

# Beyond Competition and Value for Money: Corporate Social Responsibility in Public Procurement

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## Abstract

The State needs to buy from the private sector and procurement law regulates this process. Many experts think, that public procurement should aim for more than just value for money, that the procurement function is a powerful instrument in the hands of the State that should be used for the ‘greater good’. The ‘greater good’ are labour related objectives, such as a minimum wage or health and safety at the workplace, environmental objectives, such as energy efficiency or simply using environmentally friendly material, or fair trade and human rights. In the context of public procurement where the focus is on the State as a contracting authority, these objectives can be called secondary objectives, horizontal objectives, or sustainable procurement. In the context of corporate social responsibility (CSR), the focus is on the private economic operators who are bidding for government contracts. Sustainability objectives are pursued by the State through public procurement to change the behaviour of the economic operators they are doing business with. Thus, we have a public and a private side of the same sustainability coin. As the objective is to change society for the better through public procurement, the changed behaviour should actually not be limited to the economic operator’s corporate social responsibility in the context of the awarded contract but to all their other business as well. Moreover, there is the intention to even change the behaviour of companies that do not even do business with the government by creating good corporate social responsibility examples in the business community. This paper argues that horizontal objectives should be promoted through public procurement. However, a balance must be struck with the

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other objectives – especially with value for money. This is best done early, in the technical specifications or definition of requirements, where appropriate through qualification, and to a more limited extent as an award criterion. This makes procurement laws more *complex* and this must be accepted. Most importantly though, is control and enforcement. Otherwise competition will be distorted by economic operators who make empty promises and win over more honest and quite possibly better offers.

**Keywords:** Public procurement law, Corporate Social Responsibility, sustainability, value for money, link to the subject matter of the public contract.

## 1. Introduction

Most States cannot produce every good, construct every building, and provide every service they need to operate ‘in-house’. States therefore have to buy from the private sector. Public procurement law regulates this process. Relevant laws, regulations, or internal guidelines normally require advertising procurement opportunities, following prescribed procedures, awarding the contract on the basis of clear criteria, and allowing aggrieved bidders to seek remedies.

The primary objective of most procurement laws is to achieve value for money<sup>(1)</sup> for the State through competition facilitated by transparency. Value for money roughly means that the State acquires the relevant good, service, or work (construction) at the best possible terms, regarding *inter alia* price, quality, or delivery date. However, there are public procurement laws that want more than that<sup>(2)</sup>. These laws pursue a multitude of environmental and social objectives, ranging from the use of renewable energy to the prevention of child labour<sup>(3)</sup>.

The basic idea is that the State cannot behave like any private actor in the market but must use the procurement function, its considerable buying power, to pursue policy objectives, ‘to make the world a better place’. The focus is on the responsibility of the State for the society it serves. In the traditional understanding, corporate social responsibility (CSR), however, concerns the private economic operators who are selling their goods, works, and services to the government. Sustainability objectives are pursued by the State through public procurement to change the behaviour, the CSR, of the economic operators they are doing business with<sup>(4)</sup>.

(1) Although not of European Union (EU) public procurement law, the main objective of which is to ensure mutual access of the private sector to the procurement markets of other Member States and consequently aims to ensure non-discrimination on grounds of nationality in procurement. The EU does not even have the competence to regulate value for money. However, the EU Member States certainly have this objective in procurement.

(2) Or interpret value for money in broader terms. Value for money can be understood as economic sustainability which includes environmental and social concerns when determining what constitutes ‘value’. A good example for this is Life Cycle Costing (LCC) where the overall costs of a product or services are factored in, including issues such as energy costs or disposal. Thanks to Marta Andhov for pointing this out to me when discussing an earlier draft of this paper.

(3) For examples for rules promoting sustainability objectives in procurement laws see: Articles 18 (2), 20, 42(1), 43, 46, 58(3)(2), 59, 62, 67(3), 68, 70 EU Public Sector Directive 2014/24/EU; Articles III and X(6) and (9) Government Procurement Agreement of the World Trade Organisation; and Articles 10 and 11 UNCITRAL Model Law on Procurement 2011.

