Christopher Bovis, *The Law of EU Public Procurement*, Oxford: Oxford University Press 2015, 2nd edn, hardback, ISBN 9780199684687, lxi+864 pp., £195.00

In outline, a scientific high value work admits two types of reading: the first is accessible to all, based solely on the text, the second intends to provide the specialist with the tools to delve into the many subjects dealt with through footnotes, which give an account on the sources, literatures, discussion and opinions. *The Law of EU Public Procurement* satisfies the needs of both the types of readers, assuming a double theoretical and judicial perspective.

As the author states, the book '*aims to provide the reader with a comprehensive analysis of the law, jurisprudence, and regulation of public procurement in the European Union*',[1] as provided in the directives package.[2] The aim is amply achieved by means of the integral application of the ordo-liberal theoretical system (taken as a whole), revealing assumptions and backgrounds of the public procurement legal framework design, in continuity with his previous monographs.[3] Notably, the long run expertise of Chris Bovis comes to us as professor of Business Law at University of Hull, founder and director of the *European Procurement & Public Private Partnership Law Review*.

1. Structure

The volume enfolds fourteen chapters (twelve on the substantial discipline), and the author suggests (pp. 18–21) an organic reading in four-parts (which, indeed, is not apparent from the *summary*). According with his partition, (*i*) '[*p*]*art one comprises of three chapters which offer the reader a trajectory of the development, evolution, and application of the public procurement* acquis' (basically Ch. 2–3–4); (*ii*) the second part relates to the principles of public procurement (Ch. 5) and the so called judicial doctrines (Ch. 6); (*iii*) the third covers the jurisprudential analysis regarding the basics and grounds of the notions of contracting authorities (Ch. 7), public contracts (Ch. 8), selection and qualification (Ch. 9), award procedures (Ch. 10), award criteria (Ch. 11); finally,

1 ibid, 18 §1.47.

2 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L94/1 [Directive 2014/23/EU]; 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 [Directive 2014/24/EU] and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L94/243 [Directive 2014/25/EU].

3 C Bovis, *The Liberalisation of Public Procurement in the European Community and its Impact on the Common Market* (Ashgate International 1998); C Bovis, *Public Procurement in the European Union* (Palgrave Macmillan 2005) and C Bovis, *EU Public Procurement Law* (2nd edn, Edward Elgar 2012).

(*iv*) the fourth part concentrates on redress and remedies (Ch. 12), and on the link between public partnerships and public procurement regulation (Ch. 13).

To these parts is added the transcript of the Directives as in force in 2014 (pp. 681–864, without the useful and cited recitals), which allow the combined reading of the text to the provisions, cited mostly in the text informally, addressing the work mainly to experts. At a formal level, it should be noted that there are few textual repetitions, which unfortunately slow, without strengthening, the exposure of the specific subject matter (for example, §§ 1.27–1.41 is like §§ 5.30–5.44).

The book is a gold mine for those looking for hand notions, thanks to the valuable *table of cases* (pp. xxv–xlv) and *index* (pp. 851–864), facilitating intra-textual research and transversal and integral study of the work. The structure of the volume corresponds substantially to the logic model of the first edition, published in 2006 by the same publishing house, but with a different title, *The EC Public Procurement: Case Law and Regulation*,[4] which has been fully updated and revised in consequence of the established case law and the adoption of the European directives package on public contracts and concessions in the public sectors and utilities sectors,[5] which reformed the law of public procurement, repealing the earlier directives of 2004 and introducing for the first time a European regulation of concessions.

The exposition has a circular, sometime recursive development, deserving the mark of a research textbook: in fact, *Foreword* (pp. v–xiii), *Introduction* (pp. 1–21), corresponding to a previously published essay,[6] and *Conclusions* (pp. 667–679) can be read in a unified way, separate from the rest of the volume, which requires the subsequent explanation.

