COMPETITIVE DIALOGUE IN EU PROCUREMENT

Competitive dialogue is a procedure introduced into the EU procurement system in 2004 to provide an improved method for awarding complex contracts, such as those for public infrastructure and major IT systems. This book provides a critical examination of the legal rules on this new procedure, focusing in particular on grey areas such as availability of the procedure and the scope for negotiations after 'final tenders'. It considers both the EU-level rules and the way in which those rules have been applied in national systems. The examination draws on extensive evidence of the way in which the procedure has been operated and interpreted across Europe, including from several studies commissioned specifically for this volume. It also includes an extensive chapter co-authored by the volume editors which provides a thorough analysis of the EU-level rules, a comparative reflection on national experiences, and significant critical commentary and recommendations.

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PREFACE

The introduction of competitive dialogue into the EU's legal regime on public procurement was indisputably one of the most important elements of the latest revision of this regime in 2004. Competitive dialogue was introduced in order to improve on the procedures previously available for realising complex projects, such as privately financed infrastructure projects, complex IT systems, and new types of services. Prior to this, many stakeholders considered that the award procedures for such projects were either too inflexible or were not sufficiently widely available in law, and competitive dialogue was added to fill the gap. The complex contracts to which it applies are significant both because they often involve considerable public expenditure and because they concern vital public services and infrastructure, and a suitable legal regime for awarding such contracts is therefore of utmost importance.

The main aim of this book is to provide a critical examination of the legal regime on competitive dialogue, in light of its objective of providing a procedure for complex procurement across the diverse Member States of the EU. This involves considering both the legal rules at EU level and the way in which those rules have been implemented and applied at national level, the latter being essential for a full perspective on the EU rules themselves. Through this analysis, the book also, significantly, aims to contribute towards the sound future development of the rules on competitive dialogue, both at EU level and in its implementation in national law and practice – whether that be through legislative change, judicial development, government guidance or simply application by contracting authorities. The work also offers an interesting case study of the way in which EU public procurement law has been received in national law and practice, and has influenced, and been influenced by, national approaches to regulating public procurement.

Enhancing the simplicity of the EU's legal regime and the flexibility of the procurement procedures it offers are also at the top of the agenda in the current process of modernising the EU procurement regime. A first

proposal for a new basic Directive on public procurement was forwarded by the European Commission in December 2011, after the text of this book was completed. The outcome of the legislative process is by its very nature uncertain. However, it is notable that it will become much easier to access the competitive dialogue procedure if the European legislator follows the proposal of the European Commission. As this book demonstrates, its current scope is very uncertain, and this is one of the main reasons for the remarkable variation in the frequency of its use between Member States; but the Commission has proposed that the procedure should in future become more generally available, eliminating this uncertainty and the legal risks that may arise in choosing this procedure.

To increase the value of this book we have conducted several empirical studies. These studies have examined the way in which the legal rules 'in the books' have been applied and interpreted in practice by those responsible for operating and/or advising on competitive dialogue – mainly lawyers, procurement practitioners and policy-makers – in several of the Member States covered. This information is supplemented with information from other empirical studies, mostly from national governments. It is our hope that this element of the book will be a source of inspiration for practitioners, as well as informing policy-makers of the practical difficulties and concerns that need addressing in relation to this relatively novel procedure.

Many persons contributed to the production of this book or otherwise provided necessary support. Early versions of some of the papers incorporated in this volume were included in a workshop, held at Copenhagen Business School in September 2009. Subsequent versions and some additional papers included in the volume were presented at the conferences, Public Procurement: Global Revolution IV in Nottingham in April 2010, and Public Procurement: Global Revolution V in Copenhagen in September 2010, both of which were organised jointly by the University of Nottingham and the University of Copenhagen. We are grateful to all those who made presentations at these events, as well as to the delegates who provided interesting feedback on the papers presented there. We would also like to record our thanks to those assisting with the organisation of these events, in particular Justine Goodenough and Paula Faustino at the Nottingham event and Tina Futtrup Borg at the Copenhagen event.

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contributions. Sue Arrowsmith would like also to express her great appreciation to the sponsors of the Public Procurement Research Group, in particular to Achilles Information for funding and support for many aspects of the project, including the empirical studies on Spain and Portugal, and to Bevan Brittan for co-funding the empirical research on UK practice. We are also grateful to the ESRC for the funding that it provided for this UK project under the CASE studentship scheme. The editors would also like to express their great appreciation to the many practitioners and policy-makers who were willing to take part in the empirical study on competitive dialogue in the UK, Denmark, France, Spain and Portugal.

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We also record our very sincere thanks to the authors/co-authors of all the chapters of the book, who freely gave of their time and insights and whose contributions made the book possible.

The information in this book is in general up to date as of July 2011. However, it has also been possible to a limited extent to note some important later developments, including, in Chapter 3, a change of policy on use of competitive dialogue announced in the UK in November 2011.