SOCIAL AND ENVIRONMENTAL POLICIES IN EC PROCUREMENT LAW

In developing public procurement policy, governments are often concerned not only with value for money but also with promoting their social and environmental objectives. However, imposing social and environmental requirements makes it harder for some suppliers to participate in public procurement. EC law thus limits the ability of national governments to implement such policies. But how should the balance be struck between these trade concerns and the desire of national governments to use procurement as a policy tool? And should the EC even harness Member States’ procurement power to EC-wide objectives, such as green energy policy?

Despite the new provisions included in the EC’s new (2004) procurement directives, important issues remain unresolved. This volume focuses on new issues in the field, notably the innovative provisions in the new directives, new academic thinking and areas neglected in the debate, such as the impact of EC law on the Corporate Social Responsibility policies of private utilities.

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SOCIAL AND ENVIRONMENTAL POLICIES IN EC PROCUREMENT LAW

New Directives and New Directions

Edited by
SUE ARROWSMITH
and
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### 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

1  Public procurement and horizontal policies in EC law: general principles  9  
**Sue Arrowsmith and Peter Kunzlik**

1. Introduction  9
2. The concept of horizontal policies, the equal status of horizontal policies and the issue of terminology  12
3. Purchasing autonomy, the market mechanism and the internal market  15
4. Government as purchaser and government as regulator under EC law  21
5. 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
vi CONTENTS

2 EC regulation of public procurement 55

SUE ARROWSMITH AND PETER KUNZLIK
1. Introduction 55
2. Procurement outside the scope of the Treaty 55
3. Procurement within the Treaty but outside the procurement directives 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. Procurement 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 103
    4.3.6. Exclusion and selection of tenderers 104
    4.3.7. Award criteria 106
    4.3.8. Information obligations 107

3 A taxonomy of horizontal policies in public procurement 108

SUE ARROWSMITH
1. Introduction 108
2. Policies limited to compliance with general legal requirements and policies that go beyond legal compliance 109
  2.1. Policies limited to compliance with general legal requirements 109
  2.2. Policies that go beyond compliance with general legal requirements 116
CONTENTS

3. Policies confined to performance of the contract being awarded and policies that go beyond contract performance 121
   3.1. Introduction 121
   3.2. Policies confined to contract performance 122
   3.3. Policies that go beyond contract performance 125

4. Mechanisms for implementing horizontal policies 127

5. Conclusion 146

4 Application of the EC Treaty and directives to horizontal policies: a critical review 147

SUE ARROWSMITH

1. Introduction 147
2. Horizontal policies and the EC Treaty: introductory remarks 148
3. Industrial policies and the EC Treaty 148
4. Social and environmental policies and the EC Treaty 158
   4.1. Introduction 158
   4.2. The decision to purchase or not to purchase and the decision on what to purchase 159
   4.3. Contractual requirements laid down by the purchaser 159
      4.3.1. Requirements confined to contract performance 159
      4.3.2. Contractual requirements going beyond contract performance 177
   4.4. Packaging and timing of orders 182
   4.5. Set-asides 182
   4.6. Exclusion from contracts for non-compliance with government policies 184
      4.6.1. Provisions limited to compliance with general legal requirements 184
      4.6.2. Provisions that go beyond compliance with general legal requirements 185
   4.7. Preferences in inviting firms to tender 188
   4.8. Award criteria 188
      4.8.1. Award criteria confined to contract performance 188
      4.8.2. Award criteria that are not confined to contract performance 190
   4.9. Measures for improving access to government contracts 191
   4.10. Proving compliance with social and environmental measures under the EC Treaty 191
   4.11. Disclosure obligations under the EC Treaty 192
5. Horizontal policies and the Public Sector Directive: introductory remarks 192
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

10. Exclusion from contracts for non-compliance with government 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
5 The impact of the EC state aid rules on horizontal policies in public procurement

HANS-JOACHIM PRIESS AND MORITZ GRAF VON 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

