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SUSTAINABILITY IN GERMAN PUBLIC PROCUREMENT LAW: THE CURRENT FRAMEWORK AND LEGISLATIVE DEVELOPMENTS IN THE MAKING

ZRÓWNOWAŻONY ROZWÓJ W NIEMIECKIM PRAWIE ZAMÓWIEŃ PUBLICZNYCH: OBECNE RAMY I PRZYGOTOWYWANE ZMIANY LEGISLACYJNE

This paper presents an overview of sustainability considerations in current German public procurement law. It highlights the existing scope and particularities in the implementation of EU public procurement law with regard to sustainability in Germany. Additionally, it briefly looks at how sustainability aspects are implemented in practice. Further, the article provides an outline of what is currently planned for the future as Germany intends to strengthen the aspect of sustainability in its public procurement through the so-called ‘public procurement transformation package’ (*Vergabetransformationspaket*).

Keywords: *Vergabetransformationspaket*; Germany; public procurement; sustainability

Niniejszy artykuł przedstawia przegląd kwestii zrównoważonego rozwoju w obecnym niemieckim prawie zamówień publicznych. Podkreśla istniejący zakres i specyfikę wdrażania unijnego prawa zamówień publicznych w odniesieniu do zrównoważonego rozwoju w Niemczech. Ponadto pokrótce omówiono, w jaki sposób aspekty zrównoważonego rozwoju są wdrażane w praktyce. Dodatkowo artykuł przedstawia zarys planowanych przyszłych rozwiązań, ponieważ Niemcy zamierzają wzmocnić aspekt zrównoważonego rozwoju w swoich zamówieniach publicznych przez tak zwany „pakiet transformacji zamówień publicznych” (*Vergabetransformationspaket*).

Słowa kluczowe: *Vergabetransformationspaket*; Niemcy; zamówienia publiczne; zrównoważony rozwój

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I. INTRODUCTION

In the 2030 Agenda for Sustainable Development, the United Nations agreed to promote sustainable public procurement practices in accordance with national policies and priorities.¹ The global community reached an agreement to give sustainability a greater role in public procurement law. Nevertheless, real change requires action from the individual states, as public procurement law is (largely) national law. For the EU Member States, the EU legislator plays a pivotal role in the integration of sustainability into legal frameworks. Public procurement is harmonized by the EU directives on public procurement² if the contract value exceeds certain thresholds (Article 4 Dir. 2014/24/EU). There are plenty of examples of how environmental, social and corporate governance (ESG) considerations were recently introduced in EU competition and finance law, for example the CSDDD,³ CSRD,⁴ and the Taxonomy Regulation.⁵

This paper presents an overview of sustainability considerations in current German public procurement law. It highlights the existing scope and particularities in the implementation of EU public procurement law with regard to sustainability in Germany (section II). Additionally, it briefly examines how sustainability aspects are implemented in practice (section III). Further, the article provides an outline of what is currently planned for the future, as Germany intends to strengthen the aspect of sustainability in its public procurement through the so-called ‘public procurement transformation package’ (*Vergabetransformationspaket*). The reform in general is not intended to be a complete overhaul of public procurement law in Germany. Rather, it aims to introduce some bespoke changes to strengthen environmentally, climate-friendly, and socially sustainable procurement; digitize the procure-

¹ United Nations, A/Res/70/1 of 21st October 2015.

² 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, OJ L 94/65 (‘Dir. 2014/24/EU’ or ‘Public Procurement Directive’); Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94/1; 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, OJ L 94/243; Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ L 216/76. In the following, reference is made only to Dir. 2014/24/EU.

³ Directive 2024/1760/EU of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive 2019/1937/EU and Regulation 2023/2859/EU, OJ L 2024/1760.

⁴ Directive 2022/2464/EU of the European Parliament and of the Council of 14 December 2022 amending Regulation No 537/2014/EU, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322/15.

⁵ Regulation 2020/852/EU of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation 2019/2088/EU, OJ L 198/13.

ment system; simplify and accelerate procurement procedures; and promote small- and medium-sized enterprises (SMEs), start-ups, and innovation (German Federal Ministry for Economic Affairs and Energy, 2023). The proposed reforms with a view to incorporating greater consideration of environmental and social sustainability are explained and discussed in greater detail later in this article (section IV). However, due to the early elections in February 2025, it is currently unclear whether the planned reforms will be passed.