(4) This traditional understanding will be the basis of the discussion in this paper. However, contracting authorities may also have CSR in place, part of which may be to conduct sustainable procurement for

Should procurement laws aim to foster CSR? In order to address this basic question, this paper will, firstly, try to define the issue of CSR in procurement law and put it into a historical perspective. Furthermore, the paper will discuss arguments for and against procurement laws aiming to foster CSR. Moreover, the paper will discuss how and when a procurement law could pursue fostering CSR, and finally discuss a crucial limitation in many procurement laws. It will be argued that CSR should be promoted through public procurement laws.

However, a balance must be struck with the other objectives – especially with value for money. This is best done early, in the technical specifications or definition of requirements, where appropriate through qualification, and to a more limited extent at the award stage. This inevitably makes the procurement laws more *complex* and this must be accepted. Crucial though, is the control and enforcement of the environmental and social objectives promised to be pursued and upheld by the bidding companies in their tenders actually being pursued and upheld. Otherwise competition will be distorted by economic operators who make empty promises and win over more honest and quite possibly better offers.

### 2. CSR in procurement: what is this about?

There is a widespread public<sup>(5)</sup>, academic<sup>(6)</sup>, and political opinion<sup>(7)</sup> that public procurement should aim for more than just value for money, that the procurement function, the considerable buying power of the taxpayer, is a powerful instrument in the hands of the State that should be used for the

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example for 20% of their tenders. The public/private division is not as clear anymore. The concept of CSR was developed in private contracting but is currently also very present in public institutions. Thanks to Marta Andhov for discussing this point with me when commenting on an earlier draft of this paper.

(5) See for example: *Strategic Public Procurement: Facilitating Green, Inclusive and Innovative Growth*, European Commission, in (2017) 12 *European Procurement & Public Private Partnership Law Review* 217-223.

(6) See *inter alia*: S. Arrowsmith and P. Kunzlik in the chapter, “Public procurement and horizontal policies in EC law: general principles”, in their edited collection *Social and Environmental Policies in EC Procurement Law*, (Cambridge: CUP, 2009); S. Arrowsmith, “Horizontal Policies in Public Procurement: A Taxonomy”, (2010) 10 *Journal of Public Procurement* 149; A. Semple, *A Practical Guide to Public Procurement*, (Oxford: OUP, 2015); and the contributions in R. Caranta and M. Trybus (eds.), *The Law of Green and Social Procurement in Europe* (Djøf Publishing: Copenhagen, 2010); M. Andhov, “Contracting authorities and strategic goals of public procurement – a relationship defined by discretion?” in: X. Groussot, S. Bogojevic (eds.): *Discretion under EU Procurement Law* (Hart Publishing: Oxford, 2019); M. Andrecka & K. Peterkova Mitkidis, “Sustainability requirements in EU public and private procurement – a right or an obligation?” 2017/1 *Nordic Journal of Commercial Law* 56-87.

(7) An example is the *Sustainable Business Policy*, <https://www.greens.org.nz/page/sustainable-business-policy>, of the Green Party of New Zealand.

‘greater good’<sup>(8)</sup>.

## 2.1 Horizontal objectives in procurement

What the ‘greater good’ to be pursued through procurement is depends to a certain extent on the political context of the procuring State. It can mean labour related objectives, such as a minimum wage, a living wage, equal pay for men and women, the ban on child and slave labour, or health and safety at the workplace<sup>(9)</sup>. The standards set by the International Labour Organisation (ILO) are only a starting point here<sup>(10)</sup>.

In Germany, for example, wages based on collective bargaining agreements are fostered in various procurement instruments<sup>(11)</sup>. In the United Kingdom, for example, the Modern Slavery Act also has a procurement dimension<sup>(12)</sup>. Environmental objectives also feature prominently here, production using renewable energy, energy efficiency, or simply using environmentally friendly material,<sup>(13)</sup> and even to use procurement to fight climate change<sup>(14)</sup>.

These objectives feature prominently in the judgments of the Court of Justice of the European Union on cases from inter alia Finland, Austria, or France<sup>(15)</sup>.

(8) On the objectives of public procurement regulation see the short yet seminal article of S. Schooner, “Desiderata: Objectives for a System of Government Contract Law”, (2002) 11 *Public Procurement Law Review* 99-102 or S. Arrowsmith, J. Linarelli, D. Wallace Jr., *Regulating Public Procurement: National and International Perspectives*, (London: Kluwer Law International, 2000), chapter 1, at 27-32.

(9) See the seminal monograph of C. McCrudden, *Buying Social Justice, Equality, Government Procurement and Legal Change*, (Oxford: OUP, 2007). See also: M. A. Corvaglia, *Public Procurement and Labour Rights: Towards Coherence in International Instruments of Procurement Regulation*, (Hart: Oxford, 2017).

