

Cambridge University Press

978-1-107-12964-1 - Sustainable Public Procurement Under Eu Law: New Perspectives on the State as Stakeholder

Edited by Beate Sjøfjell and Anja Wiesbrock

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Why should public procurement be about sustainability?

BEATE SJØFJELL AND ANJA WIESBROCK

1. A new context for public procurement

Public procurement law, the rules regulating purchase of goods and service by public agencies, is an area of great economic interest. In the European Union, total public expenditure on goods, works and services amounted to over €2,400 billion in 2010.¹ While the main focus on the EU level has been on facilitating competition, transparency, non-discrimination and anti-corruption,² the last decade has seen a growing recognition of the importance of employing economic drivers to promote overarching societal goals. Next to the objective of increasing the simplicity and flexibility of EU public procurement law, a major aim of the 2014 Procurement Directives of the EU³ is to enlarge the possibilities for using public procurement in support of broader social and environmental goals.⁴ The EU

¹ Amounting to 19.7 per cent of EU GDP, see European Commission, *Public Procurement Indicators 2010*, 4 November 2011.

² Based on the assumption that 'Public purchasers cannot be assumed to have the same commercial pressure or organisational incentives in sound management of their expenditure as private-sector purchasers subject to strong competition', which has informed varieties of national legislation, to which the EU has sought to bring some common principles, facilitating cross-border competition, see EU Public Procurement Legislation: delivering results. Summary of evaluation report, p. 6, see https://ec.europa.eu/europeaid/communication-global-partnership-poverty-eradication-and-sustainable-development-after-2015_en.

³ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance; and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance. We concentrate in this volume on Directive 2014/24/EU, leaving aside the special rules concerning utilities and concessions.

⁴ European Commission, *Proposal for a directive on public procurement*, COM (2011) 896 final, 20 December 2011, p. 2.

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Commission has defined public procurement as a policy strategic instrument to achieve sustainability, and as an essential contribution to the achievement of EU's goal of smart, sustainable and inclusive growth.⁵ Public procurement is seen as a driver to stimulate innovation⁶ and resource efficiency,⁷ and as an integral part of an industrial policy for a global, low-carbon economy.⁸ Public procurement is also repeatedly mentioned in the context of the UN Sustainable Development Goals.⁹

Sustainable public procurement has accordingly become an established term, without any authoritative definition of the concept. According to the United Nations Environment Programme, sustainable procurement seeks to 'achieve the appropriate balance between the three pillars of sustainable development, i.e. economic, social and environmental'.¹⁰ The EU's definition is along these lines, albeit without the explicit mention of balancing: 'whereby contracting authorities take account of all three pillars of sustainable development (economic, social and environmental), when procuring goods, services or works'.¹¹ The EU Commission's policy strategic approach is evident from its statement that sustainable public procurement 'allows governments to leverage public spending to increase demand for sustainable products and services, based on social and environmental criteria, increasing their market share and providing business with tangible incentives'. This is seen in the context of policy coherence for development, with the EU Commission's emphasis that 'all policies at national and subnational level need to contribute coherently' to achieve the Sustainable Development Goals.¹² The UN's Sustainable

⁵ Communication from the Commission, *Europe 2020: a strategy for smart, sustainable and inclusive growth*, COM (2010) 2010 final.

⁶ Ibid., p. 12. ⁷ Ibid., p. 15. ⁸ Ibid., p. 16.

⁹ For example, Commission Communication, *A global partnership for poverty eradication and sustainable development after 2015*, COM (2015) 44 final, see https://ec.europa.eu/europeaid/communication-global-partnership-poverty-eradication-and-sustainable-development-after-2015_en.

¹⁰ United Nations Environment Programme (UNEP), Sustainable Consumption and Production Branch (2012), see www.unep.fr/scp/procurement/whatispp/.

¹¹ European Commission, Sustainable public procurement, see http://ec.europa.eu/environment/gpp/glossary_en.htm, while the balancing is explicitly mentioned in the definition on the website of the EU Commission's Directorate General for the Environment: 'Sustainable Public Procurement (SPP) means that public authorities seek to achieve the appropriate balance between the three pillars of sustainable development – economic, social and environmental – when procuring goods, services or works at all stages of the project', see http://ec.europa.eu/environment/gpp/versus_en.htm.

¹² For example, Commission Communication, *A global partnership*, see https://ec.europa.eu/europeaid/communication-global-partnership-poverty-eradication-and-sustainable-development-after-2015_en.

