

*Event report - Main findings and conclusions  
Utrecht University (Centre for Public Procurement)  
23 October 2023*

## **The Future of Sustainable Public Procurement: Legal Possibilities and Obligations**

On 26 October 2023, the event "The Future of Sustainable Public Procurement: Legal Possibilities and Obligations" took place at Utrecht University. The focus was on the development from legal possibilities to obligations for sustainable public procurement in the European Union. The aim was to examine how this shift towards green and social obligations within public procurement law can be understood and interpreted, the impact of these obligations on Dutch procurement practices, and, finally, to find answers on how public procurement law can effectively operate in the future, especially in the context of the fight against climate change and growing social inequality.

### *Relevance for the entire European Union*

The event, attended by various perspectives, including policy, science, and legal practice, delved into this significant legal development. It also marked the launch of the book *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Change* (eds. W.A. Janssen, R. Caranta).<sup>1</sup> This brief report below provides a concise overview of the discussions during the event in an attempt to spur the debate and discussion throughout the European Union amongst all those involved in the public procurement world. It presents the main findings and conclusions.

### *1. The Evolution of Public Procurement Law: From Possibilities to Obligations*

#### *The power of public procurement*

Sustainable public procurement has the potential to contribute significantly to green and social objectives in society. However, according to prof. Willem Janssen (Utrecht University / University of Groningen), the fight against climate change and social inequality faces obstacles and is not effectively implemented in many places in the Netherlands and the EU. Although public procurement law offers many legal possibilities for sustainable procurement, which is thanks to reforms in the Public Procurement Directives in 2014, it can still restrict sustainability transitions. This includes, for instance, the limited scope of reserved procedures and the prohibition of incorporating general sustainability policies into the evaluation of a procurement due to the principle of proportionality.

#### *A changing legal framework*

Janssen emphasized that the legal framework is rapidly changing. Current obligations for sustainable public procurement, as outlined in the Public Procurement Directives, are under debate. Articles such as 18(2), 69, and 42(1) of Directive 2014/24/EU, implemented in articles 2.81(2), 2.116(5), and 2.75(4-5) of the Dutch Public Procurement Act 2012, are being questioned. Janssen concluded that the current impact of these obligations on practice is limited, partly due to their unclear formulation.<sup>2</sup> The ongoing shift from possibilities to obligations, driven by the EU Green Deal's ambitious goals for the European Union, was

evident during the event in Utrecht.<sup>3</sup> New European legislative proposals will limit the discretionary space of contracting authorities to decide on what to buy. The discussion highlighted crucial themes for effective regulatory frameworks in the future, including the level of regulation (EU vs. member states), the changing role of legal protection, the possibility of NGOs litigating in procurement law, and determining the most effective form of regulation. Regulatory forms could include product requirements, objectives, or minimum sustainability requirements for procurements.

#### *Stimulating and supporting in addition to mandating*

Before discussing concrete legislative proposals during the event, Anita Poort (DG Grow, European Commission) emphasized the importance of promoting and supporting green and social procurement, in addition to regulating "what to procure." The Commission continues to play this role through publications like 'Buying Green!' and 'Buying Social!'.<sup>4</sup> She discussed the 'Big Buyers: Working Together' initiative, where public procurers collaborate on joint market strategies and approaches at the European level.<sup>5</sup> She also introduced the **Public Buyers Platform**, including **Communities of Practice** working on knowledge, tools, and products to be made available to other procurement organizations.<sup>6</sup>

## *2. A Wave of New Legislation and Many New Questions*

At the European level, numerous public procurement obligations are emerging in (proposed) environmental and social legislation that will impact Dutch and EU procurement practices. This is noteworthy, especially as it goes beyond the scope of the Public Procurement Directives. Previously, this legal area mainly had the Clean Vehicles Directive as an example of obligations for sustainable procurement. At this point in time, a considerable number of directives and regulations containing public procurement-related obligations are being proposed and have been passed by the EU legislature.

#### *Energy, Batteries and Net-zero*

Tjinta Terlien (Ploum) discussed the proposal for the net-zero industry regulation, the already adopted Batteries regulation, and the Energy Efficiency Directive.<sup>7</sup> All these legislative initiatives are relevant for sustainability transitions such as the energy transition.<sup>8</sup> Specifically, attention was drawn to how the proposed mandatory award criteria, including the suggested weighting for price/quality from the net-zero industry regulation, should be interpreted for the procurement of various energy transition-related products, such as wind turbines. Additionally, she raised the question of how the European Commission would use delegated powers to regulate the conditions and award criteria for the procurement of batteries.

#### *Deforestation, CSDDD and Clean Vehicles*

Mariska Verseveld (PIANOo) discussed the Clean Vehicles Directive, the proposal for the Deforestation regulation, and the proposal for the Corporate Sustainability Due Diligence Directive (CSDDD).<sup>9</sup> Key issues include how enforcement will occur regarding the targets posed by the Clean Vehicles Directive, how the proposed temporary exclusion ground from the Deforestation regulation will relate to the mandatory and facultative exclusion grounds from the Public Procurement Directives, and whether the public sector will ultimately have to comply with due diligence obligations concerning supply chains and human rights from the

CSDDD. This compliance may be explicit or indirectly compelled by Article 18(2) of Directive 2014/24/EU.