II. CURRENT GERMAN LAW

Public procurement law and enhancing sustainability have not always been seen as fitting together. Procurement law has its origins in budgetary law, which obliges contracting authorities to use taxpayers' money economically. Therefore, introducing sustainability criteria in procurement procedures was initially considered to be problematic (Lausen & Pustal, 2022). In the early stages of EU public procurement law, the European Court of Justice (ECJ) had to decide on several occasions whether and to what extent contracting authorities are allowed to consider sustainability in a procurement procedure. In 2002, the ECJ ruled in the *Concordia Bus Finland Oy Ab* case for the first time that environmental aspects may be included in the procurement procedure.⁶ According to the ECJ, contracting authorities may take into account environmental criteria for the award of a contract, 'provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination (para. 69).

In the case of *EVN and Wienstrom*, the ECJ ruled that a criterion requiring a certain percentage of the supplied electricity to be produced from renewable energy sources is lawful if it is in accordance with this ruling (para. 34).⁷ The use of labels to specify sustainability criteria in the award procedure was confirmed by the ECJ in the *Max-Havelaar* case, within certain limits (para. 63).⁸ For social sustainability, the ECJ ruled in 2000 in the *Calais* case that social criteria may be taken into account, provided that they are consistent with the principles of EU law, in particular the principle of non-discrimination, the right of establishment, and the freedom to provide services (para. 50).⁹ This requires social considerations to be appropriate for achieving their objective; for example, there have to be good reasons why employees working in the context of public contracts need more protection than those in the private sector.¹⁰

⁶ ECJ Judgement of 17 September 2002, C-513/99, *Concordia Bus Finland Oy Ab*.

⁷ ECJ Judgement of 4 December 2003, C-448/01, *EVN and Wienstrom*.

⁸ ECJ Judgement of 10 May 2012, C-368/10, *Max-Havelaar*.

⁹ ECJ Judgement of 26 September 2000, C-225/98, *Calais*.

¹⁰ ECJ Judgement of 18 September 2014, C-549/13, *Bundesdruckerei*, para. 32; ECJ Judgment of 3 April 2008, C-346/06, *Rüffert*, para. 39–40, 43.

The discussion has shifted notably since then. Public procurement is increasingly seen as a means of achieving sustainability goals. For example, Recital 2 of the current Public Procurement Directive states that the directive should enable contracting authorities to make better use of public procurement in support of common societal goals, and that procurement must also play its part in the Europe 2020 strategy for smart, sustainable and inclusive growth, environment, social affairs, and innovation. A dichotomy can be observed here: while under EU and German public procurement legislation, contracting authorities are generally free to decide whether they make use of sustainability criteria (see section II.1), there are increasing mandatory requirements outside public procurement law (see section II.2).

1. Public procurement law

Under public procurement law, still, the primary objective is still not considered to be sustainability. Accordingly, EU law sets limits on the implementation of social and environmental considerations. In particular, this is enforced by the requirement of a subject-matter connection. In addition, EU public procurement law does not oblige contracting authorities to take sustainability aspects into account. German public procurement law does not generally deviate from this. Similar to the framework set by EU law, sustainability considerations can affect public procurement particularly as part of the fundamental principle (see section II.1.1), the eligibility criteria (see section II.1.2), the award criteria (see section II.1.3) and the tender specifications (see section II.1.4).

1.1. Fundamental principles

The principles of German above-threshold public procurement law (Article 4 Dir. 2014/24/EU) are set out in Section 97 of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* [GWB]). The fundamental principles set out in Section 97 para. 1 and 2 GWB are competition, transparency, economic efficiency, proportionality, and non-discrimination. German law thus goes beyond the EU Public Procurement Directive, which only mentions non-discrimination, transparency, and proportionality (Article 18 para. 1 Dir. 2014/24/EU). The German principles are designed to guarantee fair competition between the bidding companies (Verfürth, 2016).

This does not, however, preclude the consideration of sustainability within the procurement procedure (Lausen & Pustal, 2022). According to Section 97 para. 3 GWB, sustainability aspects are also part of the principles of awarding contracts. However, unlike the other principles, aspects of quality, innovation as well as social and environmental aspects are only to be taken into account in accordance with the provisions of public procurement law. This implies that they can only be considered if a specific provision allows for this. Consequently, while sustainability is mentioned as part of the fundamental principles, these principles do not oblige contracting authorities to consider such aspects

in their procurement. Rather, Section 97 para. 3 GWB is mostly seen as having a merely indicative function (Ziekow, 2024; also Kühnast, 2022).

