



The Danish Procurement Act from a European Perspective

**Professors Francois Lichère
and Steen Treumer
University of Lyon
and University of Copenhagen**

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1. Introduction

Main issues: Which approach has been taken in the other Member States?

Is the Danish approach in compliance with interpretations and tendencies in other Member States and EU law?

**Mario Comba og Steen Treumer (eds.),
Modernising Public Procurement: The Approach of EU Member States, Edward Elgar Publishing 2018 (under publication)**



1.1 Introduction

Member States covered by the study: UK, FR, GER, DK, Spain, Italy, Poland, Romania, Finland, Sweden, Slovenia and Estonia

Focus: Methods, over-implementation (gold-plating), questionable implementation and selected issues

- 1) variation in approaches and challenges**
- 2) Relatively few questionable issues due to the copy and paste approach in many Member States**



1.2 Introduction

Action against gold-plating/over-implementation in the Member States is a general trend (France and Denmark are exceptions)

Distinction between Member States with a restrictive and a flexible approach

Denmark is in the group with a flexible approach (like United Kingdom and Finland)



2. Implementation in the Member States

The legal value of preparatory works in the various Member States

Legislation in the preparatory works has been used numerous times in the Danish Procurement Act

Will lead to challenges and sometimes overruling at national and supranational level.

See C-171/15, Connexion



2.1 Implementation in the Member States

Implementation of the Recitals in the Preamble appears not to have taken place in most Member States

Where they are implemented then it is typically through preparatory works and in the Nordic countries (including Estonia and Germany)

Important to be aware of this, if you become involved in a cross-border dispute



3. Danish Implementation

Transfer of the contract to a third party after bankruptcy

- **From the trustee to a third party without retender?**
- **-change of other substantial issues (in addition to the identity of the contracting party)?**

-remarks with regard to consortia changes (info on French regulation)



3.1 Danish Implementation

Competitive dialogue with negotiation

- **Reservations to fundamental tender conditions in the initial bids as long as they are withdrawn the latest in the final offer**
- **change of minimum requirements allowed if no impact on potential competition or distortion of competition**
- **Change/development of the award criteria**



3.2 Danish Implementation

- **Prior publication of the method of evaluation, cf. § 160 of the Procurement Act**
- **Termination of the contract after annulment of the award decision, cf. § 185(2) of the Procurement Act**

(DK appears to be the only country in the study that explicitly has adopted the above-mentioned approaches in its implementation)



3.3 Danish Implementation

Does the flexible approach harmonize with recent trends in the case law of the Court of Justice?

C-396/14, Højgaard

C-549/14 Finn Frogne (with regard to review clauses)

C-6/15, Dimarso

C-298/15, Borta (changes of the tender conditions)

Yes, in principle