#### *More legislation on the way*

In addition to the legislative initiatives discussed during the event, proposals in Article 25(1) of the Critical Raw Materials Regulation<sup>10</sup>, the Sustainable Construction Materials Regulation, Article 9(1) of the Energy Performance of Buildings Directive<sup>11</sup>, Article 24 of the Directive on equal pay for men and women<sup>12</sup>, Article 1(6) of the Renewable Energy Directive<sup>13</sup>, Article 57(1) of the Packaging Directive<sup>14</sup>, Article 17(3)(c) of the Green Claims Directive<sup>15</sup>, Articles 5(5)(c) and 7(2)(d) of the Directive on the protection of the environment through criminal law<sup>16</sup>, and Article 84 of the Construction Products Directive<sup>17</sup> should also be considered. Sustainability obligations also seem to be on the horizon for the ICT, food, and textile sectors in the coming years.

#### *National best practices: Netherlands, Italy and Spain*

With this development, the question of how to effectively shape obligations for sustainable public procurement becomes increasingly important. Some European countries, including the Netherlands, Spain, and Italy, have gained experience at the national level. Paul Heijnsbroek (Straatman Koster Advocaten) discussed the experiences from these member states.<sup>18</sup> In the Netherlands, for example, Article 2.114(2) of the Dutch Public Procurement Act 2012 obliges procurement based on the 'best price-quality ratio, unless.' The same law also includes the obligation to create 'as much societal value as possible' from Article 1.4(2).<sup>19</sup> While there seems to be room for further discussion before the courts, Heijnsbroek argued that this provision is ineffective, mainly because it lacks a concrete obligation and does not impose a requirement for justification. In Spain, recent legislative obligations have created a complex framework of rules at various levels, including the obligation to include at least one sustainability requirement, detailed technical specifications, or broad obligations to include sustainability in a procurement. Finally, Italy appears to regulate socially responsible procurement in the most detailed manner. The Italian legislator has made the European voluntary GPP criteria mandatory as minimum criteria (in the form of technical specifications and implementation conditions) for 18 different procurement categories, such as furniture, street lighting, and cleaning. Contracting authorities can set stricter requirements, but compliance seems to require attention.

### *3. Public Procurement Obligations: What Now?*

During the panel debate, various themes were discussed by Alfred de Weert (Knowledge Circle Public Procurement), Janet Meesters (DLA Piper), Tom Huisjes (UUCePP), and Sara Rademaker (Municipality of Utrecht) along with the audience.

#### *Lack of awareness*

In broad terms, it was acknowledged that this development has not yet sufficiently permeated Dutch and EU public procurement practice.<sup>20</sup> Both contracting authorities and bidders are not adequately aware of it. Increased awareness is necessary so that all parties in the procurement world can adequately prepare for upcoming legislation. The discussion highlighted many legal questions, and the practical implementation also requires attention.

### *Legal discussions*

Legal questions mainly revolve around the interpretation of current and future obligations. How should these obligations be precisely understood? The question was raised whether there is a sustainability principle based on the *TIM* case at the Court of Justice and whether, in comparison with the *Urgenda* case, legal actions could be initiated based on, for example, the Clean Vehicles Directive if the targets are not met.<sup>21</sup> Further discussion included the consideration that minimum harmonization for obligations could be an opportune route for the European legislature, as it allows for the imposition of stricter national sustainability rules by member states.<sup>22</sup> The role of the procurement lawyer was also discussed during the debate. Due to the shift towards (increasing) obligations, this lawyer might also need to become (partially) an environmental law expert.

### *Implementation issues*

Regarding implementation in practice, it was pointed out from the perspective of contracting authorities that the legal framework for procurement must remain effective. Many obligations are coming, and procurement is already a challenging profession. The debate also addressed whether public procurement can solve all societal problems and whether this could limit effectiveness. There was also a call for more knowledge and expertise for contracting authorities to navigate this legal development, requiring more financial budgets. On the other hand, tendering parties may experience issues with too many sustainability requirements, potentially making them less interested in participating in a procurement.

Nevertheless, clarity and uniformity of sustainability requirements in the law could be useful for both bidding and contracting parties, making the requirements more predictable and minimizing differences between governments. The urgency of climate change also seems to justify stricter rules. The discussion also touched on which form of obligations could be effective. It was suggested that there should be room for contracting authorities to go beyond the minimum sustainability set by the Dutch legislator. European maximum requirements should be avoided unless they allow for innovations.

### **Event organisation**

This event was organised in light of the ongoing research at the Centre for Public Procurement and the Centre for Regulation and Enforcement in Europe (Utrecht University) under the auspice of prof. dr. Willem A. Janssen (professor of Public Procurement Law, Utrecht University / Groningen University)

## End notes

<sup>1</sup> Full reference: W.A. Janssen, R. Caranta (eds.), *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Change*, Bloomsbury Hart, 2023.