In principle, the rule on sustainability in the procurement principles is similar to that of EU law. The Public Procurement Directive, as part of the procurement principles, requires Member States to take appropriate means to ensure compliance with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social, and labour law provisions listed in Annex X (Article 18 para. 3 Dir. 2014/24/EU). Thus, the directive only requires compliance with the existing law but does not impose additional obligations on contracting authorities.

1.2. Eligibility criteria

In concretizing the fundamental procurement principle, German law allows sustainability considerations to be taken into account as part of the eligibility criteria. The German regulations implement the provisions of the Public Procurement Directive without any relevant deviations.

Depending on the nature, purpose and scope of the supplies or services to be provided, the contracting authority may require an indication of (i) the supply chain management and tracking systems available to the contractor when performing the contract, or (ii) the environmental management measures that the contractor will apply when performing the contract. Such an indication, if required, is to be submitted as proof that tenderers have the necessary technical and professional ability (Section 46 para. 3 no. 4, 7 Public Procurement Ordinance (*Vergabeverordnung* [VgV])). Furthermore, contracting authorities may demand certificates drawn up by independent bodies attesting that the tenderer complies with certain environmental management systems or standards (Section 49 para. 2 VgV). The list of acceptable eligibility criteria provided for in the Public Procurement Ordinance is exhaustive (Bärenbrinker, 2024). Therefore, contracting authorities do not have the possibility to set additional eligibility requirements regarding sustainability beyond those mentioned above.

An additional limit for contracting authorities is that eligibility criteria must be related to and proportionate to the subject matter of the contract (Section 122 para. 4 GWB). For example, certificates of compliance with certain environmental management systems or standards can be justified if the performance of the contract is associated with increased environmental risks or impacts and it is an environmentally relevant activity (Mager, 2019). By contrast, the requirement for a supply chain management system may not be appropriate if no supply chain is relevant due to the subject matter of the contract.

As part of the eligibility criteria, there are therefore opportunities to take sustainability requirements into account. However, due to the exhaustive list of possible means of proof and the necessary connection with the subject matter of the contract, contracting authorities are considerably restricted in their

room for manoeuvre. When defining mandatory eligibility criteria, contracting authorities should also ensure that they select requirements that companies operating in the relevant market fulfil. Otherwise, there is a risk that few or even no companies will apply, as non-fulfilment of mandatory eligibility criteria leads to exclusion from the public procurement procedure (Section 57 para. 1 VgV).

1.3. Award criteria

By contrast, less caution is generally required when using sustainability aspects as part of the award criteria. Generally, non-fulfilment or poor fulfilment of such criteria does not lead to exclusion, but only to a lower score for the tender.

Additionally, contracting authorities have greater freedom when it comes to taking sustainability aspects into account in the award criteria. German law provides for awarding the most economically advantageous tender, which is to be determined according to the best price-quality ratio (Section 127 para. 1 sentence 1 and 2 GWB). The law expressly clarifies that, apart from the price or costs, qualitative, environmental, or social aspects may also be considered to determine the best price-quality ratio (Section 127 para. 1 sentence 3 GWB). Whether and to what extent such aspects are taken into account is generally at the discretion of the respective contracting authority.

However, there are certain limits: similar to eligibility criteria, the award criteria must also be related to the subject matter of the contract. However, this does not necessarily mean that the aspects must be inherent in the product to be procured. It is sufficient if an award criterion refers to processes relating to the production, provision, or disposal of the product, to trading with the product or to another stage in the life cycle of the product (Section 127 para. 3 GWB). Additionally, the award criteria must be specified and defined in a manner that ensures the possibility of effective competition, that the contract cannot be awarded arbitrarily, and that it is possible to conduct an effective review of whether and to what extent the tenders meet the award criteria (Section 127 para. 4 sentence 1 GWB). Even if the wording differs in part, the content of the German rules corresponds to the Public Procurement Directive (Hölzl, 2022).

One example of how sustainability aspects can be taken into account as part of the award criteria is awarding additional points if a product comes from fair trade. Alternatively, tenderers can be asked to provide concepts for certain sustainability aspects, such as the recycling of products, and be awarded from a range of points, depending on how well the concept fulfils the contracting authority's expectations. It can be observed in the German public procurement market that such instruments are increasingly being used. However, the weighting is generally low compared to the price or cost criterion.

It is also possible to take sustainability into account with regard to the financial aspects of a bid (see II.1.3.1). Furthermore, specific rules apply for energy-related supplies or services (see II.1.3.2).