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WHY SHOULD PUBLIC PROCUREMENT BE ABOUT SUSTAINABILITY? 3

Development Goals, building on the Millennium Development Goals,¹³ are to be the international community's response to the Rio+20 promise 'to strive for a world that is just, equitable and inclusive', based on the commitment to 'promote sustained and inclusive economic growth, social development and environmental protection and thereby to benefit all, in particular the children of the world, youth and future generations of the world'.¹⁴ In this process, the overarching objectives of and essential requirements for sustainable development are declared to be: 'Poverty eradication, changing unsustainable and promoting sustainable patterns of consumption and production and protecting and managing the natural resource base of economic and social development'.¹⁵

On this basis we can tentatively, as a starting point for the analysis in this volume, define sustainable public procurement as procurement rules and practices that contribute to global sustainability: a balancing of social and economic development, ensuring the fundamentals of quality of life for all people, within the ecological boundaries of the planet we live on.¹⁶ We see this reflected also on Member State level, in for example the UK's definition of sustainable public procurement as 'a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organisation, but also to society and the economy, whilst minimising damage to the environment'.¹⁷ Sustainable public procurement is thereby distinguishable from green public procurement, which aims solely at reducing the environmental impact,¹⁸ and from social or socially responsible public procurement, which is

¹³ One of the main outcomes of the Rio+20 Conference was the agreement to launch a process to develop a set of sustainable development goals (SDGs), which would build upon the Millennium Development Goals and converge with the post-2015 development agenda, see <https://sustainabledevelopment.un.org/topics/sustainabledevelopmentgoals>.

¹⁴ Full report of the Open Working Group of the General Assembly on sustainable development goals, issued as document A/68/970, see <http://undocs.org/A/68/970>, p. 3, para 4.

¹⁵ Ibid., para 3.

¹⁶ This dovetails with the well-known definition of sustainable development in the Brundtland Report as a development that allows us to meet our needs today without compromising the ability of future generations to meet theirs; World Commission on Environment and Development, *Our common future* (Oxford University Press, 1987).

¹⁷ DEFRA, *Procuring the future: sustainable procurement national action plan: recommendations from the Sustainable Procurement Task Force* (DEFRA, 2006), p. 10.

¹⁸ Which may be formulated as procurement of 'goods, services and works with a reduced environmental impact throughout their life cycle compared to goods, services and works with the same primary function that would otherwise be procured', see http://ec.europa.eu/environment/gpp/versus_en.htm.

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about promoting ‘employment opportunities, decent work, social inclusion, accessibility, design for all, ethical trade’ and seeks to ‘achieve wider compliance with social standards’.¹⁹ Sustainable public procurement thus encompasses both green and social procurement.

Reforming public procurement law to contribute to sustainability is not merely a matter of policy choice; it is arguably required as a matter of EU Treaty Law, as we will outline further below. This also gives direction and a framework for analysing whether the EU’s public procurement law reform of 2014 is sufficient. Our approach in this book does not entail that public procurement from now on should have as its primary or only task to promote environmental protection, reduce greenhouse gas emissions and ensure that human rights including fundamental labour rights are respected, and ignore the economic aspects. Indeed, efficient use of public funds, also in the short term,²⁰ remains a core aspect of public procurement.²¹ The issue is one of balancing and not of choosing either economic efficiency or environmental protection and social development. Indeed, ignoring environmental and social concerns is not economically efficient either, especially in the long term.²² However, balancing environmental, social and economic interests will not lead to sustainability if it is not undertaken within the planetary boundaries (Section 2). This fundamental recognition is not apparent in the policy choices of the EU. As outlined in the contribution by Suzanne Kingston, the reality on political and policy level tends rather towards taking economic growth as the overarching objective and the framework within which environmental and social concerns may be taken into account.²³

¹⁹ European Commission, *Buying social: a guide to taking account of social considerations in public procurement*, p. 5, see http://ec.europa.eu/growth/single-market/public-procurement/other-aspects/index_en.htm.

²⁰ While internalising environmental and social concerns may be the best economic choice also in the short term, especially, in the long run ignoring these concerns does not make good economic sense.

²¹ The Europe 2020 strategy stresses that public procurement policy must ensure the most efficient use of public funds and that procurement markets must be kept open Union-wide (all the more in times of financial crisis); European Commission Memo, *Revision of Public Procurement Directives – frequently asked questions* (14 January 2014), see http://europa.eu/rapid/press-release_MEMO-14-20_en.htm.