6 EC public procurement law and equality linkages: foundations for interpretation

CHRISTOPHER MCCRUDDEN

1. Introduction 271
2. Some preliminary points 272
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 279
      3.1.4. Equality as proactive promotion of equality of opportunity between particular groups 280
   3.2. Equal treatment in Community law 280
### 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. Freedom of contract and the subject matter of the contract 289

### 5. Overall limits of the procurement directives: the limits of the Treaty 300

### 6. Conclusion 308

## 7 Disability issues in public procurement 310

### ROSEMARY BOYLE

1. Introduction 310

2. Disability laws at European and national level and in the United States 311

3. Contract compliance – the United Kingdom experience 316

4. Pre-existing possibilities for considering disability issues under the 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. Innovative 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
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

8 The legality of SME development policies under EC procurement law 345

NICHOLAS HATZIS

1. 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

9 The procurement of ‘green’ energy 369

PETER 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. Procurement 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. Procurement of goods produced using electricity from renewable energy 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 energy sources 405

10. Conclusions 406

10. Reconciling national autonomy and trade integration in the context of eco-labelling 408

   DAN WILSHER

   1. Introduction and overview 408
   2. What are eco-labels? 410
   3. The effect of the EC Treaty: is procurement by reference to eco-labels consumption or regulation? 413
   4. The case 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
      4.2. Conclusions on the EC Treaty 421
   5. Eco-labelling under the new procurement directives: enabling green procurement or a super-hurdle? 422
      5.1. 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
      5.2. Eco-labels and award criteria 432
   6. Conclusions 433
11 CSR in the utilities sector and the implications of EC procurement policy: a framework for debate  436
SUE 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 Coordinating public procurement to support EU objectives – a first step? The case of exclusions for serious criminal offences  479
SOPE 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
4. The procuring entities covered by the provisions  492
5. The range of contractors subject to the exclusions  492
6. The nature of investigations required  493
7. Time limits  495
8. Derogations  495
9. The significance of the mandatory exclusions for future EC policy on public procurement  497

Index  499
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Public procurement – the government’s activity of purchasing the goods and services it needs to carry out its functions – is a subject of growing interest to academics and in the last two decades has emerged as a distinct area for legal study. Whilst, given the recent nature of this development, many aspects of public procurement law and policy remain unexplored by scholars, the use of procurement as a tool to promote social and environmental objectives – what we call ‘horizontal’ procurement policy – is one aspect that has always attracted interest. In part, this is because of its intersection with other policy areas such as labour relations, gender equality and environmental and energy policy. In most jurisdictions interest in the use of procurement as a policy tool has been increasing, not least because of its potential role in addressing the pressing issues of climate change and energy security and because increased outsourcing to developing countries has led to a resurgence of interest in the issues of fair working conditions and ‘fair trade’ in public contracts.

This subject has interested the co-editors of this book for many years. Sue Arrowsmith’s interest has arisen from her broader interest in public procurement regulation. She first examined the use and regulation of procurement as a policy tool in the context of the Canadian system in Government Procurement and Judicial Review back in 1989 and she has since explored differing national approaches (for example, in the United Kingdom, South Africa and the United States) in research for, amongst others, the UK Office of Government Commerce and the UN, and in the book Regulating Public Procurement: National and International Perspectives (2000, with John Linarelli and Don Wallace). She examined the implications of this subject for trade agreements in a 1995 article ‘Public Procurement as a Tool of Policy and the Impact of Market Liberalisation’ (1995) 111 LQR 235) and later developed her ideas on this perspective in her treatises on WTO and EC/UK procurement law which both include extensive chapters on horizontal policies.
(Government Procurement in the WTO (2003) and The Law of Public and Utilities Procurement (1996, and 2nd edn 2005)). She has also been closely involved in EC policy in her capacity as a long-standing member of the European Commission’s Advisory Committee for the Opening Up of Public Procurement. Peter Kunzlik’s interest stems from his work in the fields of environmental law and energy policy as well as his specific interest in procurement, both as an academic and (previously) as a practitioner. He has written extensively on the implications of procurement law for environmental and energy policy over the last fifteen years, culminating in his participation in a recent OECD study on environmental issues in procurement (N. Johnstone (ed.), The Environmental Performance of Public Procurement: Issues of Policy Coherence (2003)) and recent publications on the new procurement directives. In some respects the editors hold different views on the subject of horizontal policies: at the risk of some oversimplification, Arrowsmith is sceptical of its value in view of the difficulties of implementing policies in an effective way in the real world whilst Kunzlik is in general more sympathetic. However, they have been united in arguing for a flexible approach in interpreting international trade rules that allows considerable discretion for national horizontal policies.

