

PUBLIC
PROCUREMENT
AND THE EU
COMPETITION
RULES

Albert Sánchez Graells



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PUBLIC PROCUREMENT AND THE EU COMPETITION RULES

Public procurement and competition law are both important fields of EU law and policy, intimately intertwined in the creation of the internal market. Hitherto their close connection has been noted, but not closely examined. This new work is the most comprehensive attempt to date to explain the many ways in which these fields, often considered independent of one another, interact and overlap in the creation of the internal market. In this process of convergence between competition and public procurement law, the need for this joint study is clearly apparent. As such the book asks whether competition law principles inform or condition public procurement rules, and whether they are adequate to ensure that competition is not distorted in markets where public procurement is particularly significant. The book moves away from the classical focus of public procurement on the activities of private actors, developing instead an analytical framework for the appraisal of the market behaviour of the public buyer from a competition perspective. The analysis is both legal and economic. Proceeding through a careful assessment of the general rules of competition and public procurement, the book constantly tests the efficacy of the rules in competition and public procurement against a standard of the proper functioning of undistorted competition in the market for public procurement.

Foreword

Pride and envy. Writing this Foreword arouses in me the contradictory feelings of pride and envy. I feel as proud of Albert Sánchez Graells for writing this book as I would if I had written it myself. On the other hand, I also feel envy as he has written a very well conceived book that I would have liked to write myself. He has chosen an interesting and greatly complex topic and he has done a magnificent job of covering most of the background and issues that arise around it in a clear and convincing manner.

Public Procurement and the EU Competition Rules is a superb product of academic research and scholarship. It is the fruit of several years of study and reflection by Mr Sánchez Graells. I had the privilege of accompanying Mr Sánchez Graells during the course of much of his work, and I witnessed the perseverance, care and maturity he has poured into each of these pages.

Mr Sánchez Graells addresses in the book the seminal topic of the competition issues pervading public procurement. He follows a coherent and all-inclusive methodology, based on legal and economic grounds (inspired by a sensible functional approach), to build a strong and solid thesis on the limits and requirements that the free competition principle instils in public procurement.

The reader will find the book both good and original, mastering two different areas of law: competition policy and public procurement. It provides a well-balanced mix of theoretical construction (chapters three, four and five being the backbone of his thesis) with a detailed set of useful practical recommendations or guidelines also for the public buyer (chapter six) and for the European legislatures or governments that might endeavour to correct the shortcomings of current public procurement law (chapter seven).

In spite of the aridity and the difficulties of the topic, the book is clear and well written, using lucid and well-defined arguments. The reader will follow and discover the path, laboriously constructed by Mr Sánchez Graells, bridging two traditionally unrelated areas of public policy: competition and public procurement. It does so in an articulate and rigorous manner, erecting a persuading construction: that the competition principle/requirement is embedded in EU public procurement law. The work is especially valuable as it is not a mere description of the state of the law in these two areas. Mr Sánchez Graells portrays a novel view of *public procurement under the lens of competition* based on an extensive and exhaustive analysis of the case law of the European Union's Court of Justice.

Of course, the reader may or may not be persuaded by Mr Sánchez Graells' clearheaded and convincing arguments. Understandably and despite the coherency of his arguments, if they are followed, they will profoundly overhaul the practice of EU public procurement and that will have economic and political implications. Therefore, that may condition how far competition is allowed to run in public procurement practice.

Finally, Mr Sánchez Graells does not cheat himself; neither does he try to mislead the reader, as he acknowledges from the start the risks of his pursuit. At the end, the topics dealt with by Mr Sánchez Graells in this book have a strong ideological scent—that is, the weakness of competition policy worldwide—and it may well happen that political

considerations lead to other public goals superseding competition as a principle in organising public tenders.

At this point, the only thing that remains for me to say, before leaving readers on their own, is that I am sure that they will find useful advice in the ideas and challenges Mr Sánchez Graells addresses in the book. *Public Procurement and the EU Competition Rules* is in itself an extensive intellectual puzzle that Mr Sánchez Graells has cleverly put together. I hope readers enjoy it as much as I have learned and enjoyed accompanying him during this, his first, major academic venture.

Francisco Marcos, Professor of Law
IE Law School,
Madrid (Spain)

To all those who taught me how to do this,
knowingly or not

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