Contents

Fa	rewor	d to the Second Edition	vii
Fc	orewor	d to the First Edition	xi
A	uthor's	Note to the Second Edition	xiii
Τι	able of	Cases and Opinions	xxvii
Τι	able of	Legislation	xli
		Dord On a	
		Part One Introduction	1
1	Intro	duction and Framework for Analysis	3
_	I.	Introduction	3
		A. The Current Situation from a Competition Law Perspective	7
		B. The Current Situation from a Public Procurement Law Perspective	10
		C. Overall Perspective	12
	II.	General Approach to the Interrelationship between Competition and	
		Public Procurement Law	13
	III.	Aim of the Study	14
	IV.	Structure of the Study and General Overview	15
		A. General Overview	15
		B. Foundations and Principles: On the Economic and Legal Basics of	1.5
		Public Procurement and Competition Law	15
		C. General Part: Public Procurement Viewed from a Competition	
		Perspective, and Competition Elements of Public Procurement Rules—The Building Blocks of the Framework for the Competition	
		Analysis of Public Procurement	16
		D. Special Part: Operationalisation of the General Framework through	10
		Current Public Procurement Rules—Proposals for the Further	
		Development of a More Pro-Competitive Public Procurement System	17
		E. General Conclusions	19
	V.	Methodology: An Eclectic and Heuristic Multi-Disciplinary and	
		Functional Approach to EU Law	19
	VI.	Normative Assumptions	24
	VII.	Delimitation of the Study: Exclusions and Limitations	26
		A. Exclusions from the Object of Study	27
		B. Limitations on the Sources Used in the Study	30

Part Two

			Foundations and Principles: The Economic and Legal Basics of Public Procurement and Competition Law	35			
2	An Economic Approach to Public Procurement and Competition						
-	I.		roduction	37 37			
	II.		pes of 'Public Procurement Markets'	39			
	11.	A.		39			
		В.	A More Detailed Taxonomy of 'Public Procurement Markets'	41			
		ъ.	i. The 'Regulatory Situation' of Public Procurement Markets	41			
			ii. The Relative Importance of the Public Buyer in the Market:				
			Exclusive, Dependent, Commercial and Private Markets	43			
			iii. Temporal Considerations of Relevance for Public				
			Procurement Markets	47			
			iv. Relevance of the Geographic Dimension of the Market	49			
			v. Other Considerations: 'Prescriptive Role' of Public				
			Procurement and 'Adjacent' Markets	49			
		C.	Preliminary Conclusion as Regards the Proposed Taxonomy of				
			Public Procurement Markets	51			
	III.	Eco	onomic Dimensions of Public Procurement	52			
		A.		52			
		В.		54			
		C.		56			
	IV.	The	Role of Public Authorities as Purchasing and Contracting Authorities	56			
		A.		56			
		В.	Public Buyers as Gatekeepers	58			
		C.	Public Buyers as Market-Makers	58			
	V.	Pul	olic Procurement as a Market Failure:				
		Dif	ficulties in Recreating a Competitive Scenario and Competition-				
		Res	stricting Effects	60			
		A.	Public Procurement as a Market-Like Regulatory Instrument	62			
		В.	A Model for the Analysis of Public Buyer Behaviour and the Effects				
			of Public Procurement Regulation	65			
		C.	Direct Competition-Distorting Effects: Waterbed Effects	69			
		D.	Indirect Competition-Distorting Effects: Increased Bidder Collusion				
			and Other Effects of Price Signalling	73			
		E.	Other Competition-Distorting Effects	75			
	VI.	Co	nclusions to this Chapter	77			
3	Basics of Competition and Public Procurement Regulation						
	I.	I. Introduction					
	II.	Pri	nciples Common to Competition and Public Procurement Law as				
			o Sets of Economic Regulation	80			
	III.		e Goal(s) of Competition Law	87			
		A.	Brief Overview of the Discussion Regarding this Topic	87			
		В.	Economic Goals	93			
		C.	Social and Political Goals	96			