It is covered the whole subject of public procurement, except for the defense sector and green procurement. The exposition does not follow the order of the titles of Directives 2014/23–24–25/EU (moreover mistakenly recalling, not a few times, Directives 2004/17–18/EC,[7] as if they were '*the current public procure-*

4 C Bovis, *The EC Public Procurement: Case Law and Regulation* (Oxford University Press 2006)

5 Directive 2014/23/EU; Directive 2014/24/EU and Directive 2014/25/EU.

6 The *Foreword* (pp. v–xiii) and *Introduction* (pp. 1–21) of the volume correspond to C Bovis, 'Public Procurement and the Internal Market of the 21st Century: Economic Exercise versus Policy Choice' in T Tridimas and P Nebbia (eds), *European union law for the twenty-first century: rethinking the new legal order. volume 2* (Hart 2004), ch 17, 291-310. *Internal Market and Free Movement Community Policies*, Ch. 17, 291–310. Indeed, also the section relating to the *Public Procurement and State Aid*, inserted within Chapter 5 of the textbook, reproduces the essay with the same title in HCH Hofmann and C Micheau (eds), *State Aid Law of the European Union* (Oxford University Press 2016) pt II, ch 6, 169–186.

7 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134/1 and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114.

ment acquis'[8]). For that reason, the concessions[9] have no autonomous explicitly devoted section, despite the two other directives on public procurement and utilities (Ch. 3 and 4), but are part of the public-private partnership scheme, stimulated by the inner opinion that '*there is no overriding legal definition of a public services concession under EU law or international law*'.[10] This is a precise choice of the author, not the choice of the European Legislator.

2. Content

Under the procurement system regime, '[*t*]*he European Institution through the enactment of the Single Market Act have identified public procurement reforms as essential components of competitiveness and growth and as indispensable instruments of delivering public services*'.[11] Hence, the public procurement regulation (such term stands out even in the title of twelve out of fourteen chapters) is necessary for the market integration, as '*the identification of public procurement as a major non-tariff barrier has revealed the economic important of its regulation*';[12] but this kind of economic regulation is not exaustive; notably, the author distinguishes public market mechanism and market forces from judicial doctrine and legal integration, which comply the system, even if is not necessarily consistent. In few words, the public procurement system is dependent by the market integration, but is complied by the multilevel legal system. In pratice, the volume is all concentrated on the EU case law and on the regulation of public procurement as a managerial tool available to the public sector.

Behind the insight of Bovis there is the awareness that '[*t*]*he concepts of public procurement regulation refer to the mechanism for the applicability and engagement of the relevant rules and provide for different notions and definitions which are necessary for the harmonization of national legal and political systems with a view to integrating their respective public markets*',[13] but these legal concepts are not self-sufficient, hence the author highlights wisely the relevance of the '*doctrines which the Court established and had recourse to its attempt to develop public procurement law as the conduit for the delivery of public services in EU Member States*'.[14] The judicial approach to public procurement principles is viewed as a collection of "doctrines", but the book is not less doctrinal in their reconstruction, as repeated in another study. Those principles are transparency and account-

8 As defined in C Bovis, *The Law of Public Procurement* (2nd edn hardback, Oxford University Press 2015) xi at fn 20 and 61 at fn 129.
9 Directive 2014/23/EU.
10 C Bovis, *The Law of Public Procurement* (2nd edn hardback, Oxford University Press 2015) 593.
11 ibid, vi and 306, §6.72.
12 ibid, v and 667, §14.01.
13 ibid, 18-19, §1.53.
14 ibid, 19, §1.54.

ability, as properly regarded by public procurement law, apparently, just for doctrinal reasons, the non-discrimination and the equal treatment principles are not covered, because entailed by the primary law.[15]

In other words, the procurement system is not so much the sum of legal concepts, political doctrines and economic policies, but is the reconstruction of a higher structure paradoxically lying underneath the system itself actually, that is posed on the institutional and ideological dogmas which lead the legal interpretation in order to define the conditions triggering the scope of the EU law.