The present book is concerned with the particular issue of horizontal policies under EC law. The first, and hitherto most important, dimension of this issue is that already referred to above, namely the extent to which the law limits the discretion of Member States to pursue national policies in order to advance the internal market. In addition, a second and more novel dimension concerns the question of whether EC law should require or encourage Member States to use their procurement power to promote the EC’s own policies, such as development of renewable energy sources or gender equality. From both perspectives the subject was a hotly debated and politically contentious one during the legislative procedure for the EC’s recent procurement directives. The outcome of this procedure was some new EC provisions to clarify and extend the possibilities for Member States to use procurement as a policy tool, as well as some innovative measures harnessing national procurement power for EC objectives, by requiring states to exclude contractors convicted of corruption and certain other offences and by requiring them to consider accessibility issues in drafting specifications. However, additional proposals from the European Parliament that would have taken the directives even further in both dimensions were rejected, and many issues were left open given the difficulty of reaching agreement. Thus the recent
legislation has by no means closed the debate on horizontal policies, but has merely heralded a new phase in its development.

This aim of this book is not to provide a comprehensive account of the law but, as the title indicates, to examine new legal developments and to consider new dimensions of the subject. To this end, we have solicited a series of essays that examine discrete themes relating to the regulation of horizontal policies under EC law.

Firstly, an important aim has been to examine the new provisions in the 2004 procurement directives. This is done, in particular, in several chapters that focus mainly on these new provisions.

One is chapter 7 on disability issues by Rosemary Boyle, which considers (inter alia) the directives’ new provisions on accessibility and on reserving contracts for sheltered employment programmes. Whilst generally favouring legal interpretations that offer discretion for Member States in this area, Boyle urges caution in the way in which this is used in practice, drawing upon the US experience to support her argument.

Another chapter that focuses on an important new provision is chapter 10 on eco-labels by Dan Wilsher, which examines the new rules on eco-labels in the 2004 directives as well as the implications of the Treaty for this field. After explaining the practical value and use of eco-labels, he explains that there are considerable difficulties in balancing EC and national interest in promoting their use with the needs of the internal market, to which there are no easy short-term solutions. Using the framework set out in previous chapters for analysing EC policy, Wilsher elaborates legal interpretations of the law that could be adopted to address this issue. In addition, chapter 12, by Sope Williams, examines the directives’ new requirements for excluding contractors convicted of certain criminal offences. She explores the practical difficulties of applying these provisions, as well as many of the grey areas in the legal rules. She also highlights the provisions’ potential significance for any future exclusions policies – for example, in defining the scope of authorities covered and persons to be excluded.

Secondly, we have also included several essays that examine issues that have not yet been much addressed and/or which make significant new contributions to the debate.

Thus in chapter 6 Christopher McCrudden deals with the subject of equality considerations in public procurement. In this chapter he supports the case for an interpretation of EC law that gives a broad discretion to Member States to pursue horizontal policies based, inter alia, on the fundamental principle of equality as a principle of interpretation. He also
raises the possibility that the procurement directive’s equal treatment principle, when interpreted in light of this principle, might be developed by the ECJ to impose a duty to consider equality considerations in public procurement. This analysis forms part of his wider research project on social issues in procurement, published as Buying Social Justice: Equality, Government Procurement, and Legal Change (2007).