		D. Creation of the Internal Market, as a Purely European Goal	99
		E. Preliminary Conclusion regarding the Objective of Competition Law	100
	IV.	Goals of Public Procurement	101
		A. A More Limited Discussion on the Goals of Public Procurement	101
		B. Competition (Value for Money, or Best Value)	105
		C. Efficiency (of Public Procurement Itself)	109
		D. Transparency (Oversight, Anti-Fraud Objectives)	111
		E. Market Integration as a Purely (and Transitory) European Goal	112
		F. Preliminary Conclusion regarding the Objectives of Public	
		Procurement Law	114
	V.	Conclusions to this Chapter: Common Goals of Competition Law and	
		Public Procurement	114
	Con	clusions to Part Two: Legal and Economic Normative Foundations of a	
		More Competition-Oriented Public Procurement System	116
		Part Three	
		General Part: The Building Blocks of a Framework	
		for the Competition Analysis of Public Procurement	119
	DII (
4		Competition Law and Public Procurement: The Inability of EU	101
		petition Rules to Rein in Anti-Competitive Public Procurement	121
	I.	Introduction	121
	II.	The Inability of Rules on the Grant of State Aid and Special or Exclusive	100
		Rights to Tackle Anti-Competitive Public Procurement	123
		A. The Proper Award of a Public Contract Establishes a Presumption	124
		against the Existence of State Aid	124
		B. The Award of Most Public Contracts Does Not Constitute a Grant	
		of a Special or Exclusive Right to the Government Contractor,	120
		except for Concessions i. In General: Article 106(1) TFEU	128 128
		ii. Different Treatment under Directive 2014/25?	130
		iii. The Coverage of All Concessions Contracts in	130
		Directive 2014/23	131
		iv. Services of General Economic Interest: Article 106(2) TFEU	132
		v. Overall, Article 106 TFEU is Largely Irrelevant for	132
		the Purposes of Reigning in Anti-Competitive Public	
		Procurement Activities	134
	III.	The Inapplicability of 'Core' EU Antitrust Rules to Public Procurement:	131
	111.	A Jurisprudentially Created Gap in EU Competition Law	135
		A. In General, the Concept of 'Undertaking' as the Key Element of	100
		Analysis	135
		B. The Carrying Out of an Economic Activity as the Distinctive	_00
		Criterion: The General Functional Approach to the Concept of	
		'Economic Activity'	137
		C. The Approach to Purchasing Activities As Such: A Departure from	
		the General Functional Approach to the Concept of	
		'Economic Activity'	140

	D.	The Ga	ap Generated by the Adoption of Too Narrow a Concept of						
		Econor	mic Activity—Which Excludes Procurement Activities As Such	141					
IV.	The	Insuffic	ciency of State Action Doctrine to Capture Most of the Anti-						
	Cor	npetitiv	e Public Procurement Regulations and Practices	142					
	A.	The Po	etential for Publicly Created Distortions of Competition as the						
			ale behind the Development of the State Action Doctrine	142					
	B.		ck Overview on the Development of the State Action Doctrine	143					
	C.		irrent Formulation and Boundaries of the State Action Doctrine	147					
	D.		ment of the State Action Doctrine under its Current						
		Formu		149					
V.	Pre	iminary	y Conclusions: The Insufficiency of Current Competition						
			s and Potential Improvements to Achieve Better Results	152					
VI.			of Current Doctrine to Achieve Better Results (1): A More						
	Economic Approach to the Concept of 'Economic Activity' in the Public								
			nt Field	156					
	A.		arrent Approach: The Analysis of Public Procurement	100					
	11.		ies Is Pegged to the Subsequent Use of the Furchased Goods						
		or Serv		156					
	В.		sessment of the Current Approach in the EU Case law	158					
	ъ.	i.	The FENIN–Selex Doctrine Run: Contrary to Previous	130					
		1.	Practice in Several Member States	159					
		ii.	The FENIN-Selex Doctrine Runs Contrary to Alternative	137					
		111.	Approaches Previously Suggested to the EU Judicature	161					
		iii.	The FENIN-Selex Doctrine Runs Contrary to the General	101					
		111.	Functional Approach to the Concept of 'Undertaking'	161					
		iv.	The FENIN-Selex Doctrine Makes Poor Economic Sense	163					
		v. V.	A Possible Justification to the FENIN–Selex Doctrine:	103					
		٧.	Aiming to Afford a Different Competition Treatment to						
			Social and Other Public Interest Activities	166					
	C.	Skotch	Proposal for the Review of the Current Case Law	171					
	D.		Scope for a More Stringent Approach by Member States?	171					
VII.		A -	of Current Doctrine to Achieve Better Results (2): Setting	1/2					
V 11.		y	Bounds to the State Action Doctrine	173					
	A.		ate Action Doctrine in the US as a Benchmark	173					
	л.	i.	Brief Description of the US State Action Doctrine	173					
		ii.	Scope for a 'Market Participant Exception' under US State	1/4					
		11.	Action Doctrine	176					
		:::		170					
		iii.	Comparative Assessment of the State Action Doctrine in the	177					
	D	C -44:	US and the EU	177					
	В.	_	the Proper Bounds of the State Action Doctrine (1):						
		_	ng Sovereignty to the Centre of the Doctrine, and Developing	170					
			ket Participant Exception'	179					
		i.	General Approach: 'Sovereignty' and 'Legitimacy' as Ruling	170					
			Criteria	179					
		ii.	Anti-Competitive Public Procurement Legislation and						
			Regulation as Instances of the Exercise of Public Powers or	101					
			Sovereign Activities	181					

