

Book Review

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Carina Risvig Hamer and Mario Comba (Eds.), *Centralising Public Procurement: The Approach of EU Member States*. Cheltenham: Edward Elgar, 2021. xvi + 351 pages. ISBN: 9781800370401. GBP 121

In *Centralising Public Procurement: The Approach of EU Member States*, central purchasing bodies (CPBs) are placed “central” as a technique for aggregated procurement. Their task is to offer, on a permanent basis, central purchasing activities to contracting authorities that have combined their purchasing. Such activities can consist of the actual acquisition of supplies and/or services (i.e. wholesaler model) but can also relate to the award of public contracts or the conclusion of framework agreements (FAs), which contracting authorities can use without the need to conduct a procurement procedure themselves (i.e. intermediary/agent model). For example, the national police division of a Ministry can conclude FAs through which local police forces make concrete purchases.

The aim of the book is to analyse the use and structure of CPBs in various Member States – Belgium, Denmark, Finland, France, Germany, the Netherlands, Italy, Poland, Portugal, Romania, Spain, Sweden – and the United Kingdom. This analysis is highly interesting, not only because there is no other book nor study in which the regulation of CPBs is extensively addressed in a comparative manner, but also because Directive 2014/24 on public procurement (Procurement Directive) contains only a few requirements on the organisation and mode of operation of CPBs. It is even left to the discretion of the Member States to decide whether it is possible for contracting authorities to purchase by means of a CPB.

Although the monograph does not explicitly mention the underlying goal of the provided analyses, it is clear that it aims to identify the benefits and risks that come along with the use of CPBs. This allows contracting authorities to make more informed choices when procuring, and enables legislature and policy makers to reflect on whether their national regulations and practices are most suitable to satisfy existing needs. Why and on which basis these countries were selected is not clear. However, the 13 country reports demonstrate that the book is well balanced as regards country selection by including States with substantial CPB experience (e.g.

Sweden), States in which CPBs are not (yet) used often (e.g. Germany and Romania), and States where the use of CPBs is diverse in terms of how integrated the purchasing activities of cooperating contracting authorities are (e.g. the Netherlands).

The country studies are all drafted on the basis of a well-designed questionnaire which contains many and very detailed – yet open – questions on five topics: (i) the structure and use of CPBs and other forms of joint procurement, (ii) procurement techniques, (iii) competition and SME aspects, (iv) liability between CPBs and their users, and (v) COVID-19 and joint procurement. This allows for structured insights into national approaches and adequate comparisons in Chapters 3–8.

The five topics mentioned above are not only interesting from a comparative perspective, but certain conclusions may even have far reaching consequences at EU level, not least when applying specific fields of EU law to CPBs. For example, with regard to topic (i), it is noted that since CPBs act to satisfy the needs of contracting authorities, they are not regarded by the Court of Justice as offering services on a market open to competition by private undertakings, which in essence means that they cannot be subject to European competition law. This leaves open another interpretation, namely that when a CPB is not operating under the instruction of contracting authorities, such as in the wholesaler model, its procuring activities are not inseparably connected to the interest of the contracting authorities, so that it can be seen as an undertaking. This has important consequences for the scope of application of (EU) law to CPBs. Since CPBs are qualified as bodies exercising public power in France, while they are seen as performing commercial activities in Germany, the comparative analyses presented in this book will be most helpful in answering this question on a case-by-case basis.

Regarding specific procurement techniques or instruments (topic ii), the comparative analyses made clear that FAs are generally widely used and that CPBs are becoming the leading creators of such agreements on behalf of their users (i.e. other contracting authorities) who are still in charge of deciding whether they will make purchases by means of call-off contracts. On the other hand, instruments like e-catalogues are hardly used. Since the use of techniques and instruments can increase streamline public purchasing, it is proposed that their use should be unified and made efficient throughout the EU by utilizing initiatives at the Union level. The form this should take in practice is not discussed, yet an EU-wide study on the effectiveness of FAs is called for as this allows CPBs to share knowledge and gain insights into good practices. Equally, the creation of a network of CPBs at the EU level is proposed to help CPBs to engage in more complex procurement procedures and apply the available techniques. However, such networks already exist for European Economic Area CPBs – although on a voluntary basis – and Member States, such as the Netherlands and Poland, do not participate. Whether there is sufficient political will for unification is thus an important question.