Chapter 8 by Nicholas Hatzis assesses the impact of EC law on small and medium-sized enterprise (SME) policy in public procurement, explaining the context of this subject and unravelling the way in which various complex rules of EC law apply in this field. Disagreeing with some of the principles proposed by Arrowsmith in chapter 4, Hatzis contends that there are important restrictions on implementing SME policies under the EC Treaty and, in particular, that these cannot form grounds for justification under the Treaty derogations or mandatory requirements. However, he also highlights many ways in which SME policies may still lawfully be pursued.

In chapter 9 Peter Kunzlik considers the increasingly critical issue of using public procurement policies to promote the production of ‘green’ energy, which is an important plank of EC strategy both in the environmental sphere and in the field of energy security. This chapter examines both the background to this subject and the legal position of green energy policies in procurement. In particular, building on his previous work, he presents a detailed case for an interpretation of EC law that gives considerable flexibility to Member States not merely to favour energy supplied from renewable sources but also to favour the purchase of products that are themselves made with green energy. These possibilities he considers to be based on a general principle that public authorities may favour products produced in a particular way – challenging a view of the Commission that green energy requirements are somehow different from other production-related measures in public procurement.

Chapter 11, by Sue Arrowsmith and Colin Maund, examines an area hitherto largely unexplored, namely the use of horizontal policies by utilities. As they explain, utilities in many sectors have become increasingly concerned with social and environmental issues in the supply chain as part of the general Corporate Social Responsibility (CSR) movement and, to some extent at least, this concern is driven by commercial pressures arising from the need to respond to the concerns of investors, customers and employees. However, many utilities – including private utilities – are regulated by the EC procurement rules that impose constraints not applicable to other commercial companies. As the chapter
explains, these issues have been barely touched on in public debate, in
guidance from the European Commission or in academic literature. The
chapter calls for a debate on the subject and elaborates a framework for
that debate. After explaining the background, it explores the legal con-
straints that exist, including the myriad uncertainties that utilities face. It
then highlights the policy issues relevant for addressing this subject,
including the Commission’s own policy on CSR, the need for utilities
to respond to commercial pressures, and the problems caused by increas-
ing globalisation and cooperation in the utility sector which, combined
with fragmentation of procurement regimes, create difficulties for global
strategy development and collaborative sourcing policies.

Finally, we have also included a chapter (chapter 5) by Hans-
Joachim Priess and Moritz Graf von Merveldt on the implications of
the state aid rules for horizontal policies, which brings to an English-
speaking audience and integrates with the English-language literature
important discussions found, in particular, in German literature. They
explore the extent to which implementing of horizontal policies through
procurement might involve provision of unlawful state aid and how
authorities can ensure avoidance of the risks in this area.

All these chapters were presented and discussed at two workshops
organised for this purpose as part of the international conference
‘Public Procurement: Global Revolution III’ at the University of
Nottingham in June 2006. This conference, which attracted more
than 200 participants from 35 countries and 15 international organi-
sations, provided the opportunity for the authors to debate the issues
in this book both with each other and with a diverse audience of
academics, practitioners and policy-makers, and we are grateful to all
the participants for their input.

Our original plan was to include a single introductory chapter that,
drawing on our previous work in this area, would outline the govern-
ing rules and principles and set out our own thoughts on key issues, by
way of background to the later chapters. However, as we began to
write this chapter we came to appreciate more fully that there are some
fundamental difficulties in dealing with procurement under the EC’s
free movement rules and some problems with the ECJ’s approach that
have potentially important implications for horizontal policies. Most
specifically these relate to the characterisation of some public procure-
ment measures as hindrances to trade, the application of the Keck
jurisprudence to procurement, and the application of the principle of
equal treatment without regard to nationality that the ECJ has created
in the area of public procurement. These, we realised, were novel and important problems that needed fuller exploration. In addition, we realised that to address these issues properly we needed to elaborate more fully the taxonomy of horizontal policies that we had developed in previous work.

