# INDEX

access for disabled see disability issues affirmative action 356-357 alternatives to horizontal procurement policies less restrictive procurement methods 166 - 167non-procurement methods 166 awarding of contracts see under contracts barriers to trade see equality and non-discrimination carbon footprint, procurement relating to 175-176 case law on eco-labelling 417-422 on state aid and horizontal policies see under state aid competence for procurement legislation, ECs 38-45 competitive dialogue 101-102 compliance see also non-compliance with contract requirements for disabled access 325-326. 331-333 of contract requirements with general legal requirements 159-177 with CSR policies under Utilities Directive, evidence for 464-467 with disability laws, in UK 316-317 with procurement measures relating to social and environmental measures 191-192

with technical requirements in contracts, ensuring 205-206 consumption of products, works or services, policies relating to effect of 123, 176-177 contract notices 101 contractors see tenderers contracts see also exclusion from contracts, freedom of contract, reserved contracts access to, measures for improving 31 and Treaty 191 awarding, criteria for and eco-labels under procurement directives 432-433 for electricity from renewable sources 390-391 as mechanism for implementing procurement policies 142 - 146under procurement directives 327-329 for products made using only electricity from renewable sources 402-404 under Public Sector Directive 106-107, 235-243 under Treaty 188-191 carried out abroad 170 compliance with legal requirements 159 - 177and CSR policies see under corporate social responsibility (CSR) and the utilities sector and disability issues

### 500

contracts (cont.) access for disabled, specifications relating to 320-326, 331-333 UK compliance 316–317 enforcement measures, legality of 177 exclusion from see exclusion from contracts and horizontal policies 121-122 confined to contract performance 122 - 125legal compliance 159-177 contract requirements as means of implementing policies 132-136 going beyond contract performance 125-127 outsourcing to non-EC countries 174-175 performance of, policies relating to 121-122 policies confined to performance 122-125 and procurement directives access for disabled, specifications relating to 320-326 and promotion of environmental objectives 388-389 and Public Sector Directive see Public Sector Directive set-asides above EC thresholds see under small and medium-sized enterprises (SMEs) specifications and other requirements in 330-331 eco-labels as technical specifications conditions for using 426–430 presumption of legality of labelling schemes 430–432 for eco-labels under Public Sector Directive 203 electricity supply contracts special conditions 401-402 specifications 391-401

### INDEX

ensuring compliance with 205 - 206as hindrances to trade 162-177 non-discrimination regulation 74-76 and Public Sector Directive see under Public Sector Directive special conditions 206-212 technical requirements and Public Sector Directive 201-206 'technical specification', definition of 201-202 supply contracts, legality of terms in 172-174 corporate social responsibility (CSR) and the utilities sector 436-438 future issues 474-478 impact of different regulatory regimes 472-474 monitoring and enforcement of contract requirements 449-450, 457 exclusion from contracts for anticipated non-compliance 450 - 454exclusion from contracts for previous or current non-compliance 454-457 and procurement outside Utilities Directive 471-472 selection of tenderers based on social and environmental issues 462-463 set-asides, use of 463 use of qualification systems 467-469 legal issues 469-471 and Utilities Directive 444-445 criteria for awarding contracts, social and environmental impacts as 463-464 evidence for compliance with CSR policies 464-467 exclusion from contracts for corruption and money laundering 461-462 for non-compliance 459-461

#### INDEX

501

overview of Directive 441-444 requirements beyond contract performance 457-459, 461 exclusion from contracts for non-compliance 459–461 requirements related to contract performance monitoring and enforcement see monitoring and enforcement of contract requirements above permitted requirements 445-449 and utilities' supply chain policies 438-441 corruption EC policy on 484-486 exclusion from contracts for 461-462 criminal offences EC policies 481-482 corruption 484-486 fraud 486-488 money laundering 488-490 organised crime 482-484 exclusion from contracts for 479-481 EC policy implications of mandatory exclusions 497-498 Treaty basis for anti-crime measures 44 - 45use of procurement legislation to combat 490-491 approach to investigations 493-494 contractors subject to exclusions 492-493 derogations 495-497 procuring entities covered by provisions 492 time limits 495 CSR see corporate social responsibility (CSR) and the utilities sector delivery of products, works or services,