Regarding topic (iii), competition law, three key points are raised. First, it is argued that overly large CPBs may become monopsonies and abuse their position. This is interesting, not only because the non-application of competition law to CPBs is contested in the book (see topic (i)) but also because the country studies reveal that in some Member States, such as Finland and Spain, CPB activities are increasingly made subject to competition scrutiny. Second, even though CPBs are sold as a pro-competitive technique, as large procurement contracts may be appealing for a higher number of economic operators, bid rigging practices among economic operators are likely to occur more often due to the higher stakes. Third, large-size contracts can be a pressing obstacle for SME participation. The division of contracts into lots is not necessarily a solution as there is no guarantee that a certain lot will be awarded to an SME. Since diversity of supply is a strategic need for resilient systems, centralization strategies should be carefully thought through, and the obligation to consider market impacts (on SMEs) at the design stage is considered to be an appealing action in this regard. Hence, it is proposed that CPBs generate and share with the relevant competition authority more detailed and specific reports on the evolution of market structures and dynamics in the area in which they are active. This seems to be a valuable proposal that requires important additional efforts and professionalization of CPBs in the future.

Contract management and liability (topic iv) is generally not regulated by the Procurement Directive, and liability issues between CPBs and their users are often not regulated at Member State level either. In practice, responsibilities are usually shared, meaning the CPB is responsible for the FA and the contracting authorities for the call-off contracts. While there is hardly any case law to be found, interesting topics are addressed, including what should happen when a contracting authority purchases outside a (mandatory) FA or above the estimated value. In the latter regard, the judgment of the Court of Justice in *Simonsen & Weel* (Case C-23/20), demonstrates that CPBs are faced with difficult contract management duties for assessing whether the maximum estimated value of an FA has been reached. It is not surprising that the authors plead for increased transparency regarding the actual purchases made in order to keep FAs manageable.

Without any doubt it was a wise decision to include the consequences of the COVID-19 crisis for CPBs in this book (topic v). As the EU initially struggled to provide a united response for addressing the scarcity of supplies, Member States started to tackle the pandemic individually in different ways, including the move to centralised purchasing of healthcare equipment and personal protective equipment (PPE), either at state or local level, or through CPBs. The book, interestingly, discusses how in several Member States, CPBs could not cope with the demand for PPE and contracting authorities started to directly award contracts contrary to the Procurement Directive and national law. In Poland, the government even held that its Procurement Act did not have to be applied, which led to many contracts unrelated to COVID-19 being awarded contrary to the legislation.

Centralised purchasing can also occur at the EU institutional level. For example, through the Joint Procurement Agreement, the Commission initiated several procurement procedures for the joint purchasing of medical countermeasures, even though this occurred at a rather late stage. Additionally, advance purchase agreements were made to secure vaccines. While the legal bases for the different initiatives are unfortunately not addressed – as this could have made it easier to better understand the background of the European mechanisms and instruments – it is rightly concluded that throughout the pandemic, the successful use of centralized procurement was present not only at the EU level, but also at the Member States' level. In my opinion, this is also the main reason why the title of the book is not just "Central Purchasing Bodies" but "Centralising Public Procurement".

What cannot be left unmentioned is that the book includes a chapter containing an economics and management perspective on joint procurement, as this offers vast added value to the other more descriptive and comparative parts. While the advantages and disadvantages of CPBs are repeated often throughout the book (i.e. more efficient purchases through economies of scale and increased professionalization versus more coordination costs, less flexibility, and participation of SMEs), this chapter specifically reveals how the advantages of joint procurement outweigh the relative disadvantages, which is an important finding for actually "promoting" the use of CPBs. Although the number of bidders per tender for an individual contract significantly increases when the procedure is organized by a CPB, the book honestly reveals that based on the national chapters it was not possible to understand the real cost of single procurement procedures in order to compare them to procurement by CPBs. Nevertheless, the efficiency of CPBs is not limited to cost efficiency but is above all related to higher professionalization.

To conclude, *Centralising Public Procurement* provides a long-awaited overview on the practice of central purchasing bodies and, to a lesser extent, on some other forms of joint procurement. As the book provides the first overview of practices in a selected set of Member States, there is still plenty of work awaiting comparative lawyers, which is also acknowledged by the editors. Specifically, further insights are needed on the experiences with cross-border joint procurement through a CPB, as this encompasses complex legal problems relating to the preparation and execution of tenders, and the lack of clear models to be followed. The use of centralized procurement and, to a lesser degree, cross border procurement throughout the

pandemic, may be an inspiration for a general increase of these techniques in the future and . . . for a follow-up book!

Sarah Schoenmaekers
Maastricht