The single introductory chapter has thus expanded into four. Our first chapter explains the phenomenon of horizontal policies and then, drawing on our previous work as well as some chapters of the present book, elaborates certain key themes, trends and principles that we consider central to understanding and developing EC law in this field. It includes an elaboration of our view set out elsewhere on the need for an interpretation that gives significant weight to Member State discretion: this is based on several key principles, namely the equal status of horizontal policies with other procurement policies; the principle (based on the objectives of the EC procurement regime and limited competence of the EC) that it is for Member States to determine the balance between these different policies in procurement; the principle of subsidiarity; the fundamental principle of equality; and the Integration Principle of Article 6 EC. Chapter 2 then provides an overview of the current EC instruments that regulate public procurement, focusing, in particular, on the areas of difficulty in applying the Treaty to public procurement that we referred to above. Chapter 3 sets out a detailed taxonomy of horizontal policies in procurement and chapter 4 then offers a critical review of the impact of the EC regime, in light of the principles highlighted in chapters 1 and 2, and using the taxonomy of chapter 3. These chapters now provide a relatively full contextual and legal background for the later chapters, identifying the key issues emerging from the past and current debate and offering our own perspective on these issues.

We are extremely grateful to Ama Eyo who has worked tirelessly and cheerfully as the research assistant on this project and without whose unstinting efforts it would not have been brought to a (reasonably) timely completion. Sue Arrowsmith would also like to thank the sponsors of the Public Procurement Research Group at the University of Nottingham, Achilles Information Ltd, Bevan Brittan LLP and the Chartered Institute of Purchasing and Supply, whose generosity in providing funds has, inter alia, enabled us to employ a research assistant for the technical work. We also owe specific thanks to Achilles for the additional sponsorship provided to run the ‘Global Revolution III’ conference. Finally, we would also both like to express our gratitude to
everyone at Cambridge University Press, in particular to Kim Hughes, and in particular for their tolerance of our ever-expanding ambitions for this work as it progressed and the consequent impact on timescales and length of this book.

This book is up to date as of 31 December 2007, although in some cases we have also been able to accommodate some later developments.