Within public procurement, the governance is not completely codified, rather is implemented by soft regulation and grounded on the well-known principles of transparency and non-discrimination, which remain open textured, permeable and suffering from '*porosity*', with the words of the author.[16] For that, '[*p*]*ublic procurement is the regime that can provide for transparency, objectivity and non-discrimination as well as insert elements of competition in the provision, organization, and delivery of public services*'.[17]

The uncertainty issue is well faced when the author dwells on the public-private partnership, to which he devotes a entire monograph:[18] in fact, '*the procurement of public-private partnership must adhere to the newly adopted Concession Directive which has enshrined the principles of transparency and non-discrimination that underpin the public procurement regime*'.[19] To complete the view, even before the adoption of concessions Directive,[20] the public-private partnership would have been conceived as an instrument of public procurement pursuant to the '*fundamental change in perceptions about the role and responsibilities expected from governments in delivering public services*'.[21]

In short, the author claims that '[*s*]*uch changes, in practical terms viewed through the evolution of public-private partnership, are translated into a new contractual interface between public and private sectors, which in turn encapsulates an era of* contractualized governance'.[22]

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15 cf C Bovis, 'The Principles of Public Procurement Regulation' in C Bovis (ed), *Research Handbook on EU Public Procurement Law* (Edward Elgar 2016) ch 1, 35–59.

16 C Bovis, *The Law of Public Procurement* (2nd edn hardback, Oxford University Press 2015) 672 and 673, § 14.11 and §14.13.

17 ibid, 263, § 5.88, *desinit* of the chapter.

18 Entitled *Public Private Partnerships* (Routledge 2013).

19 C Bovis, *The Law of Public Procurement* (2nd edn hardback, Oxford University Press 2015) 21, §1.62.

20 Directive 2014/23/EU.

21 C Bovis, *The Law of Public Procurement* (2nd edn hardback, Oxford University Press 2015) 11, §1.26.

22 ibid, 11, §1.26, *italics* in original.

3. Some critical remarks from an administrative law perspective on public services.

The explained conceptual framework provided by Bovis engaging public procurement regime as a tool to provide public services could be understood as the result of the axiomatic overlap between service contract and public service contract. According to the author, '[*t*]*he Service Directive* [dir. 92/50/EEC, then dir. 2004/18/EC and 2014/24/EU] *is the first legal instrument which attempts to open the increasingly important public services sector to intra-community competition*'.[23] Actually, the services covered under first public sector directive were specifically listed in annexes I (branches A and B) and II (branches A and B), hence no EU rule can justify any mutual equivalence between service (even delivered to the public) and *public* services (*i.e.* to be carried out by the law by the public sector). Nor the notion of main purpose of the contract has been decisive to trigger the EU law, when the service was delivered to serve public and also to benefit the public authorities.[24]

Notably, the volume doesn't remark public services from a regulatory point of view (according to the economic approach, inherent to the author), but it is only postulated the positive effects stemming by the recourse of the public procurement law for the liberalization of the public market, only developed in another essay.[25]

Indeed, the services provided by the public sector are specular and opposite to the regime provided by the (effective) Service Directive, *i.e.* Directive 2006/123/EC (in the jargon the Bolkestein Directive),[26] thereby is not should logic find the *rationale* of the public service market openness in the notion of service itself, without considering any administrative matters and therefore the national reserve of the public sector to define and organise the public service delivery. Otherwise, after its potential complete liberalisation, the notion of public service should be useful only in order to define the public service obligations.

If we take a closer look, the purpose of the book addresses the need of readers to receive a comprehensive analysis, almost holistic, of the public pro-

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23 ibid, 43, §2.52.

24 cf C Bovis, 'Public Contracts in Public Procurement Regulation' in C Bovis (ed), *Research Handbook on EU Public Procurement Law* (Edward Elgar 2016) ch 7, 89–118, specifically § *Delineation of Public Service Contracts* (103–105).

25 cf C Bovis, 'The State, Competition and Public Services' in P Brikinshaw and M Varney (eds), *The European Union Legal Order after Lisbon* (Kluwer 2010) ch 7, 137–153 and, almost identical, C Bovis, 'Public Procurement and Public Services in the EU' in I Lianos and O Odudu (eds), *Regulating Trade in Services in the EU and the WTO. Trust, Distrust and Economic Integration* (Cambridge University Press 2012) ch 5, 147–170.