			iii. Anti-Competitive Public Procurement Decisions and	
			Practices as Instances of the Exercise of Economic Powers or	
			Non-Sovereign Activities by the State	182
			iv. Excluding Activities with Weak Sovereignty and Legitimacy Implications from the Scope of the State Action Doctrine:	
			the 'Market Participant Exception'	184
		C.	Setting the Proper Bounds to the State Action Doctrine (2): The Complex Issue of Balancing EU and Member States' Conflicting	
			Policies	185
			i. General Framework	185
			ii. Criteria for the Balancing of Conflicting Policy Goals and Effects	187
	37111	C	iii. The Impact on the Public Procurement Field	191
	V 111.	Coi	nclusions to this Chapter	193
5	The I	Princ	ciple of Competition Embedded in the EU Public Procurement	
	Direc	ctive		195
	I.	Inti	roduction	195
	II.	The	Competition Principle Embedded in the pre-2014 EU Public	
		Pro	curement Directives	196
		A.	The Recognition of the Existence of a Competition Principle	
			Embedded in the pre-2014 EU Public Procurement Directives and	
			their Interpreting Case Law	196
		B.	Delimiting the Competition Principle Embedded in the pre-2014	
			EU Public Procurement Directives	203
		C.	The Link between the Competition Principle Embedded in the	
			pre-2014 EU Public Procurement Directives and General EU	
			Competition Law	206
	III.	The	Principle of Competition Consolidated in Article 18(1) of Directive	
		201	4/24: A Critical Assessment of the Interpretative Difficulties it Creates	207
		A.		
			Related to Unequal Treatment	208
		В.	The Introduction of a Subjective Element of 'Intention' and the	
			Need to 'Objectify' It	210
		C.	Preliminary Conclusion: Towards an Objective Interpretation of	
			the Principle of Competition as Consolidated in Article 18(1) of	
			Directive 2014/24	214
	IV.	Imp	plications of the Competition Principle for the Shaping of Public	
		Pro	curement Rules by Member States: The General Obligation to	
		Dev	velop a Pro-Competitive Public Procurement Framework	215
		A.	The Competition Principle as a Rule of Self-Construction for EU	
			Public Procurement Directives	216
		B.	The Competition Principle and the Transposition of the EU	
			Directives on Public Procurement by Member States	217
		C.	The Competition Principle and the Consistent Interpretation of	
			Domestic Public Procurement Legislation	218
			Consistent Interpretation as a Rule of Construction of EU Law	218

			ii.	Consistent Interpretation of the EU Public Procurement Directives with the Competition Principle	222
		D.		sion of the Competition Principle to Procurement Conducted	
				de the Blueprint of the EU Directives: Competition as a	222
		г		ral Principle	223
	17	Е.		ual Application of the Principle of Competition	226
	V.			iple of Equal Treatment and the Principle of Competition	227
			tinguis		227
		A.		st Approximation: The Close Links between the Principles of Treatment and Competition	227
		В.		oser Look: The Principles Impose Different Requirements, and	221
		Б.		petition Concerns should Modulate the Application of the	
			_	iple of Equality	228
		C.		nasis on the Distinction of both Principles in the Area of	220
		٥.	_	nal Market	232
	VI.	Cor		ns to this Chapter	235
				Part III: Sketching a Legal Framework to Discipline the	
				Phaviour of the Public Buyer and to Guarantee Undistorted	
				on in Public Procurement	237
			1		
				Part Four	
		An	alysis	of Competition Distortions Caused by Public Procurement	241
6	A Cr	itica	l Asses	sment of the 2014 EU Public Procurement Directives and the	
	Exist	ing (Case La	aw from a Competition Perspective: Preventing Competitive	
	Disto	ortio	ns by tl	he Public Buyer	243
	I.		roducti		243
	II.		_	tition Appraise of Potential Distortions Derived from Public	
		Pro		ent Processes	245
		A.		sment of Unnecessary Restrictions of Access to the	
				rement Process	247
			i.	Make-or-Buy Decisions and Public-Public Cooperation	
				Mechanisms (or Cooperate-or-Buy Decisions)	248
			ii.	Unnecessary Use of Closed or Non-Competitive Procedures,	
				Particularly In-House Schemes, and the Associated	250
			:::	Restrictions on the Publicity of the Procurement Processes	258
			iii.	Sale of Bid Documents as a Barrier to Entry	280
			iv.	Delays and Other Restrictions in the Disclosure of Information Required to Prepare and Submit a Bid	282
			37	Grounds for Exclusion of Potential Bidders: In General,	202
			V.	Establishment of Additional and Excessively Restrictive	
				Disqualification Grounds	284
			vi.	Grounds for Exclusion of Potential Bidders: In Particular,	204
			۷1.	Consideration of Previous Breaches of Competition Law as	
				Offences against Professional Conduct	296
			vii.	Excessive Qualitative Selection Criteria: Early Restriction of	270
			,	Competition	301

