

Regular update and analysis of case law

Summary

Case law analysis supports the interpretation and correct application of public procurement legislation, particularly provisions that are ambiguous or complex. This includes areas that are often subject to litigation, but also new provisions of the law. With respect to EU Directives, there are a number of areas where case law analysis is particularly relevant, e.g. provisions concerning the acceptance of unusually low-value offers, selection and award criteria, as well as changes to contracts.

Procurement practitioners need regular updates regarding latest developments in case law to correctly interpret the legal basis and ultimately exercise their job well. To facilitate this, some MS have introduced regular analysis of case law, which is published and disseminated online. This allows practitioners to remain up to date with the most recent developments in procurement jurisprudence, and be aware of key areas of vulnerability to court challenge.

Typically, analysis of case law is issued with a regular frequency (e.g. weekly, monthly, quarterly, etc.) and is available free of charge on the website of the Public Procurement Office or a similar institution. In some cases, private providers also make such case law analysis available. It is organised either by procurement legislation theme or by legal article. In some cases, MS publish a collection of decisions by the national remedies body.

As case law libraries are not always intuitive and searchable, commercial providers in some MS have developed online tools to facilitate the process of browsing through case law and offer these for a fee. The portals usually deliver additional relevant information, such as verdicts of the Supreme Court and the Court of Justice of the European Union, in a user-friendly and searchable way.

Input

Cost – €

- Low set-up cost
- Low operation cost, e.g. annual fee for case law analysis



Time – 6 to 12 months



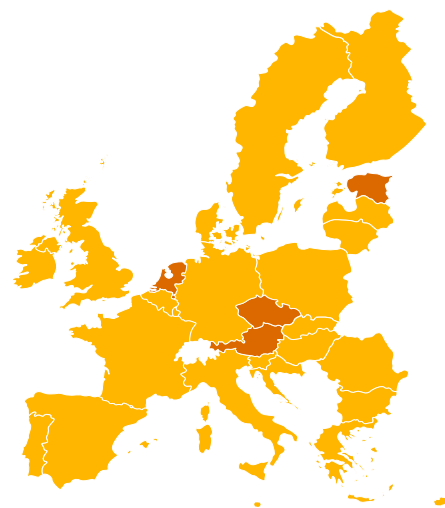
Complexity – Low

- Development of IT infrastructure
- Need for dedicated resources to follow and analyse developments



Good Practice Examples

- ✓ Austria
- ✓ Czech Republic
- ✓ Estonia
- ✓ The Netherlands



Impact

Ensure better compliance



Case law analysis provides insight into how rules are meant to be interpreted and thus gives guidance on how to be compliant with procurement legislation.

Increase transparency



Whenever case law is published regularly and free of charge, key decisions are made more transparent, increasing the visibility of procurement rules.

Promote professionalisation



Procurement practitioners need to be knowledgeable about latest developments in procurement case law as part of their key skill set. Having access to regularly updated case law facilitates this learning and development process.

Related Good Practices

- One-stop shop procurement portal
- Detailed and up-to-date methodological manual
- Targeted thematic guidance materials
- National database of procurement audit errors and irregularities

Key success factors and potential pitfalls

Logical organisation of information

To make the update and analysis of case law easy to navigate, it is important that the information is structured in a clear and logical way. This can be achieved either by linking case law to the specific articles in the legislation or by organising case law by relevant topic.

Publish case law on a highly-visible website

In order to ensure dissemination of the case law analysis among practitioners, it is useful to publish it on a frequently-visited website, such as a public procurement one-stop shop.

Frequent and up-to-date

Case law evolves quickly, therefore it must be updated on a regular basis to provide practitioners with relevant insight. A newsletter summary with recent cases is a simple way to circulate up-to-date information.

Keep track of European Court of Justice jurisprudence

Practitioners must be aware of changes in the jurisprudence of the Court of Justice of the European Union (ECJ) or amendments to past interpretations, especially if it impacts established practices. Thus, ECJ jurisprudence should feature prominently in case law updates.

Counter-intuitive search functionalities

Some case law libraries are only searchable on the basis of the reference number of the judgement. This is counter-intuitive and is of use only to people that are knowledgeable about jurisprudence in the first place.

Excessively legalistic language

To make the analysis accessible for users, it is important to avoid excessively legalistic analysis and language. Instead, the case law analysis should make use of simple language and focus on practical examples.

Directly target procurement practitioners with supervisory function

Civil servants with a supervisory function, e.g. responsible for controls and verification within ESIF, should be a priority target group for case law analysis platforms, since obsolete knowledge of jurisprudence may lead to contradictory interpretations of procurement law and potentially faulty application of financial corrections. Thus, case law updates should be delivered directly by newsletter or direct e-mail system to targeted public servants.

Case Studies (1)

Czech Republic – Virtual library on public procurement law

The Association for Public Procurement, a civil society platform for procurement stakeholders in the Czech Republic developed a commercially-available virtual library on public procurement case law.¹ The application was created in 2012 with a view to facilitate the practical application of procurement law, at a time when the main Czech procurement law, Act. No 137/2006 Coll., was newly introduced. The Association saw a need for contracting authorities to have at their disposal a web application that would present relevant provisions of Czech procurement law, as well as the decisions of the Office for Protection of Competition, i.e. the first remedies body in the Czech Republic.

The web application provides a user-friendly, searchable repository of all case law related to the basic Czech procurement law, Act no. 137/2006 Coll. The interface allows browsing through each article, which is linked to relevant jurisprudence at national and EU level, including the following types of case law: decisions from the Office for Protection of Competition, i.e. the Czech remedy body; decisions by national courts; decisions by the ECJ; related European legislation; other relevant comments, professional literature and expert opinions. The decisions by the Office for Protection of Competition are also available in full text.

Among the library's main users are municipalities and law firms as well as consultants and public procurement contractors; subscribers have an annual access to the tool. The Association provides access to the tool to its members. The daily operations of the application are run by a private company, which has maintained the library since its launch.

Case Studies (2)

The Netherlands – Summary of jurisprudence

The website of the Dutch Procurement Expertise Centre PIANOo² is the main online resource on procurement case law in the Netherlands. Specifically, PIANOo posts a collection of EU and national procurement jurisprudence, as well as a weekly summary of procurement judgements available free of charge. PIANOo offers the weekly case law summary since 2011, in addition to the information on legislation and a Q&A section.

The collection of jurisprudence³ is organised by topic in the procurement process, and contains step-by-step recommendations for each phase of the procurement cycle. For instance, the tender preparation phase is subdivided in its main sub-topics, containing key recommendations for practitioners on the basis of relevant case law.

PIANOo also re-publishes a weekly case law summary⁴ prepared by the Institute for Construction Law (IBR) on the PIANOo website. This weekly digest contains an analysis of rulings of the ECJ and of Dutch judges. PIANOo pays an annual fee for this service.

Both the collection of jurisprudence and the weekly summary of judgements offer an up-to-date overview and useful interpretation of legislation, which procurement professionals consider valuable to interpret the tendering rules and put them into practice. The website has a steady traffic with the number of page views amounting to over 60,000 in 2016.

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¹ Association for Public Procurement, "Lexicon Public Procurement Law" (2012), see: <http://www.lexikonvz.cz/>

² See: <https://www.pianoo.nl/>

³ PIANOo, "Collection of Jurisprudence" (2016), see: <https://www.pianoo.nl/regelgeving/jurisprudentie/jurisprudentieoverzicht>

⁴ PIANOo, "Weekly Case Summary", see: <https://www.pianoo.nl/regelgeving/jurisprudentie/wekelijks-samenvattingen-jurisprudentie>