26 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36.

curement law. The purpose of the author seems to be directed to demonstrate that the public procurement as such is a sector governed by market forces (called '*competitive pressures*')[27], before and beyond the law, up to point out that '*there is strong evidence that the existence of competitive conditions within public markets would disengage the applicability of the relevant Directives*',[28] up to state that '*the Court also suggested that* commerciality *and* competitiveness *might lift the veil of compulsory tendering, thus rendering the public procurement rules inapplicable*'.[29]

The author, in particular, argues that '[*j*]*ustifications for its regulation are based on the assumption that by introducing competitiveness into the relevant markets of the Member State, their liberalization and integration will follow*',[30] then the idea of public procurement regulation may seem to be based on an *a priori* assumption, liberalization and integration between public sector and private market look alike, in his view, as ends rather than instruments.

From this topic it follows the need for public procurement regulation, which is justified from the existence of a 'sui generis *market place often referred to as* marchés publique *(public markets)*',[31] according to the French law meaning of public procurement system, and would justify the creation of the public markets law (*marchés publique*, as the author states at p. 668, §14.03), with the intent to emulate the regulation of private markets.

Bovis also states that '[*p*]*ublic procurement regulation has also an introvert focus on the internal market. It envisages bringing the respective behaviour of the public sector in parallel to the operation of private markets. Public procurement regulation reveals distinctive* sui generis *markets which function within the EU internal market and have their main feature the pursuit of public interest*'.[32] It follows that '*the economic approach to the regulation of public procurement aims at the integration of public markets across the European Union*',[33] which implies the need to argue that '[*p*]*ublic markets require a positive regulatory approach in order to enhance market access*'[34] and that '[*p*]*ublic markets are* fora *where the structural and behavioural remedial tools of competition law also apply*'.[35]

The statements transcribed here are not the synthesis, perhaps expressed in a non-perspicuous way, of the results of a previous analysis suitable to specify its meaning, but the main thesis of the author, proposed to demonstrate his

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27 C Bovis, *The Law of Public Procurement* (2nd edn hardback, Oxford University Press 2015) 1, §1.02.
28 ibid, 17, §1.45 and 676, §14.18.
29 ibid, 671, §14.08, *italics* in original.
30 ibid, 668, §14.02.
31 ibid, 668, §14.03.
32 ibid, 239, §5.47.
33 ibid, 667, §14.01.
34 ibid, 668, §14.04.
35 ibid, 6, §1.16.

personal view by which the current EU directives and the public procurement *acquis* admit and nudge the decisions-making driven by a case-by-case approach.

Actually, before of any evaluation of the directives objectives, it must be developed if the implementation of the single market and the application of competition rules, which design private markets, can justify the automatic extension of the public procurement law to the provision of public services, without undermining the dogma of the '*principle of free administration of public authorities*', set out in Article 2 of Directive 2014/23/EU, of which there is no mention in the book.

This analysis is far from being reached, representing the counterpart of the original concern of the EU law to give access to public markets, through public procurement regime, to firms established in Member States and non-Member countries, as already examined by the authors in the beginning of his research path.[36]

4. The dogmatic approach to supranational administrative law

In this vein, the author states that '[*t*]*he Public Sector Directive represents a notable example of codification of supranational administrative law*'[37] and that '[*t*]*he objective of simplification has materialized through the codification of supranational administrative law in the form of an EU Directive which covers all public sector procurement*',[38] which sounds like an admission that the law of public procurement, including the Public Sector Directive,[39] finds in the administrative law (albeit supranational), but certainly not in competition law, its legal basics (not economical), which define *ab extra* the scope of the public contracts EU legal system, due to the public prerogative of delivering public services.

The study lacks any evaluation of the influence of the public procurement law compared to the global administrative law, to be understood as supranational law *à regime administratif*–it is necessary to provide an administrative regime addressing the procurement system when public entities act not as purchasers, but rather as regulators, facing this field from a regulatory (not of compliance) perspective.