	viii.	In Particular, the Use of Previous Experience and Past	
		Performance as Qualification Requirements	306
	ix.	Restrictive or Discriminatory Short-Listing or Invitation of	
		Candidates	312
	х.	More Precise Rules Governing Reliance on the Capacities of	
		Other Entities	315
	xi.	Excessive Documentary Requests for the (Non-)Exclusion	
		and Qualitative Selection of Candidates, and the European	
		Single Procurement Document as an Intended Solution	318
	xii.	More Scope For a Power/Duty to Seek Clarifications and	
		Additional Information from Tenderers at Qualitative	
		Selection Stage	321
	xiii.	Official Lists of Contractors and Certification Systems	323
	xiv.	Excessive Participation Guarantees (Bid Bonds or Bid Deposits)	326
	XV.	Use of Restrictive Technical Specifications	327
	xvi.	Teaming and Joint Bidding: Formation of Bidding Consortia	336
	xvii.	Prohibition on Multiple Bidding	340
	xviii.	Bundling and Aggregation of Contracts	347
	xix.	Induced and Mandatory Subcontracting	353
	XX.	Framework Agreements	355
	xxi.	Dynamic Purchasing Systems	363
	xxii.	Electronic Auctions	366
	xxiii.	Electronic Catalogues	368
В.	Assessi	ment of Unnecessary Restrictions in the Evaluation of Bids	
	and Av	vard of the Contract	369
	i.	In General, the Adoption of a Neutral and Possibilistic	
		Approach to Bid Evaluation and Contract Award	369
	ii.	Appraisal of Bigs Submitted by Advantaged Parties: The	
		Issue of Involvement of Project Consultants	373
	iii.	Selection and Application of Award Criteria	378
	iv.	Treatment of Non-Fully Compliant Bids and, in particular,	
		of Variants	391
	v.	Treatment of Abnormally Low Tenders	400
	vi.	Awarding Constraints	410
	vii.	Path Dependence (or Consolidation of Current Commercial	
		Relationships)	412
	viii.	In Particular, the Problem of Switching Costs in Public	
		Procurement	413
	ix.	Conduct of Renegotiations Prior to or Immediately after	
		Contract Award	418
	X.	Restrictive Cancellation of the Tendering Procedures	421
C.	Assessi	ment of Unnecessary Restrictions after Award of the Contract	424
	i.	Excessive Guarantees (Performance Bonds)	425
	ii.	Renegotiation of the Main Conditions of the Contract and	
		its Modification	426
	iii.	Extensions and Award of Additional Works	429

		iv. Termination and Re-tendering	434			
		v. Setting Up Ineffective Bid Protest Mechanisms	438			
	III.	Two Examples of Potential Distortions Derived from the Exercise of				
		Public Entities' Market Power	446			
		A. 'Squeezing' Public Contractors	447			
		B. Rules on Transmission of Intellectual Property Rights or				
		Know-How Related to or Derived from the Procurement Process	449			
	IV.	Conclusions to this Chapter	451			
7	Com	plementary Proposals for the Development of a More				
•		petition-Oriented Public Procurement Framework	459			
	I.	Introduction	459			
	II.	Complementary Proposals Aimed at Limiting Publicly Created	10,			
		Restraints of Competition	460			
		A. Progressive or Incremental Enhancement of Competition				
		Requirements in Public Procurement	460			
		B. Secondary or Dual Sourcing Policies in Public Procurement	462			
		C. The 'Market Economy Buyer Test' as a Yardstick for the Evaluation				
		of Public Procurement Decisions	466			
	III.	Complementary Proposals Aimed at Limiting Frivately Created				
		Restraints of Competition	468			
		A. Mandatory Reporting of Suspected Competition Law Violations	469			
		B. Suspension and Debarment of Competition Infringers	470			
	IV.	Complementary Measures Aimed, in General, at Strengthening the				
		Relationships between Competition and Procurement Authorities	474			
		A. Appointment of Competition Advocates or Liaison Officers	475			
		B. Granting Competition Authorities Oversight Competences over All				
		or Some Public Procurement Decisions	477			
	V.	Conclusions to this Chapter	478			
		Part V				
		General Conclusions	481			
8	Cond	clusions: Towards a More Competition-Oriented Procurement System	483			
Re	eferen	ces	489			
	Bool		489			
	Perio	odical Materials and Contributions to Collective Works	498			
		king Papers and Other Academic Works	548			
	Official Documents and Sectoral Reports					
	European Commission					
		United States	552 554			
		OECD	554			
		Other	554			
In	dex		557			
III	ues		33/			