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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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## 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).

BEATE SJØFJELL 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.

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To Katarina and Linnea, who hold the future in their hands

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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 SJØFJELL 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

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## FOREWORD

‘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

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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*<sup>1</sup>

<sup>1</sup> 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.

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## 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

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PREFACE

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 Sjøfjell and Anja Wiesbrock*