1.3.1. Life-cycle costing

Costs may be calculated not only based on the price offered by the tenderers, but also taking into account life-cycle costing. For example, this can include costs borne by the contracting authority such as consumption of energy and other resources during use and end-of-life costs such as collection and recycling costs. Additionally, contracting authorities may consider costs imputed to environmental externalities linked to the product during its life cycle, if their monetary value can be determined, such as the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs (Section 59 VgV). Section 59 VgV implements Article 68 Dir. 2014/24/EU almost word-for-word (Bultmann, 2023).

In principle, contracting authorities are free to set the method according to which life-cycle costs are calculated. Where a method has been made mandatory by a legislative act of the EU, the contracting authorities shall prescribe this method (Section 59 para. 4 VgV). So far, this is only the case for road transport vehicles.¹¹ In other cases, such methods can be established at a national, regional, or local level, but they should – to avoid distortions of competition through tailor-made methodologies – remain general in the sense that they should not be set up specifically for a particular public procurement procedure (Recital 96 Dir. 2014/24/EU). Additionally, the method shall be based on objectively verifiable and non-discriminatory criteria and it shall be accessible to all interested parties. In particular, it is necessary that the information required for the calculations can be provided with reasonable effort by tenderers exercising normal due diligence, including tenderers from third countries party to the 1994 Agreement on Government Procurement (GPA) or other international agreements by which the European Union is bound (Section 59 para. 3 no. 3 VgV).

The Commission provides a tool for calculating the life cycle costs of various goods,¹² which can be used as a guide by contracting authorities. There are also various guidelines from public authorities in Germany that can serve as an aid.¹³ Nevertheless, in practice, the use of life-cycle costing as an award criterion in Germany is the exception rather than the rule. In the absence of a standardized methodology to date, this option is associated with greater effort for both contracting authorities and tenderers. The strict requirements combined with the lack of practical experience to date also lead to legal uncertainties and increase the risk that fewer companies will apply. In order to increase the use of this instrument, it would certainly be helpful if either the EU or the German legislator were to specify a standardized methodology that could be used by both contracting authorities and tenderers.

¹¹ Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles, OJ L 120/5.

¹² https://circabc.europa.eu/ui/group/44278090-3fae-4515-bcc2-44fd57c1d0d1/library/1fac691f-005a-4396-b275-0c234ff55c4f?p=1&n=10&sort=modified_DESC

¹³ See for example the tool by German Federal Environment Agency (Umweltbundesamt) <https://www.umweltbundesamt.de/dokument/berechnungswerkzeug-fuer-lebenszykluskosten>

1.3.2. Specific rules for energy-related supplies or services

Special rules apply to the procurement of energy-related supplies or services. An energy-related product is an object whose use influences the consumption of energy and which is placed on the market or put into operation (Knauff, 2019; Wendt, 2022). In particular, technical devices of all kinds, such as computers, lamps, and household appliances, are covered (Knauff, 2019). Where energy-related products, technical devices, or equipment are the subject of supplies or an essential prerequisite for performing a service, reasonable account shall be taken of their energy efficiency in determining the most economically advantageous tender (Section 67 para. 5 VgV). This results in a mandatory obligation for contracting authorities to take energy efficiency into account as an award criterion (Bischof, 2024; Knauff, 2019; Rusch, 2022; Wendt, 2022). However, there is a certain degree of discretion regarding what is meant by ‘reasonable account’.

These rules, which provide for mandatory consideration of sustainability aspects for certain procurement objects, are a foreign element in public procurement law. As already mentioned, public procurement law itself does not contain any obligations to take sustainability considerations into account. Accordingly, Section 67 VgV is in principle not a procurement law regulation but rather was taken from special EU legislation.¹⁴ However, unlike other specialized EU legislation (see below, section II.2), the German legislator has decided to implement this provision directly in public procurement law.

1.4. Technical specifications and special performance conditions

While a lack of fulfilment of sustainability aspects in the award criteria does not generally lead to exclusion from the award procedure, contracting authorities have the option of setting mandatory requirements as part of the technical specifications (see II.1.4.1) and special performance criteria (see II.1.4.2). At present, these appear to be the instruments most frequently used in Germany to integrate sustainability aspects in public procurement procedures.

Such requirements must be complied with by the successful bidder when executing the contract. Therefore, it is particularly important that contracting authorities have sufficient knowledge of the market to only set sustainability requirements that the respective market participants can fulfil.

