin Trybus for hosting us in Munich and Birmingham to discuss qualification in pub-

lic procurement and for accepting to co-edit the present volume. Our thanks also go to our publisher and to Daniel Wolff from Ludwig Maximilian University in Munich for their help in the production process.

June 2016

Roberto Caranta
Professor, University of Turin

Steen Treumer
Professor, University of Copenhagen

Preface

This is the seventh volume of the European Procurement Law Series. After in-house provision, green and social procurement, enforcement, procurement outside the Directives, award criteria, and the 2014 Directives, we are now focussing on the qualification phase – exclusion, qualification and selection/shortlisting.

Qualification featured prominently in numerous public procurement disputes in the EU as it is of crucial importance to the outcome of EU tender procedures. This volume supplements volume 5 in the Series on the award phase. The book also considers the implications of the new Public Sector Directive 2014/24/EU with regard to the qualification phase, and provides an analysis of the implementation of the new Directive in a range of Member States.

The publication is unique as it is based on a comparative approach covering diversified national approaches to EU public procurement law. It provides the reader with an insight that cannot be found elsewhere and includes specific chapters on the state of law and practice in France, Germany, the United Kingdom, Spain, Italy, Portugal and Romania. In addition, it contains a number of comparative chapters on specific issues of particular theoretical and practical interest. The book can be a valuable tool in the development of public procurement regulation and practice in the EU and her Member States, and is also of a wider interest to practitioners, national law makers, complaints boards, national courts, the European Commission, the Court of Justice, and academia.

The Series is written by a cross-border research group consisting of academics from 10 Member States, and several of its members are considered leading researchers in the field of public procurement law at an international level.

A number of adjustments have been made to the "traditional" approach applied by the European Procurement Law Network in volumes 1 to 5 of their Series (volume 6 on Directive 2014/24/EU was not comparative anyway).

First, the previous timeframe of "one edited collection per year" was adapted by deliberately slowing down the research, writing and editing of this volume to a timeframe of just over two years. In this respect, both the July 2014 network meeting in Munich, and the July 2015 meeting in Birmingham, focused on the various aspects of the qualification phase and on the development and completion of this volume. Munich therefore took the form of a "kick-off" event, while Birmingham was a "wrap-up" meeting, with the most substantial work being conducted by the individual authors between these two meetings. The objective was to allow more time for both the completion of the individual chapters and the editing of the collection as a whole. Moreover, the longer timeframe allowed the individual country chapters to be completed before work on the comparative chapters started, the former thus providing the latter with the necessary national law input to produce a comparative analysis. This "country chapters first, comparative chapters second" approach had already been followed in volumes 1-4, but the additional time allowed the editors to mitigate the effect of delays.

Second, the individual country chapters – which were all submitted to the editors after the Munich meeting but before the Birmingham meeting – were subjected to a peer review process by procurement law experts outside the network-experts who (in line with the basic approach of this process) shall remain anonymous. Martin Trybus supervised this process for the editorial team, and the entire team would like to thank these unnamed reviewers for their valuable time and comments which all led to the suggested changes and amendments of the country chapters. Some of these changes were indeed considerable, leading to significantly shorter chapters, for example, or to the incorporation of entirely new aspects. In contrast, the comparative chapters were not subjected to this peer review process. However, these chapters were edited by the editorial team, which led to a comparable number of changes and amendments being made. We will discuss further adaptations to our approach during the 9th meeting of the Network in Turin (September 2016).

The editorial team would also like to thank Daniel Wolff from the Ludwig Maximilian University in Munich for his support in the editing and proofreading of this volume.