(10) The eight fundamental ILO Conventions are: 1. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); 2. Right to Organise and Collective Bargaining Convention, 1949 (No. 98), 3. Forced Labour Convention, 1930 (No. 29), 4. Abolition of Forced Labour Convention, 1957 (No. 105), 5. Minimum Age Convention, 1973 (No. 138) 6. Worst Forms of Child Labour Convention, 1999 (No. 182), 7. Equal Remuneration Convention, 1951 (No. 100), 8. Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

(11) See for example: the *Hessisches Vergabe- und Tariffreugesetz 2015*. This in English “Hesse Procurement – and Collective Bargaining Adherence Act” (Translation Trybus) shows by its very name the importance of companies bidding for government contracts adhering to collective bargaining agreements.

(12) R. Craven, “The role and potential of public procurement in the fight against modern slavery in the UK construction industry” in G. Piga and T. Tátrai (eds), *Public Procurement Policy* (Routledge: London, 2015).

(13) P. Kunzlik, “Green Public Procurement—European Law, Environmental Standards and ‘What to Buy’ Decisions” (2013) 25 *Journal of Environmental Law* 173.

(14) See B. Martinez Romera and R. Caranta, “EU Public Procurement Law: Purchasing Beyond Price in the Age of Climate Change” (2017) 12 *European Procurement & Public Private Partnership Law Review* 281.

(15) See inter alia: Case C-513/99, *Concordia Bus Finland v. Helsinki Kaupunki* [2002] ECR I-7213; Case C-448/01, *EVN Wienstrom AG v. Austria* [2003] ECR I-14521; Case C-31/87, *Gebroeders*

Fair trade and human rights can also be pursued in procurement laws<sup>(16)</sup>. In post-Apartheid South Africa, for example, procurement laws aimed to gradually increase the share of public contracts being awarded to non-White owned businesses<sup>(17)</sup>.

More recently procurement laws started to promote innovation<sup>(18)</sup>. Another important category of objectives relates to preventing corruption<sup>(19)</sup>, conflicts of interest<sup>(20)</sup>, and other criminal activities<sup>(21)</sup>. In the context of public procurement where the focus is on the State as a contracting authority, these objectives can be called secondary objectives<sup>(22)</sup>, horizontal objectives<sup>(23)</sup>,

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*Beentjes v. The Netherlands* [1988] ECR 4365; Case C-225/98, *Commission v. France (Nord Pas de Calais)* [2000] ECR I-4475. See also: S. Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and the UK*, Vol. 1, (London: Sweet & Maxwell, 3<sup>rd</sup> ed. 2014), at 8 and 1256-93; and P. A. Trepte, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation*, (Oxford: OUP, 2004), at 168-76. However, there is some evidence to demonstrate CJEU's shift towards allowance of pursuing broader sustainable objectives. See: CJEU's more recent ruling in Case C-115/14, *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz*, (RegioPost) EU:C:2015:760, upholding minimum wage clause; and Case C-368/10, *Commission v Netherlands (Dutch Coffee)* EU:C:2012:284, allowing to address social considerations such as fair trade in award criteria.

(16) Case C-368/10, *Commission v Netherlands (Dutch Coffee)* EU:C:2012:284.

(17) See: *Green Paper on Public Sector Procurement Reform in South Africa* (Ministry of Finance & Ministry of Public Works, Pretoria, April 1997). See also: T. E. Manchidi and I. Harmond, *Targeted Procurement in the Republic of South Africa: An Independent Assessment*, (Procurement Dynamics Ltd. and I. G. Harmond Associates Ltd Consulting Engineers for the Department of Public Works South Africa, the ILO and the Development Bank for Southern Africa, 2002).

(18) L. Butler, "Innovation in Public Procurement: Towards the "Innovation Union", in François Lichère, Roberto Caranta and Steen Treumer (eds.), *Modernising Public Procurement: The New Directive*, (Djøf Publishing: Copenhagen, 2014), 337-383.