1.4.1. Technical specifications

The characteristics used in the tender specifications may also relate to aspects of quality and innovation, as well as social and environmental aspects (Section 31 para. 3 sentence 1 VgV). Even though it is not expressly mentioned

¹⁴ Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, OJ L 315/1.

in German law, a connection with the object of the contract is considered necessary (Traupel, 2017). It is sufficient if such requirements refer to the process or method of production or provision of the service or to another stage in the life-cycle of the subject matter of the contract, including the production and supply chain, even where such factors do not form part of the material substance of the service. In this case, the characteristics must be linked to the subject matter of the contract and proportionate to its value and objectives (Section 31 para. 3 sentence 2 VgV; Lampert, 2019; Traupel, 2017; Wagner-Cardenal, 2022). Section 31 para. 3 VgV is based on Article 42 para. 1 subpara. 2 of the Public Procurement Directive.

In practice, technical specifications tend to relate to environmental aspects. Examples of technical specifications include requirements that certain ingredients must not be contained in the product; that certain substances or emissions may not be produced during production, or only to a limited extent; or that specific raw materials must be used, or energy-efficient machines employed, in the production process (Thiele, 2023). On the other hand, the required reference to the subject matter of the contract ensures that public contracting authorities cannot exert any influence on general company policy. Thus, a contracting authority cannot stipulate that low-emission engines must generally be used in the company, but can only insist that environmentally friendly engines are used for the duration of the performance of the service. The requirement that the contractor must generally refrain from using disposable crockery in the office or only use recycled paper is also to be regarded as an unauthorized interference in the company's general business policy (Trutzel & Meeßen, 2024).

As proof that a supply or service complies with characteristics required in the technical specifications, the contracting authority may require the submission of quality labels (Section 33 VgV). A widely used quality label in view of environmental aspects in Germany is the *Blauer Engel*,¹⁵ which was introduced by the German Government.

1.4.2. Special performance conditions

With special performance conditions, social aspects are addressed more strongly. Public contracting authorities may set special conditions for the performance of a contract, provided that they are related to the subject matter of the contract. They may in particular include economic, innovation-related, environmental, social, or employment-related considerations (Section 128 para. 2 GWB). Again, there are no relevant special provisions compared to EU law.

Social issues can become relevant, for example, with regard to inclusion measures for people with disabilities or integration measures (Gabriel & Bärenbrinker, 2023).

The Higher Regional Court of Düsseldorf ruled that the requirement that the contractor must use personnel subject to social insurance contributions to

¹⁵ <https://www.blauer-engel.de/en>

provide its services lacks the required relation to the subject matter of the contract. The Court argued that, while it was true that the contracting authority is obliged to pay particular attention to and promote social concerns due to its obligation to safeguard the common good, this alone is not sufficient to deny a contractor socially relevant options that are permitted under labour law. The labour law and social interests of marginally and temporarily employed workers were sufficiently protected by national and European law.¹⁶

2. Other laws relating to public procurement

As shown above, public procurement law in Germany only allows contracting authorities to take sustainability aspects into account, but does not generally oblige them to do so. This is different in the case of specialized laws, which often provide for stricter rules. The separation between discretionary powers in public procurement law itself and stricter obligations in other specialized laws is not unique to Germany. Rather, in many cases, this follows EU law, which also provides for stricter requirements in relation to sustainability criteria outside the public procurement directives.¹⁷

For example, the German Law on the Procurement of Clean Road Vehicles (*Gesetz über die Beschaffung sauberer Straßenfahrzeuge*) restricts the procurement autonomy of contracting authorities in the area of road vehicles. It specifies certain minimum proportions of clean vehicles that must be procured. For buses, the minimum share of clean vehicles is currently 45%, whereas for trucks, it is limited to 10%. In the case of light-weight vehicles (e.g. cars), the minimum proportion is 38.5%. From 2026, not only the minimum shares of clean vehicles but also the requirements for vehicles to be considered as clean will become stricter.

A further restriction of the contracting authorities' right to determine the specifications of the goods or services to be procured is included in the German Recycling Act (*Kreislaufwirtschaftsgesetz* [KrWG]). The act requires contracting authorities attributable to the German Federal Government to give preference to ecologically advantageous products in public procurement. This refers to products which (i) have been manufactured using production processes that conserve raw materials, energy, water, pollutants or waste, (ii) have been produced by preparing for reuse, or by recycling waste, or from renewable raw materials, (iii) are characterized by durability, ease of repair, reusability, and recyclability, or (iv) result in less or less polluting waste compared to other products or are better suited to environmentally sound waste management (Section 45 para. 1, 2 sentence 1 KrWG). The obligation applies

¹⁶ OLG Düsseldorf, decision of 17 January 2013, VII-Verg 35/12, juris, point 33.