policies relating to effect of 123–124 derogations permitting measures considered hindrances to trade 73 directives, EC see also procurement directives, Public Sector Directive, Utilities Directive under corporate social responsibility as aid to interpretation of Treaty 50 - 53overview of 29-30 disability issues 310-311, 343-344 access for disabled, 320-326, 331-333 and contracts criteria for awarding 327-329 under procurement directives see procurement directives below UK compliance 316-317 disability laws in Europe and USA 311-316 discrimination in procurement of sheltered workshops 169-170 and set-asides 183-184 and procurement directives 317-318 access for disabled, contract specifications for Member States' discretion, limits of 320-324 rules for describing accessibility requirements 324-325 verification of compliance with accessibility requirements 325-326 choice of tenderers awarding contracts, criteria for 327-329 exclusion criteria 318-319 selection criteria 319-320 compliance of contracts with national legislation 329 success in addressing issues 326-327

## 502

disability issues (cont.) and Public Sector Directive see under Public Sector Directive Treaty basis for accessibility measures 42-44 UK disability discrimination law 311-314 US disability discrimination law 314-316 disclosure of information *see under* information discrimination see equality and non-discrimination disposal of products, works or services, policies relating to effect of 124 dynamic purchasing system 102 eco-labelling 408-410, 433-435 case law under old procurement directives and Treaty 417-418 discrimination test 419 market access/proportionality test 420-421 mutual recognition/ proportionality test 420 summary of principles and practice under Treaty 421-422 definition of eco-labels 410-413 and procurement directives criteria for awarding contracts 432-433 eco-labels as technical specifications conditions for using 426-430 presumption of legality of labelling schemes 430–432 effectiveness in promoting green procurement 434 technical specifications for eco-labels 410 and Treaty 413-417 electronic reverse auctions 102 energy see 'green' energy policy enforcement measures in contracts, legality of 177

#### INDEX

environmental policies see social and environmental policies equality and non-discrimination 271-274 concepts of 277-280 discrimination, prohibition of 30, 57-58 direct discrimination 58-59 indirect discrimination 59-67 non-discriminatory hindrances to trade 67-72 permitted hindrances 73-77 contract specifications 74-76 procurement decisions on financial grounds 76-77 equal treatment as basis of equality law and procurement law 274-277 development of principle of 85-87 in EC law 280-284 in procurement directives 285-286 as interpretive principle 288 obligations to promote 286-287 'excluded buying decisions' 59-67 and freedom of contract 289-300 hindrances to trade see hindrances to trade limits of EC law in promoting 300-309 under Public Sector Directive 195 - 197effectiveness in promoting 300-309 rule of reason for permitted hindrances to trade 73-74 and set-asides affirmative action 356-357 discrimination and indistinctly applicable measures 352-356 equality under Treaty 349-352 as hindrances to trade 182-184 social benefits, in 'buying in' 168-170 Treaty basis for measures 46, 47 - 48

# INDEX

503

European Commission practice on state aid and procurement 253-254 European Community (EC) see also Treaty, EC activities of 39 competence for procurement legislation 38-45 disability laws within 311-316 policy on serious criminal offences 484-486 role in procurement, extent of 18 support for horizontal policies 37-46 task of 39 'excluded buying decisions' see under purchasing exclusion from contracts as mechanism for implementing procurement policies 139-141 under Public Sector Directive 104 - 106for serious criminal offences 479-481 under Treaty 184-188 framework agreements for repeat purchases 102 fraud, EC policy on 486-488 free movement of goods rules 57-77, 148 impact of rules (summary table) 81 procurement and industrial policies 148 - 158freedom of contract 289-300 freedom of establishment and to provide services 77-80 Government Procurement Agreement, effect of 247-248 governments see also member states as purchasers and regulators 21-29 GPA see WTO Agreement on Government Procurement

