SUSTAINABLE PUBLIC PROCUREMENT UNDER EU LAW

This book examines the effectiveness of the modernisation of EU public procurement law in light of the overarching treaty goals on sustainability. Contributors expertly cover core issues of public procurement, including life-cycle costing (LCC), eco- and fair-trade labels, the link to the subject matter (LtSM) requirement, the mandatory horizontal rule on environmental and social legal compliance and framework agreements. Also explored are the balancing of economic and non-economic objectives implied in sustainable public procurement. The volume proceeds to identify major unresolved issues in the use of sustainability considerations and highlights challenges and possibilities for the national implementation due to take place in 2016. The book 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).

Béate Sjåfjell is Professor Dr Juris at the University of Oslo. She is the head of the research group ‘Companies, Markets, Society and the Environment’ as well as of the European Law Network at the Faculty of Law in Oslo. She also chairs the international Sustainable Market Actors Network and coordinates European and international research projects on sustainability and business law.

Anja Wiesbrock is a senior advisor at the Research Council of Norway. She has previously worked as a postdoctoral researcher at the University of Oslo and as Assistant Professor in EU Law at the University of Maastricht. She has published numerous articles on the different aspects of EU law, including on state aid and on the role of the environmental integration principle in public procurement.
SUSTAINABLE PUBLIC PROCUREMENT UNDER EU LAW

New Perspectives on the State as Stakeholder

Edited by

BEATE SJÅFJELL AND ANJA WIESBROCK
To Katarina and Linnea, who hold the future in their hands
CONTENTS

List of contributors page ix
Foreword xiii
Preface xv

1 Why should public procurement be about sustainability? 1
   Beate Sjåfjell and Anja Wiesbrock

2 The uneasy relationship between EU environmental and economic policies: the role of the Court of Justice 23
   Suzanne Kingston

3 The link to the subject matter: a glass ceiling for sustainable public contracts? 50
   Abby Semple

4 Socially responsible public procurement: European value or national choice? 75
   Anja Wiesbrock

5 Labels as enablers of sustainable public procurement 99
   Roberto Caranta

6 Life-cycle costing for sustainable public procurement in the European Union 114
   Dacian C. Dragos and Bogdana Neamtu

7 Sustainable public procurement under framework agreements 138
   Marta Andrecka
8 The role of SMEs in promoting sustainable procurement  160
SARAH SCHOENMAECKERS

9 Sustainable public procurement as a driver for sustainable companies? The interface between company law and public procurement law  182
BEATE SJÅFJELL

10 Using contracts to further sustainability? A contract law perspective on sustainable public procurement  206
ANNA BECKERS

11 Public procurement’s potential for sustainability  230
ANJA WIERSBROCK AND BEATE SJÅFJELL

Index  243
CONTRIBUTORS

MARTA ANDRECKA is a postdoctoral fellow at Aarhus University, Denmark. She holds procurement courses in Public Procurement Law and Strategy LLM at Bangor University, United Kingdom. Her PhD completed at Aarhus University deals with public–private partnership (PPP) in the public procurement law context. She has an extensive international profile, which includes many research stays, conference contributions, publications and collaborations across Europe and Australia. She is also a procurement consultant and co-founder of the academic support for PPP Foundation in Poland.

ANNA BECKERS is Assistant Professor of Private Law and Legal Methodology at Maastricht University, the Netherlands. She is a fellow of the Maastricht European Private Law Institute and a Max Weber Fellow 2015–16 of the European University Institute Florence. She completed her law degree and bar exam in Germany and received her PhD degree from Maastricht University. Her research interests are related to private law and (socio-) legal theory and its links to public law.

ROBERTO CARANTA is Professor of Administrative Law at the University of Turin, Italy. He is Director of the Master on Public Procurement for Sustainable Development jointly managed by his University and ITC-ILO Turin. He is co-directing the European Procurement Law Series, DJØF, Copenhagen. He is a member of both the research networks Public Contracts in Legal Globalization/Contrats Publics dans la Globalisation Juridique and PLAN – Procurement Law Academic Network. He is a member of the dispute settlement board of the European Space Agency – ESA.

DACIAN C. DRAGOS is Jean Monnet Professor of Administrative and European Law and co-director of the Centre for Studies on Good Governance at Babes Bolyai University, Romania. He has previously been the Dean of the Faculty of Political, Administrative and Communication as
well as a Marie Curie fellow at Michigan State University. He has published widely in public procurement law and general EU and administrative law.

SUZANNE KINGSTON is a senior lecturer at the University College Dublin. She has published widely in the field of European law and governance, especially in the environmental, competition and economic and human rights fields, including the monograph *Greening EU Competition Law and Policy* (Cambridge University Press, 2012). She has a special interest in how tensions between the EU’s economic and non-economic aims play out in European law and governance.

BOGDANA NEAMTU is Associate Professor within the Public Administration Department at Babes Bolyai University, Romania. She holds an MA in urban planning from Michigan State University and obtained her PhD in sociology in 2008 with a topic on urban growth management in Romania. Her research interest is in sustainable development and how the concept applies to various fields including public procurement. She has published amongst others on secondary considerations in public procurement and on the Europeanisation of administrative law in Romania.

SARAH SCHOENMAEKERS is Assistant Professor of EU Law at Maastricht University and a practicing lawyer in Belgium. Her research focuses mainly on EU public procurement law and free movement and competition law. She has co-edited two books and written several articles on EU public procurement law and is a regular speaker at conferences on public procurement.