¹⁷ See, e.g. Directive 2019/1161/EU of the European Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles, OJ L 188/116, which sets a mandatory minimum procurement target for clean vehicles; Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, OJ L 315/1.

insofar as the products are suitable for the intended use, their procurement or use does not result in unreasonable additional costs, sufficient competition is ensured, and no other legal provisions conflict with this (Section 45 para. 1, 2 sentence 2 KrWG).

In addition, the German Supply Chain Act (*Lieferkettensorgfaltspflichtengesetz* [LkSG]) contains obligations to be taken into account in public procurement procedures. Companies that have been fined a minimum of EUR175,000 for a legally enforceable breach of certain obligations under the Supply Chain Act are to be excluded from participation in a public procurement procedure (Section 22 LkSG). Furthermore, if contracting authorities qualify as undertakings within the meaning of the LkSG, they shall implement contractual obligations vis-à-vis their contractors.

The Climate Protection Act (*Bundesklimaschutzgesetz* [KSG]) contains particularly far-reaching obligations for contracting authorities of the Federal Government. When cost-effectiveness criteria are applied, costs and savings arising for the Federal Government over the entire life-cycle of the procurement in question shall be the basis of any comparison (Section 13 para. 3 KSG). This regulation appears to be formulated in such a way that it not only opens up the possibility of taking life-cycle costing into account as part of the award criteria but – in deviation from the rules under public procurement law – actually makes this mandatory.¹⁸

Furthermore, in the preparation of a procurement, the Federal Government shall examine how each public procurement can contribute to the achievement of the national climate targets. Where there are two or more options, preference shall be given, after balancing against other relevant criteria pertaining to the objective of the respective measure, to the option with which the aim of reducing greenhouse gas emissions over the whole lifecycle of the measure can be achieved at the lowest cost. However, additional expenditure may not be disproportionate to the additional contribution to greenhouse gas reduction (Section 13 para. 2 KSG).

Additionally, the KSG determines a methodology for the calculation of greenhouse gas emissions. The avoidance or causation of greenhouse gas emissions shall be tied to a carbon price of at least the minimum price or fixed price applicable the German Fuel Emission Allowance Trading Act (*Brennstoff-Emissionshandelsgesetz*, Section 13 para. 1 sentence 3 KSG).

Especially with the consideration of life-cycle costing and the requirement to calculate greenhouse gas emissions, the KSG contains very far-reaching obligations for contracting authorities if these regulations are to be understood as mandatory obligations. As far as can be seen, there is no case law on these rules to date. As the regulations are headed ‘Consideration requirement’, and the terminology raises questions about the specific content of the regulations,

¹⁸ This is also supported by the provisions of the administrative regulation on climate (*Allgemeine Verwaltungsvorschrift Klima* [AVV Klima]): ‘In addition to the acquisition costs, the expected costs associated with the service to be procured during its life cycle (life cycle costs) must be taken into account when determining the most economical tender in the context of the award decision’ (Section 4 para. 4).

their binding nature has not yet been conclusively clarified (Siegel, 2022). In practice, these requirements have so far been implemented rather sparsely in public procurement practice.

3. Summary

The framework for considering sustainability aspects in public procurement procedures is shaped not only by public procurement law but also increasingly by specialized laws outside it. While public procurement law generally leaves it to the contracting authorities to decide whether and how to take sustainability aspects into account, specialized law often imposes stricter requirements.

This dichotomy leads to a confusing legal framework and generates uncertainty. This is not least due to the fact that some of the specialized laws contain provisions that only partially align with the system of public procurement law and whose effects and relationship to public procurement law provisions are therefore unclear. It is doubtful whether case law will bring clarity to these issues. This is because in review proceedings under public procurement law, tenderers can only successfully rely on violations of provisions relating to the award procedure (Section 97 para. 6 GWB). In the case of provisions in specialized laws that serve to protect the environment and climate, it is doubtful whether these are such provisions. For example, the legislator states in the explanatory memorandum to the Climate Protection Act that the provisions are not justiciable in the context of review procedures under public procurement law.¹⁹ At the same time, the lack of contestability of violations in the legal protection system under public procurement law means that implementation deficits often remain without consequences.

III. THE ROLE OF SUSTAINABILITY IN PRACTICE

The empirical evidence confirms that the legal leeway – and, in some cases, obligations – to consider sustainability aspects is not being sufficiently implemented. A recent study conducted by the University of the Bundeswehr in Munich on behalf of the Bertelsmann Foundation has found that only 13.7% of contracts at the municipal level currently include sustainability criteria. This figure even indicates a downward trend in the inclusion of such criteria (Kozuch et al., 2024).