(19) See for example: A. Eyo, "Corruption and the Challenge to Sustainable Procurement (SPP): A Perspective on Africa", (2017) 12 *European Procurement & Public Private Partnership Law Review* 253; and D. C. Dragos and A. Horváthová, "Addressing Conflict of Interest in Public Procurement in the European Union and the Legal Challenges in Romania and Slovakia", (2017) 12 *European Procurement & Public Private Partnership Law Review* 266. On rules addressing corruption in procurement see: Section (e) Preamble and Articles 9 and 21 UNCITRAL Model Law 2011; Preamble and Article IV(4) (c) WTO Government Procurement Agreement; Article 57 EU Public Sector Directive 2014/24/EU, in particular Article 57(1)(b); Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, [http://www.oecd.org/document/21/0,3343,en\\_2649\\_34855\\_2017813\\_1\\_1\\_1\\_1,00.html#text](http://www.oecd.org/document/21/0,3343,en_2649_34855_2017813_1_1_1_1,00.html#text).

(20) See for example: H. J. Priess, "Conflict of Interest in Tender Proceedings: How to Deal with Conflicts of Interest, (Family Ties, Business Links and Cross-Representation of Contracting Authority Officials and Bidders)", (2002) 11 *Public Procurement Law Review* 153.

(21) See for example: S. Williams, "World Bank introduces new measures to reduce fraud and corruption in Bank-financed projects and the administration of Bank loans", (2007) 16 *Public Procurement Law Review NA*, 152-157.

(22) Term used *inter alia* in by M. Burgi, D. Dragos *et altera* and G. Racca in their chapters in Caranta and Trybus, *supra* note 6.

(23) Term coined by Arrowsmith and Kunzlik, *supra* note 6.

sustainable procurement<sup>(24)</sup>, strategic objectives<sup>(25)</sup>, community benefits<sup>(26)</sup>, or simply green and social procurement<sup>(27)</sup>.

The promotion of some or all of these objectives through public procurement is controversial both with respect to whether public procurement is the right instrument and whether the use of public procurement is effective. This controversy can be reflected in the term used: ‘secondary objectives’ already implies a certain criticism as ‘secondary’ is not as important as ‘primary’ (value for money, competition, non-discrimination, transparency), whereas ‘sustainable’ implies a positive attitude towards the use of public procurement as an instrument and its effectiveness<sup>(28)</sup>.

## 2.2 From horizontal objectives in procurement to CSR

By accommodating green and social objectives in their procurement laws, States want to use environmentally friendly and socially sound products, buildings, and services in their daily operations. The coffee drank in the canteen of the town hall, for example, must be fair trade (supplies), the town hall must be accessible to the disabled (works) and heated or cooled by renewable energy (service). Thus, the first aim is to achieve a social and environmentally friendly public sector. However, the provider of these social and environmental standards is the private sector on the basis of the instructions contained in the description or specifications of the contract drafted by the public sector contracting authorities for which the private sector is bidding. As Andrecka put it:

“It is not only contracting authorities that are encouraged to align their procurement decisions with sustainability policy. Private actors are, in fact, expected to do the same”<sup>(29)</sup>.

This implies an at least partial intention to externalise the social and environmental aspirations of the State – partial as it is *prima facie* limited to

(24) Term used in the chapters of R. Caranta, S. Treumer, L. Vidal, M. Spyra, J. González Garcia and M. Trybus in Caranta and Trybus, *supra* note 6.

(25) Term used *inter alia* in W. Kahlenborn *et altera*, *Strategic Use of Public Procurement in Europe*, Final Report to the European Commission, MARKT/2010/02/C 2011.

(26) Term used in a session of the *2015 Procurement Week* organised by the University of Bangor and the Welsh Government in Cardiff.

(27) Caranta and Trybus, *supra* note 6.

(28) Marta Andhov argues that with the 2014 Directives the EU moved from ‘secondary’ considerations to ‘strategic’ ones: M. Andhov, “Contracting authorities and strategic goals of public procurement – a relationship defined by discretion?”, *supra* note 6.

(29) M. Andrecka, “CSR and Sustainability in Danish Public Procurement” (2017) 12 *European Procurement & Public Private Partnership Law Review* 333, at 335.

the private sector's business with the State as opposed to its other business with the private sector. CSR is not limited to this externalisation effect as a company might well develop its CSR for other reasons, not least to react to public opinion and the ethical standards of their private customers and to reflect the ethical standards of the owners, management, and employees. With CSR and public procurement, the focus is on the private economic operators who are bidding for government contracts<sup>(30)</sup>.