On a closer inspection, what looks like a postulate for a scholar of administrative law can be seen simply as an example of another point of view, and viceversa, requiring an amply dialogue between the two classes of scholars: in

36 C Bovis, 'Public Procurement within the Framework of the E.C. Common Commercial Policy' [1993(4)] Public Procurement Law Review, 210–220.

37 C Bovis, *The Law of Public Procurement* (2nd edn hardback, Oxford University Press 2015) 677, §14.20 and 306, §6.72.

38 ibid, ix.

39 Directive 2014/24/EU.

fact, the effort to rebuild the regulation of public procurement by using the economic approach as a tool of interpretation of the general *rationale* of such a system of rules can be understood as the natural choice for an academic with roots in business law, what is the prof. Bovis.

The analysis provided by the book goes beyond the legal framework and its legal interpretation, but should be integrated with further reflections on the correlative development of the internal market design along the path paved by the four directives generations, as the newest literature did, pushed somehow by the Brexit, which could be interesting to find in the next edition of the book.[40]

The reasons of his overall view are twofold: on one hand, '*[p]ublic procurement as a discipline expands from a simple topic of the common market, to a multi-faceted tool of European regulation and governance covering policy choices and revealing an interesting interface between centralized and national governance systems*',[41] on the other the judicial development of the scope of the EU in case of defeat of competitive conditions '*indicates the referral of public markets to anti-trust, perhaps the ultimate regulatory regime*',[42] so that the internal market principles are simple intermediary tools to ensure market access in a competitive manner.

Therefore, the work is characterized as a doctrinal study, which takes part of the recent debate on the foundations and purposes of the public procurement regulation as a whole (the book, actually, presupposes economic expertise and certainly supposes, not always in a critical way, the adherence to a specific ideological apparatus, congruent to the European Commission papers), which is confirmed by the Europe 2020 Strategy and reaffirmed in the editorials of the author written for the *European Procurement & Public Private Partnership Law Review*.[43]

The textbook is certainly the *opus magnus* of prof. Bovis, which crowned his over twenty-year career, punctuated by a series of monographs bearing the same economic approach. It is easy to guess that this work will require a further edition of the book to become a classic among the classics of the matter, providing the recognition of autonomous treatment to concessions directive

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40 S Weatherill, 'EU Law on Public Procurement: Internal Market Law Made Better' in S Bogojevic, X Groussot and J Hettne (eds), *Discretion in EU Public Procurement Law* (Hart 2019) ch 2, 21–49; S Weatherill, 'The Several Internal Markets' (2017) 36 Yearbook of European Law (2017) 125 and S Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press 2017).

41 cf C Bovis, 'Preface' in C Bovis (ed), *Research Handbook on EU Public Procurement Law* (Edward Elgar 2016) ix-xxi, cit. xv. The text is repeated in other works of Bovis, not – surprisingly – in his handbook.

42 C Bovis, *The Law of Public Procurement* (2nd edn hardback, Oxford University Press 2015) 676, §14.18.

43 cf almost every editorial after the publishing of the book: 2/2016, 2/2017 (on 'Public-Private Partnerships as the Solution to Critical Infrastructure'), 3/2017 (on 'Public Procurement as Economic or Policy Exercise'), 4/2017, 1/2018, 2/2018 (on 'Strategic Public Procurement in the EU and Its Member States'), 3/2018 (on 'Life-Cycle Costing in the New EU Public Procurement Directives'), which often reproduce thesis and phrases of the volume.

and the reconstruction of the interfere and difference between the forms of management of the public services (included the externalizations) and the method of award of the public contracts from the regulatory point of view.

5. Final remarks

In conclusion, the work assumes the traits of the monograph, in terms of a treaty (not a simple commentary), although some uncritical transplant of economic principles in the procurement field, and shows its value through the conceptual analysis of the foundations of economic regulation of public procurement and the identification of the relationship between antitrust law and public markets.

The book presents by itself, given the authority of the author, the vastness of the research field and depth of the analysis. The former observations are, therefore, valid for the reader who wants to approach the text with the aim of a unified and reflective reading.

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