The study concludes that there is an ‘intention-action gap’ in German public procurement law (Kozuch et al., p. 5). Intentions to achieve greater sustainability are not translated into legal and regulatory practice. Although there is a willingness to take sustainability into account, there are no generally applicable binding rules – environmental considerations are still not mandatory

¹⁹ Bundestag, Bundestag Drucksache [German parliamentary document], 18/14337, p. 37.

for all contracting authorities. Nevertheless, the prospect of more stringent regulations is currently unpopular, largely due to criticism of excessive regulation in Germany; this also applies to sustainability regulations (Burgi, 2021).

Consequently, the German Federal Audit Office (Bundesrechnungshof, 2022, p. 3) reported in its audit of sustainable procurement in the federal administration in 2022 that the audited central purchasing offices have not yet sufficiently fulfilled the role that has been assigned to them as managers, promoters and advisors for sustainable procurement.

In addition to legal uncertainty, a further reason for the reluctance to implement sustainability criteria to date may be that these can lead to a further reduction in the number of tenderers and, thus, diminish competition. It is therefore particularly important that contracting authorities ensure – if necessary, by means of a market survey – that they set requirements for which there are sufficient solutions on the market. However, this involves considerable effort.

IV. LEGISLATIVE DEVELOPMENTS THROUGH THE TRANSFORMATION PACKAGE

It is conceivable that the current limited consideration of sustainability aspects in public procurement procedures could change in the future. Sustainability considerations are a central subject of the German public procurement transformation package, which is currently in the legislative process. As EU law generally does not impose any binding obligations in this respect for public procurement, the debate is essentially a matter for national governments.

In 2021, the German government coalition agreed on ‘more courage to progress’ (*Mehr Fortschritt wagen*), which – in view of public procurement – means simplifying, professionalizing, digitalizing and accelerating the procedures (SPD et al., 2021, p. 27). In preparation for the legislative process, the responsible Federal Ministry of Economic Affairs and Climate Action has conducted a comprehensive consultation. A catalogue of questions was drawn up for interested stakeholders to answer. Around 450 stakeholders participated in the consultation phase and submitted their comments (German Federal Ministry for Economic Affairs and Energy, 2023). The level of participation demonstrates the public perception that a modernization of public procurement law is necessary. In its questionnaire, the legislator distinguished between environmental (see section IV.1) and social (see section IV.2) sustainability. However, this differentiation is not reflected in the draft bill published in November 2024 (see section IV.3).

1. Environmental aspects in public procurement

The government intends to make public procurement more environmentally friendly and to strengthen the binding nature of environmental and cli-

mate-related requirements. According to the legislator, this could be achieved by setting minimum quotas for climate-friendly products in public procurement and by participating in the development of a system that includes the calculation of climate and environmental costs (German Federal Ministry for Economic Affairs and Energy, 2023).

The Federal Ministry of Economic Affairs and Climate Action asked stakeholders in its questionnaire at which stage of the procurement procedure they could best imagine a (mandatory) consideration of environmental or climate-related aspects. In the responses concerning whether a mandatory obligation should be introduced, the opinion was ambiguous: 13% were in favour and 10% against.²⁰ With regard to the question of how mandatory regulations should be introduced, mandatory minimum standards were mentioned significantly more frequently than mandatory minimum quotas or procurement bans. At the same time, many of the responses were only in favour of practical guidance. The latter fits with the narrative of the described ‘intention-action gap’; there is no objection to environmental consideration as long as it is not binding. Overall, standardization was a key factor.

With regard to the stage of the procurement procedure, the relative majority was of the opinion that it would be preferable to include environmental criteria in the technical specifications. This was followed by consideration in the award criteria. Many respondents also pointed out that contracting authorities should be given room for manoeuvre when selecting the appropriate stage of the procedure for considering environmental aspects.

This is reasonable, as the proper stage broadly depends on the subject matter of the procurement. For example, environmental considerations in technical specifications may be too strict and require knowledge of realistic market conditions, while environmental considerations in the award criteria can create competition between bidders in this field (Röwekamp et al., 2022).

Differentiations by product categories were also suggested. This is consistent with the government’s decision as set forth in the coalition agreement to require the certification of IT procurements by the Federal Government in accordance with the Blue Angel standard or similar (SPD et al., p. 15). The procurement of hardware has been pointed out as a good example of where more environmental considerations could be applied.

The same applies to the construction and mobility sector. On the other hand, the procurement of intellectual services, public security and public health was not considered to have any potential for environmental considerations in the procurement process.