CSR looks only at the externalisation of the social and environmental objectives of the State through public procurement. Sustainability objectives are pursued by the State through public procurement to change the behaviour of the economic operators they are doing business with. Thus, we have a public and a private side of the same sustainability coin. As the objective is to change society for the better through public procurement, the changed behaviour should actually not be limited to the economic operator's CSR in the context of the awarded contract but to all their other business as well. Whether this is compatible with the legal framework is another question to be discussed further below.

Moreover, there is the intention to even change the behaviour of companies that do not even do business with the government by creating good CSR examples in the business community. Finally, in the context of EU public procurement legislation, this drive cannot even stop at the national borders of the Member States but must extend to the Internal Market as a whole<sup>(31)</sup>. And why stop there? The World Trade Organisation also has its Government Procurement Agreement<sup>(32)</sup> and procurement including sustainable procurement also increasingly feature in Free Trade Agreements and regional agreements<sup>(33)</sup>.

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(30) As already identified by C. McCrudden, "Corporate Social Responsibility and public procurement" in D. McBarnet, A. Voiculescu, and T. Campbell, *The New Corporate Accountability: Corporate Social Responsibility and the Law* (CUP, 2007).

(31) See on this dimension of public procurement regulation inter alia: P. A. Trepte, *Public Procurement in the EU: A Practitioner's Guide* (OUP, 2nd 2007); S. Arrowsmith, *The Law of Public and Utilities Procurement* (Sweet & Maxwell: London: 3<sup>rd</sup> ed. August 2014); M. Trybus, R. Caranta, and G. Edelstam, *EU Public Contract Law: Public Procurement and Beyond* (Bruylant: Brussels, 2014); M. Trybus, "Public Contracts in European Union Internal Market Law: Foundations and Requirements" in R. Nogouellou and U. Stelkens (eds.), *Comparative Law on Public Contracts Treatise* (Bruylant: Brussels, 2010) 81-121.

(32) S. Arrowsmith, *Government Procurement in the WTO* (Kluwer Law International, London, 2003).

(33) A. Semple, "SRPP in EU Law and International Agreements" (2017) 12 *European Procurement & Public Private Partnership Law Review* 293; A. Manzini, "The 'new' MERCOSUR Protocol on Public Procurement and its role for the EU-MERCOSUR FTA" <https://more.bham.ac.uk/eutip/the-new-mercotur-protocol-on-public-procurement-and-its-role-for-the-eu-mercotur-fta/>.



### 3. CSR in procurement: is it the only way?

In Germany there used to be a very negative attitude towards horizontal objectives being pursued through public procurement, epitomized in the old German term for it: “vergabefremde Aspekte” – loosely translated “aspect alien to procurement”. However, a representative of the (German) Federal Ministry for the Environment recently argued that the use of procurement to promote green and social objectives is now undisputed.

This dogmatic approach to the issue sees sustainability concerns in procurement as part of a historical process that moves from a past where value for money was king and horizontal objectives were of no concern, to an increasingly bright green and social procurement utopia in the future, no longer questioned by anybody<sup>(34)</sup>. It is perhaps no surprise that this is argued by a representative of the ministry of the environment rather than of the treasury.

#### 3.1 The pendulum swing

It is advocated, that phenomenon described by the American scholar Joshua Schwartz, drawn from the more than a 150-year history of US federal procurement law, may lead to a different perspective. He describes that history with respect to how densely public procurement is regulated as a pendulum. This pendulum swings back and forth from one extreme, where the focus is on the discretion of the contracting officers with little regulation, to another extreme, where public procurement is densely regulated leaving little discretion to contracting officers. Most of the time the pendulum is swinging somewhere in-between these two extremes<sup>(35)</sup>.

In other words, all public procurement laws are always in a pendulum-swing movement between contracting officer discretion on one side and (densely) regulated procurement on the other side of the swing, or on a movement in the other direction. The question is thus where in the pendulum swing a procurement law is at any given time.

Horizontal or sustainability objectives in public procurement might be subject to a similar pendulum swing. The pendulum might swing back and forth from one extreme, where the focus is on value for money pure and simple, to another extreme, where horizontal objectives are even more important than value for

(34) See also UN Environment, *2017 Global Review of Sustainable Public Procurement*, <http://www.spcclearinghouse.org/resource/2017-global-review-sustainable-public-procurement>.