Sue Arrowsmith and Peter Kunzlik
March 2008
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<td>Commission v. Italy</td>
<td>1961</td>
<td>English Special Edition 317 155, 156</td>
<td></td>
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<td>1/72</td>
<td>Frilli v. Belgium</td>
<td>1972</td>
<td>ECR 457 275</td>
<td></td>
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<tr>
<td>8/74</td>
<td>Procureur du Roi v. Dassonville</td>
<td>1974</td>
<td>ECR 837 57</td>
<td></td>
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<tr>
<td>43/75</td>
<td>Defrenne v. Sabena</td>
<td>1976</td>
<td>ECR 455 281, 283</td>
<td></td>
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<td>104/75</td>
<td>Officier van Justitie v. De Peijper</td>
<td>1976</td>
<td>ECR 613 76, 191, 497</td>
<td></td>
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<td>130/75</td>
<td>Prais v. Council</td>
<td>1976</td>
<td>ECR 1589 285</td>
<td></td>
</tr>
<tr>
<td>103 and 145/77</td>
<td>Royal Scholten-Honig (Holdings) Ltd v. Intervention Board for Agricultural Produce</td>
<td>1978</td>
<td>ECR 2037 275</td>
<td></td>
</tr>
<tr>
<td>149/77</td>
<td>Defrenne v. Sabena</td>
<td>1978</td>
<td>ECR 1365 283, 285</td>
<td></td>
</tr>
<tr>
<td>120/78</td>
<td>Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein</td>
<td>1979</td>
<td>ECR 649 58, 73, 74, 409, 414, 415, 416, 419, 420, 421, 422, 427, 428</td>
<td></td>
</tr>
<tr>
<td>34/79</td>
<td>Henn &amp; Darby</td>
<td>1979</td>
<td>ECR 3795 73</td>
<td></td>
</tr>
<tr>
<td>52/79</td>
<td>Procureur du Roi v. Debauve</td>
<td>1980</td>
<td>ECR 833 84</td>
<td></td>
</tr>
<tr>
<td>155/80</td>
<td>Oebel</td>
<td>1981</td>
<td>ECR 1993 74</td>
<td></td>
</tr>
<tr>
<td>203/80</td>
<td>Casati</td>
<td>1981</td>
<td>ECR 2595 481</td>
<td></td>
</tr>
<tr>
<td>76/81</td>
<td>S.A.Transporoute v. Minister of Public Works</td>
<td>1982</td>
<td>ECR 417 104, 192</td>
<td></td>
</tr>
<tr>
<td>286/81</td>
<td>Oosthoek’s Uitgeversmaatschaap BV</td>
<td>1982</td>
<td>ECR 4575 73</td>
<td></td>
</tr>
<tr>
<td>75 and 117/82</td>
<td>Razzouk and Beydoun v. Commission</td>
<td>1984</td>
<td>ECR 1509 283, 284</td>
<td></td>
</tr>
<tr>
<td>296 and 318/82</td>
<td>Netherlands and Leeuwarder Papierwarenfabriek v. Commission</td>
<td>1985</td>
<td>ECR 809 257</td>
<td></td>
</tr>
<tr>
<td>323/82</td>
<td>Intermills v. Commission</td>
<td>1984</td>
<td>ECR 3809 257</td>
<td></td>
</tr>
<tr>
<td>72/83</td>
<td>Campus Oil Ltd v. Minister for Industry and Energy</td>
<td>1984</td>
<td>ECR 272 151, 374, 496</td>
<td></td>
</tr>
<tr>
<td>94/83</td>
<td>Albert Heijn BV</td>
<td>1984</td>
<td>ECR 3263 73</td>
<td></td>
</tr>
<tr>
<td>106/83</td>
<td>Sermide SpA v. Cassa Conguaglio Zuccheri</td>
<td>1984</td>
<td>ECR 4209 275, 276</td>
<td></td>
</tr>
<tr>
<td>Case Reference</td>
<td>Parties</td>
<td>Year</td>
<td>Case</td>
<td>ECR Pages</td>
</tr>
<tr>
<td>----------------</td>
<td>---------</td>
<td>------</td>
<td>------</td>
<td>-----------</td>
</tr>
<tr>
<td>240/83</td>
<td>Procureur de la République v. Association de défense des brûleurs d’huiles usagées</td>
<td>[1985]</td>
<td>ECR 532</td>
<td>73</td>
</tr>
<tr>
<td>21/84</td>
<td>Commission v. France</td>
<td>[1985]</td>
<td>ECR 1356</td>
<td>57</td>
</tr>
<tr>
<td>112/84</td>
<td>Humblot v. Directeur Services Fiscaux</td>
<td>[1985]</td>
<td>ECR 1367</td>
<td>416</td>
</tr>
<tr>
<td>263/85</td>
<td>Commission v. Italy</td>
<td>[1991]</td>