ABBY SEMPLE is an independent consultant with expertise on the legal, environmental and social aspects of public procurement. She has provided consultancy and training on public procurement law, practice and policy in various EU countries, and is the author of *A Practical Guide to Public Procurement* (Oxford University Press, 2015).

BEATE SJÅFJELL is Professor Dr Juris at the University of Oslo. She is the head of the research group ‘Companies, Markets, Society and the Environment’ as well as of the European Law Network at the Faculty of Law in Oslo. In addition to her monograph *Towards a Sustainable European Company Law* (2009), she has co-edited *The Greening of European Business under EU Law* (Routledge, 2015, with Anja Wiesbrock) and *Company Law and Sustainability* (Cambridge University Press, 2015, with Benjamin...
Richardson). Her scholarship includes many papers on EU company and financial market law and the integration of sustainable development.

Anja Wiesbrock is a senior advisor at the Research Council of Norway. She has previously worked as a postdoctoral researcher at the University of Oslo and as Assistant Professor in EU Law at the University of Maastricht. Dr Wiesbrock has published numerous articles, book chapters and a monograph on different aspects of EU law, including on state aid and on the role of the environmental integration principle in public procurement. She is also co-editor of The Greening of European Business under EU Law.
'Sustainable procurement' has long been an expression primarily known to academics and practitioners dealing with public procurement. That might change, however: as environmental and social considerations become increasingly important components of the procurement process in Europe, the term may gain wider acquaintance.

The reader wishing to understand the most important issues and debates relating to sustainable procurement could hardly look for a better introduction than this volume. Prominent academics and practitioners (sometimes both in one person) map the terrain and discuss important questions from different perspectives.

This book is a very timely contribution to the debate. In 2014 a new set of European Union Directives on public procurement were adopted. The Member States are to transpose the new Union rules into their own legal systems by early 2016. Naturally, the debate involves more than an exchange of views: it is also the time to make policy choices and create national legislation. The book will also be an important contribution to the debate on sustainable public procurement in the years to come.

The complexity of sustainable public procurement (and public procurement in the European Union in general) stems from the fact that the regulatory landscape is formed by Union law, national law, as well as choices and practices of individual contracting authorities. Add to that obligations arising out of the Government Procurement Agreement and it becomes clear that neither the authors of the new directives – the Union legislator – nor authors of national laws are able to avoid some basic questions and dilemmas surrounding sustainable public procurement.

There are fundamental, conceptual issues – such as the relationship between environmental protection or social rights and market freedoms; the latitude Member States enjoy when formulating their own sustainability policies and the role public procurement should play in public policy. But it is not possible to solve these big questions in the abstract. Instead, they resurface time and again, under the guise of seemingly
minor, practical issues: the rules of using environmental and fair-trade labels; methodologies to calculate lifetime costs; the limitations on imposing national minimum wage rules on subcontractors established in other Member States of the European Union.

Such questions are among those filling the annals of the European Court of Justice and national courts. Although the new Public Procurement Directives of the European Union are an important step, the debate will no doubt continue. The authors of this volume deserve thanks for an important and timely contribution to it.

Adrián Tokár

1 Member of the Legal Service of the European Commission. The views presented here are the author’s alone and cannot be attributed to the European Commission.
PREFACE

Future generations will neither excuse nor forgive us for ignoring the signals we see today. They will not accept that it is too difficult or too costly to keep our economic aspirations in balance with the impact on the environment and the effect our decisions will inevitably have on society.

Sir Neville Simms (Chairman for the Sustainable Procurement Taskforce)

The rules on public procurement in the EU have often been approached and discussed on the basis of economic premises. With this book we seek to evaluate the new EU regime on public procurement from a sustainability perspective. The volume reflects our broader research interest in the balance between economic, environmental and social objectives under EU law within the context of the overarching objective of sustainability. It also bears witness to the immense interest in the subject that we have observed amongst scholars and practitioners. There is a great demand, not least amongst contracting authorities, for a clarification and interpretation of the EU rules on sustainable public procurement. This is in particular the case after the 2014 revision of the EU Directives, which contain many novelties and new opportunities for including environmental and social objectives in public purchasing decisions.

The book results from a conference on sustainable public procurement held in Oslo in December 2014. Most contributions in this book are based on papers presented in Oslo that have benefited from a vivid discussion during the conference as well as from several rounds of comments from the editors. After having received an offer for a contract from Cambridge University Press in the beginning of March 2015, we worked closely together with all authors in order to finalise all chapters within the agreed deadline of 20 April. Completing a manuscript in less than two months has been both a challenge and an opportunity, as it has required us to work effectively and to impose strict deadlines upon
ourselves and our contributors, regardless of many other personal and professional commitments.

Our thanks go therefore first and foremost to our contributors. It has been a great pleasure to work together with such an excellent and responsive group of scholars, who have gone out of their way to address our numerous comments within the tight deadline. Special thanks go to Abby Semple and Anna Beckers, who have not only contributed a chapter each, but also helped to improve several other chapters with their insightful comments. We would furthermore like to express our gratitude to our research assistant Morten Emil Eriksrud Bergan for his meticulous assistance in preparing this book for publication.

Most important of all, we would like to thank our wonderful families, our partners and children, for being an invaluable source of inspiration and support and in particular for bearing with our absences at times of high productivity. We would like to dedicate this book to Katarina and Linnea, who hold the future in their hands.

Beate Sjåfjell and Anja Wiesbrock