(35) J. I. Schwartz, “Regulation and Deregulation in Public Procurement Law Reform in the United States” in G. Piga and K. Thai (eds.), *Advancing Public Procurement: Practices, Innovation and Knowledge-Sharing* (PrAcademics Press, Boca Raton, Florida 2007), 177-201.

money – and most of the time the pendulum would be swinging somewhere in-between the two extremes.

In other words, according to this thesis, public procurement laws are in a pendulum-swing movement between pure value for money on one side and sustainable procurement on the other side of the swing, or on a movement in the other direction. It would require more extensive research exceeding the limits of this paper to comprehensively prove such a pendulum swing for sustainability in public procurement. However, first, the German example mentioned above shows at least one pendulum swing from a pure value for money position to a position with a considerably stronger emphasis on sustainability objectives.

Moreover, second, there is a correlation between the position of a densely regulated procurement law and a position with strong emphasis on sustainable procurement since the latter normally requires the earlier. In other words, sustainable procurement is normally implemented through dense procurement regulation. A wide discretion of the contracting officer is normally connected to a value for money emphasis at the expense of sustainability objectives. Therefore, the pendulum swing described by Schwartz was also to an extent a swing from (pure) value for money to sustainability.

### 3.2 Detecting the importance of sustainability objectives

You know that you are close to a position with an emphasis on sustainability objectives, when these objectives are more important than value for money. Social and environmental objectives are more important than value for money when they are allowed to significantly compromise competition and value for money. Examples would be the reserved contracts for small and medium sized enterprises in Japan - since competition with large companies is excluded<sup>(36)</sup>, or the price margins in favour of black-owned businesses as part of the ‘targeted procurement policy’ in post-Apartheid South Africa<sup>(37)</sup>.

Schwartz’s image of the pendulum as described in the previous section above also means that there is no one-way street towards a green and social procurement utopia but that the journey might take us back to periods of procurement with a value for money focus. Moreover, US federal procurement history also tells us how the horizontal objectives change over time. While until recently the environment was probably the most important objective and

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(36) See: J. Nakabayashi, “Small Business Set-asides in Procurement Auctions: An Empirical Analysis” *Tsukuba Economic Working Papers* No. 2009-005.

(37) Manchidi and Harborn, *supra* note 17.

even under the Trump administration SMEs are taken very seriously, in the past veterans or first nation Americans were more prominent.

The main lesson to be learnt from this is that the promotion of green and social objectives through public procurement and the connected fostering of CSR through public procurement should not be taken as a dogma, that there are times and jurisdictions when and where the focus is on value for money and other objectives. Factors influencing the swings are the political priorities of the day, the political colour of the government of the day, the financial situation allowing or limiting sustainable procurement, and outside influences through external financing for example through the World Bank group, the International Monetary Fund or private loans. In other words, there might be situations in which a government might be willing to use the procurement function to promote sustainability but is unable to do so due to financial and political constraints.

#### **4. CSR in procurement: why not?**

So why would the Americans or anybody else move (swing) away from sustainability – from CSR in procurement? There are actually many arguments against horizontal objectives in procurement – and thus in favour a strict value for money approach.

##### **4.1 Complexity of procurement laws**

Firstly, the use of the procurement function to promote sustainability inevitably creates a more complex and complicated public procurement law since all the various horizontal aspects have to be accommodated somewhere in the legislation. Rules on life-cycle costing to accommodate environmental objectives or the division of larger contracts into lots to facilitate SMEs, for example, have to be added to the procurement law.

This is why the 2014 EU public procurement Directives might meet many expectations regarding many horizontal objectives, but the goal of simplification could not be achieved in the same legislative package. Complex procurement laws are demanding for procurement staff and for the economic operators bidding for public contracts. This makes the procurement process more complicated, requires special training, and increases the litigation risk when procurement staff get it unintentionally wrong.

On the side of the economic operators, skills and patience are equally vital and some smaller companies might just give up and no longer participate in tender

procedures<sup>(38)</sup>. This leads to a reduction in competition and thus compromises the primary objective of achieving value for money through competition.

### 4.2 Conflict with value for money and market liberalisation

Secondly, there might be a conflict between value for money and horizontal objectives – higher prices and lower quality are at least a possibility, in addition to often higher transaction costs. Thirdly, for EU Member States or States subject to a bilateral or multilateral trade agreement that includes a procurement regime, there might be a conflict between the market liberalisation objectives of the Treaty on the Functioning of the European Union or the trade agreement, as horizontal objectives can affect market access, competition and even transparency.