<td>I–2457</td>
<td>58</td>
</tr>
<tr>
<td>352/85</td>
<td>Bond van Adverteerdes</td>
<td>[1988]</td>
<td>ECR 2085</td>
<td>85, 155</td>
</tr>
<tr>
<td>C–21/88</td>
<td>Du Pont de Nemours Italiana SpA v. Unità Sanitaria Locale No. 2 Di Carrara</td>
<td>[1990]</td>
<td>ECR I–889</td>
<td>58, 82, 92, 151, 152, 153, 154, 155, 157, 163, 182, 335</td>
</tr>
<tr>
<td>C–243/89</td>
<td>Commission v. Denmark</td>
<td>[1993]</td>
<td>ECR I–3353</td>
<td>57, 58, 78, 85, 100, 149, 196, 205, 208, 276, 277, 327</td>
</tr>
<tr>
<td>Case</td>
<td>Parties</td>
<td>Year</td>
<td>Volume, Page Numbers</td>
<td></td>
</tr>
<tr>
<td>------</td>
<td>---------</td>
<td>------</td>
<td>----------------------</td>
<td></td>
</tr>
<tr>
<td>C-146/91</td>
<td>Koinopraxia Enoseon Georgikon Synetairismon Diacheiriseos Enchorion Proionton Syn. PE (KYDEP) v. Commission</td>
<td>1994</td>
<td>ECR I–4199, 275, 276</td>
<td></td>
</tr>
<tr>
<td>C-19/92</td>
<td>Kraus v. Land Baden–Württemberg</td>
<td>1993</td>
<td>ECR I–1663, 301</td>
<td></td>
</tr>
<tr>
<td>C-278/92</td>
<td>Spain v. Commission</td>
<td>1994</td>
<td>ECR I–4103, 260</td>
<td></td>
</tr>
<tr>
<td>C-56/93</td>
<td>Belgium v. Commission</td>
<td>1996</td>
<td>ECR I–723, 261</td>
<td></td>
</tr>
<tr>
<td>C-324/93</td>
<td>R v. Secretary of State for the Home Department, ex parte Evans Medical and MacFarlan Smith</td>
<td>1995</td>
<td>ECR I–563, 167, 190</td>
<td></td>
</tr>
<tr>
<td>C-384/93</td>
<td>Alpine Investments B.V. v. Minister van Financien</td>
<td>1995</td>
<td>ECR I–1141, 78, 178</td>
<td></td>
</tr>
<tr>
<td>C-13/94</td>
<td>P v. S and Cornwall CC</td>
<td>1996</td>
<td>ECR I–2143, 284</td>
<td></td>
</tr>
<tr>
<td>C-55/94</td>
<td>Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano</td>
<td>1995</td>
<td>ECR I–4165, 301, 302, 416</td>
<td></td>
</tr>
<tr>
<td>C-272/94</td>
<td>Guiot and Climatic SA</td>
<td>1996</td>
<td>ECR I–1905, 301, 302</td>
<td></td>
</tr>
<tr>
<td>Case</td>
<td>Year</td>
<td>Parties</td>
<td>Details</td>
<td></td>
</tr>
<tr>
<td>------</td>
<td>------</td>
<td>---------</td>
<td>---------</td>
<td></td>
</tr>
<tr>
<td>C–120/95 Decker v. Caisse de maladie des employés privés</td>
<td>1998</td>
<td>ECR I–1831 497</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C–222/95 Société Civile Immobilière Parodi v. Banque H. Albert de Bary et Cie</td>
<td>1997</td>
<td>ECR I–3899 301</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C–44/96 Mannesmann Anlagenbau Austria AG v. Strohal Rotationsdruck GesmbH</td>
<td>1998</td>
<td>ECR I–7 31</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C–149/96 Portugal v. Council</td>
<td>1999</td>
<td>ECR I–8395 275, 276</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C–158/97 Badeck</td>
<td>2000</td>
<td>ECR I–1875 287</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C–256/97 DM Transport</td>
<td>1999</td>
<td>ECR I–3913 257</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C–292/97 Karlson</td>
<td>2000</td>
<td>ECR I–2737 275</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C–414/97 Commission v. Spain</td>
<td>1999</td>
<td>ECR I–5585 151, 496</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C–165/98 Mazzoleni v. ISA</td>
<td>2001</td>
<td>ECR I–2189 303</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C–186/98 Nunes and de Matos</td>
<td>1999</td>
<td>ECR I–4883 486</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### Table of Cases