(GPA) 'green' energy policy 406–407 balancing environmental and procurement issues 376–377

discretion over pursuing environmental objectives within contracts 388-389 EC energy policy 369-372 effect on procurement 372-375 electricity from renewable sources criteria for awarding contracts 390-391 special conditions requiring use of 401-402 specifications requiring use of 391-401 and energy-efficient products, procurement of 389-390 environmental principles and procurement 375-376 production effects, legality of contract conditions relating to 171-173 products made using only electricity from renewable sources criteria for awarding contracts 402 - 404special conditions requiring use of 405-406 specifications requiring use of 404-405 Treaty basis for 45-46 trends in EC public-sector energy targets, effects on procurement 382-388 energy-use labelling 382 energy-use standards 381 renewable energy 378-380 hindrances to trade contract requirements as requirements going beyond compliance with legal requirements 162-177 requirements going beyond

contractual performance 177–182 derogations permitting 73 industrial policies as 148–158 justification for national security as 151

## 504

hindrances to trade (cont.) regional development as 151-156 SME development as 156-157 procurement measures as awarding contracts, criteria for 190-191 exclusion from contracts 184-188 improving access to contracts 191 packaging and timing of orders 182 preferences in choosing tenderers 188 proving compliance with social & environmental policies, measures for 191-192 set-asides 182-184 horizontal procurement policies alternatives to see alternatives to horizontal procurement policies concept of 12-13 conflict with single market policy, potential for 18-20 consumption of products, works or services, relating to 123 and contract performance 121-122 policies confined to performance 122-125 policies going beyond performance 125-127 definition and significance 9-10 delivery of products, works or services, relating to 123–124 disposal of products, works or services, relating to 124 EC's support for 37-46 and free movement rules see free movement of goods rules how use of term shows equal status with other government policies 13-15 and legal requirements policies going beyond compliance 116-121 whether hindrances to trade 162 - 177policies limited to compliance 109-116

#### INDEX

mechanisms for implementing applicability of 127-128 awarding contracts, criteria for 142-146 contractual requirements 132-136 confined to contract performance 159-177 costs versus benefits 128-130 decision on what to purchase 131, 159 decision to purchase or not to purchase 130-131, 159 exclusion from contracts 139 - 141packaging and timing of orders 136-137 preferences in choosing tenderers 141-142 set-asides 137-138 as normal market behaviour 15-20 and procurement directives 90-92 production of products, works or services, relating to 123-124 and proportionality 49, 167-168 and Public Sector Directive 192-195 equal treatment and non-discrimination 195–197 and state aid rules see state aid and subsidiarity 49 taxonomy 108-146 workforce measures, relating to 124-125

industrial policies and procurement 148–158 information disclosure under Treaty 192 required from tenderers under Public Sector Directive 107 internal market, overview of policies for developing 30–31 Invisible Hand of the market, social welfare through 17

legislation, overview of 29–30 see also entries for Treaty and directives

# INDEX

'market economy' test 257-258 market forces, advancement of public welfare through 17 market price, determining see under state aid Member States see also governments legislation on disability issues, compliance of contracts with 329 Member States' discretion 30-37 over use of contracts to pursue environmental objectives 388-389 principles of interpretation 46-50 and procurement directives 90-92 contract specifications relating to access for disabled 320-324 and Public Sector Directive 244-245 reserved contracts, UK practice 337-339 money laundering EC policy on 488-490 exclusion from contracts for 461-462

national security as justification for hindrances to trade 151 negotiated procedures 102 non-compliance, exclusion from contracts for with CSR policies under Utilities Directive see under corporate social responsibility (CSR) and the utilities sector under Public Sector Directive see under Public Sector Directive under Treaty see Treaty, EC (Treaty) non-discrimination see equality and non-discrimination non-EC countries, outsourcing to, legality of contracts terms 174 - 175

open procedure 101 orders *see* packaging and timing of orders 505

organised crime, EC policy on 482–484 outsourcing to non-EC countries, legality of contract terms 174–175