### 4.3 Enforcement

Finally, the question is whether the horizontal objectives can effectively be enforced by the contracting authority or whether there are just the most poetic promises in, for example, the contract performance conditions, but nobody takes them too seriously and they are not followed up after the award<sup>(39)</sup>.

In other words, contracting authorities will never ask too many questions since they do not have the resources to do so anyway. That means that perhaps the green or social policy in question should better be pursued through other instruments at the disposal of the government which have the effective enforcement tools that go with it, for example taxation or criminal law.

### 4.4 Costs of CSR

CSR is not free either. Companies have to invest staff time and other resources to make CSR work in practice and these costs *prima facie* have to be deducted from profits. However, the public procurement market for a good, work, or service is created by the government and if the market is also shaped by sustainability considerations then strictly speaking there is no loss of profit when adapting to the corresponding requirements since the company would not have any access to that market and thus no profit from it if it did not comply with them. In other words, there is no loss in profits for the private sector comparable to the additional costs for the government caused by promoting sustainability through procurement since the private sector has no choice anyway.

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(38) However, contrary to this argument, economic operators often report that they are used to environmental requirements and other innovative calls from private procurement, which is more demanding. The issue is that the public sector does not include them in their tenders. Thanks to Marta Andhov for pointing this out the author when commenting on an earlier draft of this paper.

(39) See: M. Andrecka, “CSR and Sustainability in Danish Public Procurement”, *supra* note 29, at 338.

## **5. CSR in public procurement: why should we do it after all?**

Overall, the arguments in favour of using public procurement to promote horizontal or sustainability objectives and to foster CSR are strong.

One reason for coming to this conclusion is that in many jurisdictions several other instruments the government can use to promote sustainability and CSR are no longer as powerful as they perhaps used to be in the past. The prime example are subsidies where regimes on State aids have significantly reduced the cases in which these are legally possible.

Another example would be tax breaks which are difficult to implement in times of austerity and public debt. In other words, public procurement and its effect on CSR should be considered as an instrument, since governments now have fewer alternative instruments than they used to have and the objectives should be pursued at least with some instruments.

Another reason is the fact that governments have to set a good example to society as a whole. The credibility of the State is at stake. How can the State punish companies involved in child or slave labour, for example, but at the same time do business with the same companies? Alternatively, what sort of State and society can turn a blind eye on child and slave labour when there are decades-old ILO conventions outlawing these practices?

How can the same State that requires a certain minimum wage by law have its own public buildings constructed by employees who are paid below these rates? How can climate change be effectively addressed, and environmental protection be insured when the carbon footprint of the administration and the pollution it causes are a major contributor to these problems?

The problem of corruption, for example, necessitates fighting it by all available means including procurement law to preserve the credibility of the State and the cohesion of society. Similarly, there are many problems, such as climate change, so pressing that the arsenal of the State to address them must not be unnecessarily limited.

However, it is essential that (1) the horizontal objectives are balanced with the primary objectives, (2) that public procurement is used in addition and not instead of other instruments to promote sustainability, and (3) that States are selective and flexible about the 'secondary' objectives they pursue.

### **5.1 Balancing CSR and profitability**

From the perspective of the contracting authority and the legislator, a balance can be struck between the primary objectives of public procurement – value

for money, competition, non-discrimination on grounds of nationality, and transparency on the one hand and sustainability objectives on the other hand<sup>(40)</sup>. It all depends on how and when in the procurement process the sustainability objective is pursued and how this is enshrined in the procurement law.

This also depends to a certain extent on the sustainability objective to be pursued and on the impact of the mechanism chosen to further the objective on competition and value for money. The accessibility of a public building for the physically disabled, for example, which might well be a legal requirement, is best ensured by finalising appropriate technical specifications right at the beginning of the procurement procedure.

The building will be slightly more expensive than without accessibility. However, as all bidders know this requirement before even deciding to bid, the impact on competition and value for money is limited as most bidders can address the requirement in their bid. Similarly, environmental standards can be taken into account through life-cycle costing<sup>(41)</sup> even at a later stage of the procedure as long as their importance and way of measurement is communicated early on.

The participation of SMEs is perhaps best facilitated by dividing larger contracts into smaller lots<sup>(42)</sup>. This can even improve competition and thus value for money as now more companies are able to bid for the smaller and more manageable lots than for the large contract as a whole.