²² A point that is touched upon in several contributions and which we return to in Chapter 11 of this volume by Anna Beckers.

²³ See Chapter 2 of this volume, where Suzanne Kingston discusses the important role of the Court of Justice of the European Union (CJEU) in this context.

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Much public procurement law literature has likewise dealt with the intricacies of public procurement from an economic perspective.²⁴ This book therefore contributes to filling a void by evaluating the effectiveness of the modernisation of EU public procurement law from a sustainability perspective.²⁵ Through contributions covering core issues of public procurement, the new EU provisions on sustainable public procurement and the implied balancing of economic and non-economic objectives are analysed. This volume thereby identifies major unresolved issues in the use of sustainability considerations and highlights challenges and possibilities for national implementation to take place in 2016. It also contributes to the dismantling of the compartmentalisation that underpins unsustainable policy decisions by discussing the interface of company law and public procurement law and the implication of the new rules on sustainable public procurement for sustainable companies and specifically for small- and medium-sized enterprises (SMEs).

This chapter proceeds with a discussion of the legal status of sustainability in EU law, thereunder whether the EU 2020 goal of ‘smart, sustainable and inclusive growth’ is in line with EU law (Section 2). Thereafter, we outline the process leading towards the adoption of the 2014 Public Procurement Directives, give an overview of the main elements of the directives and the stages of a public procurement process where environmental and social concerns may be integrated, and present the other chapters in this volume (Section 3).

2. The legal status of sustainability in EU law

Sustainable development has a strong legal position among the overarching objectives of the European Union, underpinned by the growing recognition in the EU of the inextricable entity of humanity, our natural environment and our economic system. Debates on the significance of

²⁴ See, for example, F. Lichère, R. Caranta and S. Treumer (eds), *Modernising public procurement: the new directive* (DJØF Publishing, 2014), which, although having one chapter on sustainable public procurement (footnote immediately below), has as its main focus what it denotes as the primary objective of the revision of the EU public procurement regime: ‘simplification and so-called flexibilisation’ without any mention at all of sustainability or of environmental or social concerns (Foreword, p. 5, and first chapter ‘Evolution of the EU public procurement regime: the new public procurement directive’, p. 9).

²⁵ An overview is given in the chapter by D.C. Dragos and B. Neamtu, ‘Sustainable public procurement in the EU: experiences and prospects’, in F. Lichère, R. Caranta and S. Treumer (eds), *Modernising public procurement: the new directive* (DJØF Publishing, 2014), pp. 301–35.

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the EU Treaties for economic areas of policy such as public procurement usually deal with free movement, freedom of establishment, enabling competition and facilitating the level playing field. EU law is, however, not just about free movement and market integration. On a Treaty level, the general objectives of the EU have a strong legal significance in the context of the teleological, dynamic EU legal method. The codification of the principle of sustainable development entails an all-encompassing legal duty to integrate environmental protection requirements in the policies and activities of the Union, and based on a broader selection of sources the same duty arguably applies to human rights and other fundamental social rights. This section outlines the legal nature of the overarching goal of sustainable development in EU law and the significance for the EU institutions and indirectly for the Member States, generally, and specifically for public procurement.

The European Union is founded on the following values: ‘respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’.²⁶ The EU’s aim is to ‘promote peace, its values and the well-being of its peoples’.²⁷ This is an express formulation of the underlying motivation for the formation of that which originally was the European Economic Community: former wartime adversaries entered into mutual commitments to achieve peace – the end to all wars.²⁸ The European Union thus shares roots with the other post-war European project, the Council of Europe and its defence of human rights, democracy and the rule of law.²⁹

To achieve this promotion of peace, the EU’s values and the well-being of its peoples, sustainable development is a prerequisite: a balancing of

²⁶ Art. 2 TEU. See also the Preamble of the Treaty, where the Member States confirm their ‘attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers’.

²⁷ Art. 3(1) TEU.

²⁸ See, *inter alia*, J. Steiner, L. Woods and C. Twigg-Flesner, *Textbook on EC law*, 8th edn (Oxford University Press, 2003), pp. 3–4, and E.D. Hansen, *European economic history: from mercantilism to Maastricht and beyond* (Copenhagen Business School Press, 2001), pp. 361–4.