packaging and timing of orders as mechanism for implementing procurement policies 136-137 Public Sector Directive, effect of 227 'primary policies' and 'secondary policies', use of terms 13-15 private investor as benchmark in applying state aid rules 260 private sector procurement comparison with public procurement 15-16, 19, 20 perspective on market price as benchmark in applying state aid rules 258-259 procurement see also contracts, horizontal policies carbon footprint, relating to 175-176 comparison with private sector procurement 15-16, 19, 20 competitive dialogue 101-102 constraints on purchaser autonomy 17 - 20definition and significance 9 directives see procurement directives; Public Sector Directive dynamic purchasing system 102 EC's role in, extent of 18 electronic reverse auctions 102 and energy policy see 'green' energy policy and equal treatment 285-286 and equality and non-discrimination see equality and non-discrimination framework agreements for repeat purchases 102 and Government Procurement Agreement 247-248 legislation, overview of 29-30 negotiated procedures 102 open procedure 101

#### 506

procurement (cont.) as policy tool under Public Sector Directive 245–246 procedures and techniques permitted under Public Sector Directive 101–102 and purchaser autonomy 15-20 restricted procedure 101 reverse auctions, electronic 102 and SMEs see small and medium-sized enterprises (SMEs) and state aid rules see under state aid terminology issues 13-15 transparency in procedures 30-31 and Treaty see under Treaty, EC use of terms 'primary policies' and 'secondary policies' in relation to 13-15 value for money in 31-35 WTO Agreement 175, 181-182 procurement directives see also Public Sector Directive; Utilities Directive under corporate social responsibility basis in Treaty 40-41 and disability issues see under disability issues and eco-labelling 417-435 and equality and non-discrimination see under equality and non-discrimination history and nature of 88-92 and horizontal policies 90-92 impact of free movement rules (summary table) 81 and Member States' discretion 90-92 and status equality see equality and non-discrimination and value for money issues 34-35 production of products, works or services, policies relating to effect of 123-124, 171-173 prohibited requirements in contracts 212 - 215proportionality 49, 167-168 public procurement see procurement Public Sector Directive 192–195

#### INDEX

awarding contracts 106-107, 235 - 243basis in Treaty 41-42 choice of tenderers 104-106, 234-235 and contractual requirements 103 beyond contract performance 226 limited to contract performance beyond legal compliance 200 - 201beyond legal compliance classification of requirements 215-226 beyond legal compliance -'prohibited requirements' 212-215 beyond legal compliance special conditions 206-212 beyond legal compliance technical requirements 201-206 limited to legal compliance 198-199 coverage 98-100 and disability issues 329-330 contract compliance 331-333 technical specifications 330-331 and equal treatment and non-discrimination 195-197 exclusion of tenderers 104-106 for non-compliance 227-228 with extra-legal requirements 232 - 234with general legal requirements 228 - 232general principles 100-101 influence on purchasing decisions 198 information obligations 107 Member States' discretion, effect on 244-245 overview 98-107 packaging and timing of orders, effect on 227 permitted procurement procedures and techniques 101-102 and procurement as policy tool 245 - 246

# INDEX

507

and reserved contracts see reserved contracts and set-asides 234 public welfare, advancement through market forces 16-17 purchasing decisions 'excluded buying decisions' 59-67, 182, 190-191 and Public Sector Directive 198 to purchase or not to purchase 130-131, 159 on what to purchase 131, 159 purchaser autonomy in public procurement 15-20 regional development as justification for hindrances to trade 151-156 repeat purchases, framework agreements for 102 reserved contracts Member States' discretion, UK example 337-339 new provisions, overview of 336 obligations to open up contracts 339 operation in UK 333-336 sheltered workshops and employment programmes 339-343 restricted procedure 101 reverse auctions, electronic 102 rule of reason and permitted hindrances to trade 73-74 'secondary policies', use of term 13-15 set-asides as mechanism for implementing procurement policies 137-138 and Public Sector Directive 234 and SME development policies see under small and medium-sized enterprises (SMEs) and Treaty 182-184 sheltered workshops for the disabled 169-170 eligibility of schemes 339-343

