Steen Treumer and Mario Comba, *Modernising Public Procurement. The approach of EU Member States,* Edgar Elgar 2018, hardback, x+357 pages,
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The book is a collection of country reports, edited by distinguished authors in the public procurement field and signed by young and mature scholars and academics, grown in the commercial and administrative provinces. The volume, inserted in the European Procurement Law series edited by Roberto Caranta and Steen Treumer, who also sign the foreword of the volume, comes to the fore along the continuing path of European Public Procurement Law Group, paved by the preceding *Modernising Public Procurement: The New Directive.*[1] In line with the series it concerns, by and large, the European dimension of the procurement law established at national level, offering a privileged view about the implementation of the 2014 Public Procurement Directive[2] (or Directive 2014/24/EU) in several Member States.

Notably, such spotlight on implementation, even in a well ploughed field, is due to specific backgrounds of EU public procurement law, as characterized by increasing prescriptiveness (p. 323) and constructive ambiguity (p. 3) mixed with flexibility and simplification (p. 2). These factors lead the European Legislator to confer few margins of appreciation to the national Legislator, which leaves, in turn, the margin of discretion to public authorities in the application of law. This increases the interest for monitoring the implementation in legal orders where public markets usually overlap sunset rule, as eventually the public sector applies to itself the European law while discharges domestic public policies. The aftermath of the research is, not surprisingly, that 'minimalist implementation of the Directive is a common feature detected in the present analysis' (p. 327). In such context, it seems that the normative novelties count as sunset rules towards public markets driven by efficiency and competition issues, rather than by strategic management and sustainable development.

Removing any claim of effective analysis of the actual public procurement systems, it looks like a book for specialists and high priests, not for noobs. Therefore, the following question arises: what can a reader of European administrative law learn by country reports on the implementation process in a sector harmonized by four generations? In order to reply to that, some observations deserve the structure, scope and purpose of this new editorial launch.

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1 F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive* (DJØF 2014).

2 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

1. Structure: the minimalistic approach in the implementation of EU public procurement law

The structure is clear and self-evident. The book covers the implementation of the Public Procurement Directive not of the entire EU package (including concession and utilities), but in just 12 Member States (presented in alphabetic order – actually, this hasn't been clarified by editors: Denmark, Estonia, Finland, France, Germany, Italy, Poland, Romania, Slovenia, Spain, Sweden, United Kingdom). These are reported by distinguished scholars and experts, specialized in public procurement law, often involved in the process of implementation due to their institutional roles.

All the domestic reports follow the same structure, whereby Section 1 is a formal introduction to the several and varied legal tools used in the domestic transposition, aimed at the valid implementation of EU law within the national legal sources (the reports also refer to the legal force of preparatory works or soft law). From an overall perspective, it has provided an empirical and enriched survey on the different vertical integration rings with the European legal chain, also taking into account the variations affecting the transposition process, as suggested by the winking recall to 'specific internal circumstances' (p. viii), definitely not biased by the spanning hundreds of articles and recitals (as never before), but concerned by 'fear of corruption and distrust in the integrity' (p. 1), without any reconstruction, though, of the domestic patterns which interfere or delay the implementation as such.

Section 2 of each report focuses on material quality of transposition and matters on practical and technical outputs of implementation considering the divergent avail of the well-known two self-integration methods, such as gold-plating or, by contrast, of copy-out (as succeeded in Poland, Romania, UK). This brings the analysis to verify if issues raised after the implementation are 'often the result of typical national features' (p. 6) and if the concrete methodological device, relied on by the internal Legislator, attains, under the national regime, the European objective of flexibility and simplification, even if the European Legislator did not succeed (p. 2), beyond the alleged facade of harmonization current in such field.

Section 3 covers the implementation of three specific EU rules characterized by discretion of public authorities, where the legality of the implemented legislation is questionable. Luckily, the chapters also consider national preparatory works as a legal source, and their interesting role in the implementation of the Directive – including its preamble. These are all novelties in the 2014 Public Sector Directive, *i.e.* exclusion,[3] competitive procedure with negotiation,[4] and

3 ibid, art 57.
4 ibid, art 29.

contract changes (which can lead to trigger the duty to retender) that are taken into consideration in procurement practice,[5] so the Directive is also relevant for the catalogue of sophisticated and controversial issues derived from the uncertainty of EU law in such topics. The actual interest for those provisions is confirmed by recent case law.[6]

Sections 4 and 5 can be considered in parallel, looking for various aims given to the Member States by the Directive (Section 4) 'without specifying the specific legal rule or regulatory options to be applied in attempting to reach these aims' (p. 9 and p. 323) (Section 5). The openness to multiple options should be the normal way in which EU Directives operate, but in public procurement law the trend is opposite. It is difficult to spot the systematic logic lying behind the choice to leave these issues to the free determination of a Member State, as the editors state, but the minimalistic approach joint with 'the lack of common trends' (p. 327) between procurement systems and legal order implementation 'perhaps justify the increasing prescriptiveness of EU public procurement rules' (p. 324), and, I add, the judicial activism, which represents the counterpart of the unsuccessful quality of implementation at legislative level.