²⁹ E.D. Hansen, *European economic history*, pp. 367–8, and M. Emberland, *The human rights of companies: exploring the structure of ECHR protection* (Oxford University Press, 2006), p. 50, on the European Movement as the forerunner both to the Council of Europe and the EEC, whose founders clearly saw business as a means to building links between countries and promoting peace.

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economic, social and environmental interests. Sustainable development is the overarching objective and meant to be the guiding principle for the EU's policies and activities.³⁰ We see this expressed in the EU Treaty, which emphasises the position of sustainable development, in Europe and globally:

The Union shall . . . work for the *sustainable development of Europe* based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.³¹

The global aspect is enhanced in an unprecedented manner on Treaty level, in the same article:

In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. *It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights*, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.³²

This is underlined further in the article dealing with the relationship between the EU and the international community, where the EU expresses its will to work to:

foster the *sustainable economic, social and environmental development of developing countries*, with the primary aim of eradicating poverty; . . . help develop international measures to preserve and *improve the quality of the environment and the sustainable management of global natural resources*, in order to ensure *sustainable development*.³³

³⁰ Concerning sustainable development as a pre-Lisbon objective of the EU, see B. Sjøfjell, *Towards a sustainable European company law: an analysis of the overarching objectives of EU law with the Takeover Directive as a test case* (Kluwer Law International, 2009).

³¹ Art. 3(3) TEU (emphasis added). See also the Preamble of the Treaty, where the Member States express their determination to 'promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields'.

³² Art. 3(5) TEU (emphasis added). ³³ Art. 21(2)(d) and (f) TEU (emphasis added).

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The EU institutions have defined sustainable development as the overarching long-term goal of the EU in which economic growth, social cohesion and environmental protection go hand in hand and are mutually supporting.³⁴ The objective of sustainable development more broadly refers to the requirement to examine the economic, social and environmental effects of all policies in a coordinated way. In international law and politics, there is also growing recognition of sustainable development as an all-important objective and a general principle of international law.³⁵

The integration of the environmental dimension is the basis of the EU strategy of sustainable development that was introduced to reconcile the diverse interests of promoting economic development, raising the standard of living, closer relations between Member States and the protection of the environment.³⁶ The environmental integration rule in Article 11 of the Treaty on the Functioning of the European Union (TFEU) constitutes a core tool to implement the sustainability concept and to promote the transition towards sustainable development. Article 11 TFEU states that

Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.

This rule encapsulates a legal principle that constitutes one of the most important elements of EU environmental law.³⁷ Indeed, Article 11 TFEU is arguably one of the fundamentally most important provisions in EU Treaty Law as a whole. Integrating environmental protection in all areas

³⁴ European Commission, *Mainstreaming sustainable development into EU policies: 2009 review of the European Union strategy for sustainable development*, COM (2009) 400 final, 24 July 2009, p. 2; Council of the European Union, Presidency conclusions Doc 16616/1/07/REV I, 14 December 2007; see also the 6th Environmental Action Programme, which defines sustainable development as a prudent use of natural resources and the protection of the global ecosystem together with economic prosperity and a balanced social development, Decision No. 1600/2002/EC, Recital 6.

³⁵ See C. Voigt, 'Article 11 TFEU in the light of the principle of sustainable development in international law', in B. Sjøfjell and A. Wiesbrock, *The greening of European business under EU law: taking Article 11 TFEU seriously* (Routledge, 2015).

³⁶ See the opinion of A.G. Leger in Case C-371/98, delivered on 7 March 2000, paras 55–7. The increasing importance of sustainable development considerations after the publication of the Brundtland Report 'Our Common Future' in 1987 was central to the establishment of the environmental integration principle and its increasingly prominent role in EU law and policy. See M. Herodes, C. Adelle and M. Pallemmaerts, 'Environmental policy integration at the EU level – a literature review', *EPIGOV Paper* no. 5 (2007).

³⁷ See, for example, J.H. Jans and H.H.B. Vedder, *European environmental law* (Europa Law Publishing, 2008), pp. 16–23.