and set-asides 183-184

single market policy, conflict with horizontal procurement 18 - 20small and medium-sized enterprises (SMEs) 345, 367-368 hindrances to trade, as justified 156-157 procurement process for identifying problems with 364-365 SME-friendly measures 365-367 role of SMEs 346-348 and set-asides affirmative action 356-357 contracts above EC thresholds 348-349 discrimination and indistinctly applicable measures 184, 352-356 equal treatment under Treaty 349-352 subcontracting prohibited and compulsory 359-364 SMEs as subcontractors 357-359 social and environmental policies see also 'green' energy policy advancement through market forces 16 - 17carbon footprint, procurement relating to 175-176 discrimination in 'buying in' social benefits 168-170 environmental policies, integration with other policies 47-48 procurement measures relating to and Public Sector Directive see under Public Sector Directive and Treaty see under Treaty, EC (Treaty) special conditions in contracts 206-212 specifications see under contracts state aid 249, 268-270 case law and case practice, overview of 250-251 CFI 251-253

ECJ 251

## 508

state aid (cont.) European Commission practice 253-254 concept of 250 horizontal policies as 254-255 justification for procurement as 151-156 state aid rules and public procurement 255-256 determining market price 257 choice of benchmark 262-264 choice of horizontal criteria 261-262 choice of procedure 264-267 'market economy' test 257-258 private investor's perspective as benchmark 260 private purchaser's perspective as benchmark 258-259 relevant situations 256-257 subcontracting prohibited and compulsory 359-364 SMEs as subcontractors 357-359 subsidiarity principle 49 taxonomy of horizontal policies 108 - 146technical requirements in contracts 201 - 206'technical specification', definition of 201-202 tenderers choice of preferences in, as mechanism for implementing procurement policies 141-142 procurement directives and disability issues 318-320 under Public Sector Directive 104-106, 234-235 under Treaty 188 exclusion from contracts under Public Sector Directive see under Public Sector Directive under Treaty 184-188 information obligations under Public Sector Directive 107

#### INDEX

terminology issues and procurement 13 - 15timing of orders Public Sector Directive, effect of 227 transparency in procurement process 30-31, 82-85, 192 Treaty, EC (Treaty) 56, 80-82 see also legislation, overview of and access for disabled 42 - 44and anti-crime measures 44-45 directives as aid to interpretation of 50-53 and eco-labelling 413-417 case law 417-422 environmental protection and other policies, basis for integrating 47 - 48and equality and non-discrimination 46 effectiveness in promoting 300-309 equal treatment, principle of 85-87 and Member States' discretion 47 - 48and set-asides 349-352 free movement rules see free movement of goods rules and freedom of establishment and to provide services 77-80 and green energy 45-46 and industrial policies 148-158 measures with more than one objective, basis for 42 procurement directives, basis for 40 - 41and procurement measures relating to social and environmental policies 192 awarding contracts, criteria for confined to contract performance 188-190 not confined to contract performance 190-191

# INDEX

509

contractual requirements requirements confined to contract performance 159-177 requirements going beyond contractual performance 177-182 exclusion from contracts for non-compliance beyond general legal requirements 185-188 with general legal requirements 184-185 measures to improve access to contracts 191 packaging and timing of orders 182 preferences in choosing tenderers 188 proving compliance 191-192 purchasing decisions 159 set-asides 182-184 procurement outside scope of Treaty 55 Public Sector Directive, basis for 41 - 42and transparency of procurement procedures 82-85 and value for money issues 33

United Kingdom (UK) compliance of contracts with disability laws 316-317 disability discrimination law 311-314 discretion over reserved contracts under Public Sector Directive 337-339 reserved contracts, operation of 333-336 USA, disability law in 314-316 Utilities Directive see under corporate social responsibility (CSR) and the utilities sector utilities sector and CSR see under corporate social responsibility (CSR) and the utilities sector value for money in procurement policy 31-35 variant bids 205 workforce measures 124-125, 170-171 WTO Agreement on Government Procurement (GPA) 175, 181 - 182