2. Social aspects in public procurement

With regard to the implementation of social sustainability aspects, overall there was considerable disagreement as to whether adjustments are necessary at all. One fifth of the respondents were of the opinion that the existing

²⁰ The other responses did not address this question specifically.

consideration was sufficient or even already too extensive. It was argued that social aspects should be promoted outside the scope of public procurement procedures.

Furthermore, the stakeholders were requested to indicate which aspects merited particular attention and should be taken into account in the procurement procedure. Fair pay and working conditions (in particular ILO core labour standards) were identified as priority topics. Other important aspects mentioned include inclusion, gender sensitivity, promoting social enterprises, fair trade standards, and promoting education. The importance of clear, legally binding standards (and their effective monitoring) was emphasized. Closely related to this is the frequently expressed desire for greater inclusion of already existing regulations outside the field of public procurement law.

With regard to the stage at which social aspects could be taken into account, most respondents felt that such considerations could be made at all levels. Suitability criteria and award criteria were emphasized slightly more than the other stages. Potential for improvement was also seen in the preliminary stages of the procurement procedure through targeted information exchange. This indicates that contracting authorities currently lack knowledge of social sustainability aspects.

A further topic of the consultation was whether to enhance social innovation by promoting the involvement of social enterprises. Generally, the respondents remarked that the terms 'social enterprise' and 'innovation' require a clear and precise definition as a prerequisite for further discussion.

Part of the discussion focused on the preferential treatment of social enterprises. Under current legislation, in line with the EU Public Procurement Directive (Article 20 Dir. 2014/24/EU), contracting authorities in Germany may reserve the right to participate in public procurement procedures to workshops for persons with disabilities or undertakings whose main aim is the social and professional integration of disabled or disadvantaged persons, or may provide for such public contracts to be performed in the context of sheltered employment programmes (Section 118 para. 1 GWB). Suggestions were made to expand the preferential treatment to include any social enterprises (German Federal Ministry for Economic Affairs and Energy, 2023, p. 3).

3. The draft bill

Following the publication of an initial draft bill, the German Federal Cabinet adopted the draft of the public procurement law transformation package at the end of November 2024.

In principle, the draft bill does not differentiate between environmentally and socially sustainable procurement. Rather, it is envisaged that contracting authorities should take at least one social or one environmental criterion into account at a stage of the procurement procedure of their choice. Thus, it is at the discretion of the contracting authority whether it applies a social or environmental criterion and how it applies this criterion (e.g. as an eligibility criterion, award criterion, etc.). Furthermore, the draft bill does not stipulate

any strict obligation to take such a criterion into account in every case, but deviations are possible in justified exceptional cases. However, according to the draft bill, the Federal Government has the option of setting stricter requirements for certain goods and services. In addition, it is possible for the Federal Government to specify certain goods or services that public contracting authorities may not procure for environmental or social reasons (e.g. patio heaters).

Since the governing coalition in Germany broke up in autumn 2024, and with parliamentary elections held in February 2025, it is doubtful whether the draft law will be passed.

V. CONCLUSIONS AND OUTLOOK

As explained above, the legal situation in Germany with regard to sustainability aspects in public procurement procedures has become increasingly complex. It is therefore to be welcomed that the legislator is addressing this issue with its transformation package. However, the low level of implementation of sustainability aspects in procurement procedures to date is not only due to the complex legal situation, but also to a conflict of objectives. On the one hand, there are the climate targets and social considerations, including a role model function of the public sector. On the other hand, there is the interest in effective competition and, especially in times of a tight budget situation – as is currently the case – financial considerations on the part of the public sector. With its reform, the legislator faces the difficult challenge of resolving this conflict. The legislator seems to be well aware of these issues, as simplifying and speeding up procurement procedures is also a core concern of the reform.

The results of the public consultation have once again confirmed that there is no simple, generalized solution for the increased consideration of sustainability aspects. Rather, it is necessary to define any sustainability requirements individually based on the respective good or service to be procured and the prevailing market situation. Rigid obligations at certain levels entail the risk of even less competition for public contracts. Conversely, extensive discretion, as is still the case in German public procurement law and the Public Procurement Directive, entails the risk that sustainability aspects are given little consideration. The general principle foreseen in the transformation package, that is, to use a sustainability criterion on at least one stage of the procurement procedure, is intended to moderately increase the binding nature of sustainability targets.

However, it is increasingly questionable whether the transformation package will be implemented. The German Federal Parliament (*Bundestag*) was re-elected in February 2025, and the draft legislation remains pending. It is conceivable that a new Economics Minister, who may no longer come from the Green Party, will set other priorities.

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