A particular challenge both the authors and editors had to face with this collection was the rather uneven level of transposition of the 2014 EU Reform Package, in particular the new Public Sector Directive 2014/24/EU in the EU Member States being investigated. While the United Kingdom (excluding Scotland) had already fully transposed the instrument in 2015 (more than a year ahead of the deadline in 2016), Spain, for example, had not yet transposed the Directive at the time of writing. This lack of uniformity is, of

course, not unusual for the transposition process of complex Directives, and the post-2004 transposition process was no better (See: M. Trybus, "The morning after the deadline: the state of implementation of the new EC Public Procurement Directives in the Member States on February 1, 2006" (2006) 15 *Public Procurement Law Review* NA 82-90). However, the variations did not undermine the analysis. The edition does cover both the pre-2014 legislation, case law and practice but could not yet address the post-2014 situation to the same extent, simply because practice and case law are only starting to evolve, and, as already mentioned, some Member States have not even transposed the Reform Package. However, while all the national jurisdictions investigated in this book and in our previous volumes derive from a common Treaty, Directives and ECJ case law, it is also specific to the differences we are interested in, and from which we, and our readers, can learn.

Munich, Copenhagen and Birmingham in June 2016

Martin Burgi, Martin Trybus & Steen Treumer

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Exclusion, Qualification and Selection of Candidates and Tenderers in EU Procurement

Steen Treumer

1. Introduction

The state of law and choices made by the contracting authorities on exclusion, qualification and selection, have crucial importance in practice as they normally lead to a limitation of the number of competitors in the tender procedures. It is an inherent risk that a contracting authority abuses its discretion in this respect in order to discriminate or favour certain participants or tenderers. Another phenomenon that is often seen in practice is that the stipulated conditions on exclusion, selection and qualification turn out to be unsuited or too restrictive and that the contracting authority therefore would like to dispense from these conditions. However, that will frequently be ruled out by the principles of equal treatment of tenderers and of transparency.

Due to its importance the topic of this book has been considered in numerous procurement cases in the Member States, in several cases before the European Court of Justice (hereafter called the Court of Justice) and it has already received scholarly attention in the countless books and articles on EU public procurement law. For this reason all authors contributing to this book have been forced to be highly selective in choosing case law and issues that are likely to be of greatest interest to the reader. Another challenge has been the timing of this book, as the public procurement regime is currently undergoing a fundamental change due to the new Public Procurement Directive. In such a time of transition, it is relevant to focus on consequences of the new Public Procurement Directive and on implementation of the Directive at a national level where this process has already started. Furthermore, the analysis

primarily addresses the state of law for contracts fully covered by the Public Sector Directive or the new Public Procurement Directive.[1]

Nevertheless, the public procurement Directives only establishes a frame for the regulation of exclusion, qualification and selection. The Member States and contracting authorities are granted a wide discretion when it comes to establishing the requirements in this respect. Therefore the approach, practices and experiences differ to a great extent throughout the Union, as illustrated by the chapters on the various Member States.

The analysis in this chapter starts with an overview of the most important changes of the law following from the new Public Procurement Directive in section 2. This includes an analysis of some systematic legislative shortcomings of the new Directive and of issues that have not been regulated even though they are highly relevant in practice. This is followed by a brief account of the correlation between the new Directive and the case law of the Court of Justice of the European Union in section 3. It should be noted that the new Public Procurement Directive doesn't only codify the case law, as there is at least one important example of "overruling" of the case law of the Court of Justice. The reader should also be aware that the Court of Justice has recently, on some points, clarified the state of law even further than what follows from the newly adopted Directive.

Finally, this chapter ends with concluding remarks in section 4.

2. The New Public Procurement Directive

The primary objective of the revision of the EU public procurement regime, including the new Public Procurement Directive,[2] has been simplification and so-called flexibilisation of the regime.[3] The intent was to give the regime an overhaul and to make significant changes of existing obligations and to introduce important new requirements

1. See D. Dragos and R. Caranta (eds), *Outside the EU Procurement Directives – Inside the Treaty?* (DJØF: Publishing, 2012) for a comparative analysis of this issue prior to the implementation of the new Directive.
2. Directive 2014/2/EU of 26 February 2014. For discussion of the main novelties of the 2014 Directive, see F. Lichère, R. Caranta and S. Treumer (eds), *Modernising Public Procurement, The New Directive* (DJØF: Publishing 2014).
3. See COM (2011) 896 final, 2011/0438 (COD). Proposed procurement directive. Explanatory Memorandum section 1.