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to the extent necessary to secure sustainable development is a prerequisite to securing the very basis of our existence. Economic development and social welfare, or as formulated as an objective of EU law: achieving ‘a highly competitive social market economy, aiming at full employment and social progress’, is in the long run fully dependent on the stability of our ecosystems. Likewise, societal stability is dependent on ensuring fundamental social rights. We see this illustrated in Europe in the aftermath of the financial crisis, when the economic basis of a society is under threat, with unemployment, cuts in welfare and a basic uncertainty for people, societal unrest threatens. In the global perspective, the harsh brutality of tens of thousands of people dying daily for poverty-related reasons³⁸ and refugees risking their lives for the hope of a better future,³⁹ underlines the necessity of striving for a global sustainable development, where the fundamental human and social rights of all people are protected. These rights are intrinsic to the objective of sustainable development; securing fundamental human and social rights is the minimum requirement of the social dimension of sustainable development.⁴⁰ While a European perspective on human rights may have tended to focus on civil and political rights, in a global perspective, we see clearly how fundamental human rights are inextricably connected to a viable environment: the right, not only to life, but to the basics needed to be able to live, water, food and health.⁴¹

³⁸ ‘It is clear that improvements in the lives of the poor have been unacceptably slow, and some hard-won gains are being eroded by the climate, food and economic crises’, UN Secretary-General Ban Ki-moon says in the foreword to the Millennium Development Goals Report 2010, issued on 23 June 2010, see www.un.org/millenniumgoals/.

³⁹ See ‘EU ministers meet for crisis talks after hundreds of migrants drown in Mediterranean’, *The Guardian* (20 April 2015), see www.theguardian.com/world/2015/apr/19/italian-prime-minister-matteo-renzi-emergency-summit-700-drown-mediterranean.

⁴⁰ We see this understanding reflected in a global context in high-level policy documents, such as, for example, the European Consensus; joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: *The European Consensus* (OJ 2006 (C 46/1–19)), paras 5–7, concerning the Millennium Development Goals, concluding with: ‘We reaffirm that development is a central goal by itself; and that sustainable development includes good governance, human rights and political, economic, social and environmental aspects’.

⁴¹ See, *inter alia*, A. Eide ‘Realization of social and economic rights and the minimum threshold approach’, *Human Rights Law Journal*, 10 (1989), pp. 35–51, and C. Warbrick ‘Economic and social interests and the European convention on human rights’, in M.A. Baderin and R. McCorquodale (eds), *Economic, social and cultural rights in action* (Oxford University Press, 2007).

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Article 11 TFEU has contributed to and strengthened environmental protection as a general objective of EU law that is relevant in all areas of EU policy. The provision requires policymakers to promote environmental protection when defining and implementing EU policies,⁴² both on the EU level and on the Member State level.⁴³ EU law can and must be interpreted in the light of the environmental objectives of the TFEU, even in areas outside the environmental field. Hence, the environmental integration obligation is not only one of the oldest integration clauses in EU law, it also holds enormous potential as a means of steering the interpretation and application of EU legal instruments that – in one way or the other – affect the environment. With its explicit aim of sustainable development, complying with the duty contained in Article 11 TFEU entails integrating environmental protection requirements and balancing environmental, social and economic interests with the aim achieving sustainable development.⁴⁴ The social dimension is thereby also included, while a number of other EU sources, including the values and aims expressed in Articles 2 and 3(5) TEU; the Charter of Fundamental Rights and the EU's own case law, provides further basis for the inclusion and promotion of fundamental human and social rights.⁴⁵ Indeed, in addition to the environmental integration principle in Article 11 TFEU and the principle of social policy integration in Article 9 TFEU,⁴⁶ we have a general principle of integration of policy objectives contained in Article 7 TFEU,

⁴² About why it was perceived necessary to adopt, and through several Treaty reforms to strengthen, the environmental integration rule, see B. Sjøfjell, *Towards a sustainable European company law*, s. 10.5 and 10.7.

⁴³ See B. Sjøfjell, 'The legal significance of Article 11 TFEU for EU institutions and Member States', in B. Sjøfjell and A. Wiesbrock, *The greening of European business under EU law: taking Article 11 TFEU seriously* (Routledge, 2015).

⁴⁴ Arguably even clearer expressed in Art. 37 of the EU's Charter of Fundamental Rights (EUCFR): 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the *principle of sustainable development*' (emphasis added).

⁴⁵ For a discussion of the legal status of human rights protection after the Lisbon Treaty, which, *inter alia*, gives binding, primary law status to the Charter of Fundamental Rights, see S. Douglas-Scott, 'The Court of Justice of the European Union and the European Court of Human Rights after the Treaty of Lisbon', in S. Weatherill, S. de Vries and U. Bernitz (eds), *The protection of fundamental rights in the EU after Lisbon* (Hart Publishing, 2013).

⁴⁶ Art. 9 TFEU: 'In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health'.