<sup>2</sup> W.A. Janssen, G. Bouwman, 'Legislating societal value into Dutch public procurement law: symbolism or substance?', *Public Procurement Law Review*, Issue 2, 2020, pp. 91-102; W.A. Janssen, 'Verplicht maatschappelijk verantwoord aanbesteden: een eerste verkenning van een paradigmaverandering', *Tijdschrift Aanbestedingsrecht & Staatssteun*, 1, 2020, pp. 19-30.

<sup>3</sup> As an introduction to this discussion, see also: K. Pouikli, 'Towards mandatory Green Public Procurement (GPP) requirements under the EU Green Deal? Reconsidering the role of public procurement as an environmental policy tool', *ERA Forum Journal*, 4/2020, pp. 699-721; F. Schotanus, 'Van LP naar BPKV naar LEP of BPKIV', *Deal!*, May 2021; W.A. Janssen, 'Een Europees duurzaamheids- minimum voor schone voertuigen, batterijen en voedsel', *Tijdschrift Aanbestedingsrecht & Staatssteun*, nr. 6, 2021, pp. 4-6.

<sup>4</sup> EU Commission, *Buying Social: a guide to taking account social considerations in public procurement*, 2021; EU Commission, *Buying Green: a handbook on green public procurement*, 2016.

<sup>5</sup> For more information, see <<https://public-buyers-community.ec.europa.eu/about/big-buyers-working-together>>

<sup>6</sup> For more information, see <<https://public-buyers-community.ec.europa.eu/communities>>

<sup>7</sup> Article 19 Proposal for a Regulation of the European Parliament and of the Council on establishing a framework of measures for strengthening Europe's net-zero technology products manufacturing ecosystem (Net Zero Industry Act); Article 85 Regulation (EU) 2023/1542 (Batteries Regulation); Article 7 Directive (EU) 2023/1791 on energy efficiency and amending Regulation (EU) 2023/955 (Energy Efficiency Directive).

<sup>8</sup> T. Terlien, 'Energietransitie en het aanbestedingsrecht: kan het één zonder het ander?', *Tijdschrift Aanbestedingsrecht en Staatsteun*, nr. 2, 2023.

<sup>9</sup> Article 23 Proposal for a Regulation on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 (Deforestation Regulation); Articles 4(1) and 15 Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937; Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles (Clean Vehicles Directive).

<sup>10</sup> Proposal for a Regulation establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858, 2018/1724 and (EU) 2019/1020 (Critical Raw Materials Act).

<sup>11</sup> Proposal for a Directive on the energy performance of buildings.

<sup>12</sup> Directive (EU) 2023/970 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

<sup>13</sup> Proposal for a Directive amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652.

<sup>14</sup> Proposal for a Regulation on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC (Packaging Regulation).

<sup>15</sup> Proposal for a Directive on substantiation and communication of explicit environmental claims (Green Claims Directive).

<sup>16</sup> Proposal for a Directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC.

<sup>17</sup> Proposal for a Regulation laying down harmonised conditions for the marketing of construction products, amending Regulation (EU) 2019/1020 and repealing Regulation (EU) 305/2011.

<sup>18</sup> P. Heijnsbroek, 'The Netherlands: Obligations to Justify the Lowest Price and to Create as Much Societal Value as Possible', in W.A. Janssen, R. Caranta, *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Change*, Bloombury Hart, 2023, pp. 205-218.

<sup>19</sup> A.J. van Heeswijck, Postscript to C.E.C. Jansen, De inschrijver als hoeder van het algemeen belang? Reactie op A.J. van Heeswijck, 'De verplichting tot het creëren van zoveel mogelijk "maatschappelijke waarde" voor de publieke middelen', *TBR* 2015/80, p. 465.

<sup>20</sup> Exploring this question, a thematic issue was published in the *Tijdschrift voor Bouwrecht* entitled 'Maatschappelijk Verantwoord Aanbesteden: Van Mogelijkheden naar Verplichtingen', nr. 2, 2021.

<sup>21</sup> T. Huisjes, 'Reactie op J.W.A. Meesters, 'De uitsluitingsgronden als tool voor het bereiken van klimaatdoelstellingen. Is Europa klaar voor een concrete "klimaat-uitsluitingsgrond"?: De algemene uitsluitingsgrond voor schendingen van verplichtingen op het gebied van milieu-, sociaal en arbeidsrecht. *Tijdschrift voor Bouwrecht*, 2021(7), 641-643; W.A. Janssen, 'Shifting Towards Mandatory Sustainability Requirements in EU Public Procurement Law: Context, Relevance and a Typology', in W.A. Janssen, R. Caranta, *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Change*, Bloombury Hart, 2023, pp. 3-20.

<sup>22</sup> M. Andhov, R. Caranta, W.A. Janssen, O. Martin, *Shaping EU public procurement law: from 'how to procure' to 'what to procure'*, Research report for the European Parliament, 2023.