The existence of only seven legal arrangements (mostly on aims of secondary relevance) has been recorded, where Member States run specific objectives of Directive 2014/24/EU. These are finalised to ensure legal certainty and provide effective measures on (1) environmental, social and labour clauses in the performance of public contract,[7] (2) using of electronic means of communication for information exchange,[8] (3) conflict of interests remedies,[9] (4) permanent updating of e-Certis,[10] (5) termination of contract before the scheduled deadline under conditions demanded also to national law,[11] (6) the compliance to principles in the awards of contract involves also national rules level in order to ensure best price-quality ration,[12] and (7) the detection of public bodies concerned in specific tasks shall be communicated to European Commission.[13]

5 ibid, art 72.
6 See, on Article 57, Case C-41/18 *Meca Srl v Comune di Napoli* [2019] EU:C:2019:507 and Case C-267/18 *Delta Antrepriză Construcții și Montaj 93 SA v Compania Națională de Administrare a Infrastructurii Rutiere SA* [2019] EU:C:2019:393, Opinion of AG Sánchez-Bordona.
7 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65, art 18(2).
8 ibid, art 22(1).
9 ibid, art 24.
10 ibid, art 61(1).
11 ibid, art 73.
12 ibid, art 76(1).
13 ibid, art 83.

2. Scope: the regulatory approach in the legislative and administrative margins squeeze

The minimalistic approach in the implementation of the EU Public Sector Directive within the procurement national system and legal order combines with the fact that Member States 'have frequently transferred the burden of identifying the relevant legal solutions to the contracting authorities' (p. 327). This is pretty compatible with the consideration that 'only when particularly sensible policies are at stake, have the Member States used their regulatory competence', thereby implementation means only filling 'the gaps at legislative level, without transferring discretion to the contracting authorities' (p. 327).

In brief, the above mentioned are the lessons learned after the survey from Member States; though, is not explained, as the title of the volume instead claims, why the modernisation of public procurement passes through the notion of, and the interest for the national implementation. This is a part of the research which lacks.

Some guidelines on the relation between implementation and modernization would have been more than welcome, but firstly looking at the blueprint from the public lawyer perspective: (*i*) what can the public procurement modernisation say to a public lawyer? (*ii*) what can a public lawyer say about the modernisation of public procurement? By and large, the answer is that the national administrative law is becoming more and more Europeanised and, almost conversely, privatised (or under common regime), but is mixed with free zones where the typical special regime that characterizes the administrative law applies.

From a European lawyer perspective, the implementation represents a post-modern mean, more than a modernised tool of European integration, simply because the wording of a provision is 'invariably the starting point and at the same time the limit of the interpretation',[14] hence the value of the provision is in the hands of the judges. The underlying question in the modernisation process of EU law is the following: can the implementation break the post-modern interpretation flow? Can the implementation reduce normative porosity and increase legal certainty?

From another point of view, it could be argued that the minimalistic approach in implementation opens the way to explain the effects of minimum harmonisation, when EU law is also applied by the public sector as public power, discharging their institutional role through the pursuing of public policies.

In other words, the core part of the book concerns the residual power of Member States, handed down by EU law and, on the counterpart, the margin

14 Case C-46/15 *Ambisig* [2016] EU:C:2016:137, Opinion of AG Wathelet, para 41 and Case C-33/08 *Agrana Zucker* [2009] EU:C:2009:99, Opinion of AG Trstenjak, para 37.

squeeze, which comes from EU law and gives to national Legislator margin of appreciation and, to public authorities, margin of discretion.

There are at least three hypotheses where this power arises in the implementation of EU law: if the EU law is vague, if it leaves open options, or if it delegates margin to subsequent authorities.

All these variables discount the fact that the Public Procurement Directive is directed to the public sector, hence the application is already depended by the public authorities themselves. This arises the issue whether the contracting authorities have truly the insight (not only the legal ability) to implement the law without distorting the intention and the objectives of the EU law in case of light deviation. This eventuality is also not taken in account in the national reports.

Rather, it emphasizes the 'natural' ambivalence and the pragmatic porosity of some EU provisions. At this regard, two possible non-complementary scopes of legal interpretation are recorded: in the first sense, the legal arrangement is vague and the semantic scope of the norm is not well defined due to the normative ambiguity, and in the second sense, the interpretation is clear, but uncertain and not eloquent, owing to the pragmatic ambivalence of the effective application of the legal provision.