<table>
<thead>
<tr>
<th>Case Reference</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>C–336/00 Republik Österreich v. Huber [2002] I–7699</td>
<td>41</td>
</tr>
<tr>
<td>C–79/01 Payroll Data Services (Italy) Srl [2002] ECR I–8923</td>
<td>304</td>
</tr>
</tbody>
</table>
TABLE OF CASES

C–26/03 Stadt Halle RPL Recyclingpark Lochau GmbH v. TREA Leuna [2005] ECR I–1 52
C–231/03 Consorzio Aziende Metano (Coname) v. Comune di Cingia de’ Botti [2005] ECR I–7287 51
C–507/03 Commission v. Ireland (ECJ judgment of 13 November 2007) 84
## Table of Cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>C–411/05</td>
<td>Palacios de la Villa 16 October 2007 284</td>
</tr>
<tr>
<td>C–525/03</td>
<td>Commission v. Italy [2005] ECR I–9405 51</td>
</tr>
</tbody>
</table>

### Court of First Instance

<table>
<thead>
<tr>
<th>Case</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>T–258/06</td>
<td>Germany v. Commission 84</td>
</tr>
</tbody>
</table>

### EFTA

<table>
<thead>
<tr>
<th>Case</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>E–5/98</td>
<td>Fagtún v. Byggingarnefend Borgarholttsskola, the Government of Iceland, the City of Reykjavik and the Municipality of Mosfellsbaer [1999] EFTA Court Report 51 59</td>
</tr>
</tbody>
</table>

### United Kingdom

<table>
<thead>
<tr>
<th>Case</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>R v. Lewisham LBC ex p. Shell UK [1988]</td>
<td>1 All ER 938 117</td>
</tr>
<tr>
<td>Harmon CFEM Facades (UK) Ltd. v. TheCorporateOfficer of the House of Commons [2002]</td>
<td>2 LGLR 372 19</td>
</tr>
</tbody>
</table>

### United States

<table>
<thead>
<tr>
<th>Case</th>
<th>Details</th>
</tr>
</thead>
</table>

### Canada

<table>
<thead>
<tr>
<th>Case</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shell Canada Products v. City of Vancouver [1994]</td>
<td>1 SCR 231 117</td>
</tr>
</tbody>
</table>
## Table of European Legislation

### Treaties

1957 EC Treaty
- Article 2: 39, 45, 346, 376
- Article 3: 39, 45, 47, 352
- Article 5: 38, 39, 49, 83
- Article 6: 35, 37, 47, 48, 95, 165, 172, 175, 210, 214, 220, 221, 223, 224, 231, 236, 237, 239, 242, 245, 376, 377, 391
- Article 10: 287
- Article 12: 163, 275, 281
- Article 13: 282, 284, 311, 351
- Article 14: 40
- Article 18: 275, 276
- Article 28: 19, 56, 57, 58, 60, 61, 66, 67, 68, 69, 70, 72, 73, 77, 149, 251, 281, 289, 306, 414, 419, 429, 422, 427, 428
- Article 30: 36, 48, 73, 149, 151, 173, 289, 306, 335, 354, 391, 475, 496
- Article 34: 276
- Article 39: 276, 281
- Article 43: 19, 56, 63, 77, 78, 80, 84, 86, 149, 276, 281, 289, 306
- Article 47: 33, 40, 41, 42, 289, 306, 480
- Article 48: 77, 289, 306
- Article 49: 2, 3, 5, 7, 19, 56, 57, 63, 66, 77, 78, 79, 80, 84, 86, 149, 276, 281, 289, 302, 306, 408, 416, 422
- Article 55: 33, 40, 41, 42, 80, 149, 289, 306, 480
- Article 61: 44
- Article 81: 56
- Article 82: 56, 300
- Article 86: 19, 56, 263, 472
- Article 87: 151, 152, 153, 154, 250, 251, 252, 254, 255, 256, 260, 261, 263, 264, 265, 267

xxxi
Table of European Legislation

Article 88 249, 259, 266, 269
Article 90 276, 416
Article 95 33, 35, 40, 41, 42, 413, 480
Article 119 281, 283
Article 136 43
Article 137 43, 44
Article 141 281, 356, 357
Article 150 43
Article 152 42
Article 153 42, 44, 45
Article 157 157, 352
Article 158 346
Article 159 346
Article 160 346
Article 161 346
Article 162 346
Article 163 56
Article 174 46, 427
Article 175 46, 76, 382, 386, 387
Article 176 76
Article 176 A 369
Article 179 413
Article 183 56
Article 197 56
Article 220 49
Article 226 154
Article 280 485, 490
Article 296 55, 151, 496
Article 308 45
1992 Treaty on European Union
Article 29 481, 482, 485
Article 31 44, 482
Article 34(2)(b)) 44
2007 Treaty of Lisbon 369

Directives

Recitals 31
Article 29(a) 92