The book devotes attention on the semantic ambiguity and on the pragmatic ambivalence either. It doesn't define the semantic ambiguity but declares that it 'ensures that issue is regulated in spite of disagreement and the fact that unclear legal sources can often lead to different interpretation' (p. 5). On the opposite, it criticizes the pragmatic ambivalence, as it makes 'the Directive more difficult to interpret and the state of law more blurred' (p. 4). Those phenomena are distinct, but sometime the ambiguity could also lead to effective obscurity: 'in some instances the unclear wording will be part of a substantive provision' (p. 5). Notably, the pragmatic multi-references of a provision entails room for implicit and hidden regulation, *i.e.* recitals containing substantive provisions: 'obligations, concepts or very clear-cut elements of relevance for the interpretation' (p. 3), opening the scope of application of the legal arrangement to effects blurred, but involved by the law, even if the 'legislator deliberately avoids regulating the issue' (p. 5).

As stated, 'in other words, several considerations in the recitals are provisions in disguise' (p. 3). The same claim was clarified in preceding book of the series *Modernising Public Procurement: The New Directive*.[15]

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15 S Treumer, 'Evolution of the EU Public Procurement Regime: The New Public Procurement Directive' in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive* (DJØF 2014) 9-27 and 21 specifically, where Treumer considers that '[t]he European Legislator has frequently inserted statements in the Recitals that ought to have been a part of the substantive provisions because they contain obligations, concepts or very clear cut elements of relevance for the interpretation of substantive provisions in the new Public Procurement Directive. So in other words several considerations in the Recitals are provisions in disguise'.

The existence of unclear, but current provisions and, conversely, of clear, but blurred provisions increase the interest for the implementation, arising the recourse by national Legislator and public authorities of the margin of appreciation (in case of clear, but uncurrent provision) and the margin of discretion (in case of unclear, but current provision).

3. Purpose: the comparative approach in addressing the normative outcomes

The proper purpose of the book should be the representation of a fragmented landscape and how it could be useful for the next provisions generation in procurement the unification of the branches and the coverage of the industry under the regime of regulation, on one side, and the provision of a Directive for the preventing the risk that those rules will be destined to become sunset rules, on the other.

Such purpose is not embodied in the book, which is only focused on implementation at a legislative level.

As noted, 'a comparative approach makes EU institution aware of the possible developments of common trends in the Member States' (p. ix); actually, this goal is not accomplished by each report (apart for some concordance or recall in footnotes), but properly by the concluding chapter, handed down by the editors.

The surrounding logic of the book, laying underneath the reports, stands on the very fruitful idea that dialogue between national court and Court of Justice, through preliminary proceeding, can be fostered due to comparative knowledge. The added part of the reasoning stands by the evaluation that many issues on implementation can bring judges to recourse to judicial activism.

Actually, it is questionable that the national reports could increase comparative knowledge, beyond the delivery of good and fresh information. Everybody knows that eating one cake is delicious, but too much sugar is simply too sweet (even for non-diabetics), whereby the same counts for the intellectual food. Pooling diversified information, based on harmonised systems, is useful, but grasping the knowledge inner to the legal order of belonging is an effort which goes beyond the collection of national reports, that neither the conclusion by the editors reach. Paradoxically, the raw data for comparative analysis can be discovered in the index where many voices recall, page by page, the national reports. In other words, the leap in comparative research by mean of a common canvas of issues does not coincide with breakthrough in comparative insight pursued by national reports collection. Somehow, the leap from national research to comparative does not depend by the amount of the information, but by the expertise in the detection and selection of qualitative data, which lead to get knowledge by experience. This leap has not been expressly detected in this work.

4. Final remarks

The book is an essential tool both for scholars and practitioners, as well as for judges, to improve the dialogue between different legal systems and the subsequent judicial activism. As mentioned, the Public Procurement Directive 'remains a lawyer's paradise' (p. 2, repeated also at p. 5), and this book confirms it, without opening the heavenly gate, but preparing the path to a new Europeanised administrative law common to Member States, based on the mutual margin squeeze of public authority discretion.

Once again, the modernised implementation of EU public procurement law confirms the importance of the traditional role of the discretion of public authorities in the application of law and its distinction from the margin of appreciation in the implementation of EU law. This distinction remains, in fact, remarkable, vital and fruitful when the European objectives are leaved open to the actual implementation of the public authorities, given the fact that, in such contest, the public sector, even if is the direct recipient of the European law itself for some specific policies, in the meantime, and sometimes in contrast, seeks to discharge its public policies for the achievement of other objectives and purposes.

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