Translated to the private sector bidding for public contracts this would mean as Carroll summarized:

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(40) A. Sánchez Graells, in “Truly competitive public procurement as a Europe 2020 lever: what role for the principle of competition in moderating horizontal policies”, paper delivered at the UACES Conference, 9 September 2015, in Bilbao, highlights that “Otherwise, it risks diminishing its own effectiveness and efficiency due to the incompatibility of such extraneous considerations” and cites S. L. Schooner, “Commercial Purchasing: The Chasm between the United States Government’s Evolving Policy and Practice” in S. Arrowsmith and M. Trybus (eds.), *Public Procurement: The Continuing Revolution* (The Hague: Kluwer Law International, 2003) 137, at 159, and also reminds us that “This has been warned for a long time” citing C. Turpin, *Government Procurement and Contracts* (Essex: Longman, 1989), at 67. For extended discussion and further references to this academic debate, see also A. Sánchez Graells, *Public Procurement and the EU Competition Rules* (Hart: Oxford, 2<sup>nd</sup> ed. 2015), at 101-104.

(41) See on the approach of life-cycle costing: D. C. Dragos and B. Neamtu, “Sustainable public procurement in the EU: experiences and prospects” in F. Lichère, R. Caranta, and S. Treumer, *supra* note 18, 301, at 323-329. See also: M. Andhov, R. Caranta, A. Wiesbrock (eds.), *Cost and EU Public Procurement Law: Life-Cycle Costing for Sustainability* (Routledge Publishing: London, forthcoming).

(42) See: M. Trybus, “The Division of Public Contracts into Lots under Directive 2014/24: Minimum Harmonisation and Impact on SMEs in Public Procurement?” (2018) 43 *European Law Review* 311-340; M. Trybus and M. Andrecka, “Favouring SMEs with Directive 2014/24/EU?” (2017) 12 *European Procurement & Public Private Partnership Law Review*, 224-238.

“CSR usually refers to conducting business in such a manner that environmental and social interests are protected without undermining the economic prosperity of a company”<sup>(43)</sup>.

In other words, the sustainability objectives need to be balanced with the profitability of the company. If, for example, the technical specifications of a public building require accessibility for the physically disabled, then bidding for this contract is not even a question of CSR. The same can be said about the application of life-cycle costing in a procurement procedure. The company has to decide on the basis of profitability considerations whether it is feasible to bid for these contracts.

If these contracts require, for example, the use of building materials that have not been produced by child or slave labour and/or are environmentally friendly and these characteristics have to be verified by expressly defined labels<sup>(44)</sup>, then it is again a decision to be made by the company whether it wishes to bid for these contracts on this basis.

Various considerations will affect this decision. First, the share of government contracts in the overall business activities of the company will be important. If the share of government business is relatively small and the costs and effort to implement a new aspect of CSR are relatively high then the company might refrain from bidding for government contracts, which is of course a problem for the balance between sustainability and value for money the State has to struck as this would reduce competition.

If on the other hand the share of government business is relatively large it can be a driver mechanism for creating the CSR<sup>(45)</sup>. Second, pressures from inside the company – shareholders, management, private customers – supporting or opposing a sustainability agenda will play a role. The CSR standard may also already be in place irrespective of the corresponding sustainability aspect being promoted in the procurement law. Third, the general legislative framework and its enforcement will be a major consideration.

If, for example, corruption is already subject to stringent criminal law which is rigorously investigated and ferociously prosecuted on a regular basis, then there is no point not complying with just about any corruption-related

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(43) A. B. Caroll, “Corporate Social Responsibility Evolution of a Definitional Construct” (1999) 38 *Business & Society* 268.

(44) See Dragos and Neamtu, *supra* note 41, at 329-330.

(45) M. Andrecka & K. Peterkova Mitkidis, “Sustainability requirements in EU public and private procurement – a right or an obligation?”, *supra* note 6.

requirement in the context of public procurement. Similarly, if goods cannot be sold in a particular jurisdiction without an environmental or social label, then there is no point in not falling in line in the context of government business.

The second and third point also affect whether the CSR agenda is limited to public contracts or extends to the entire business activities of a company. This shall be discussed further below.

### **5.2 CSR through procurement: cumulatively not alternatively**

For most horizontal objectives it will not be enough to address them through public procurement law. Health and safety at the workplace, for example, need to be safeguarded first of all through a variety of labour laws which are enforced by the ministry of labour, if necessary, by conducting hands-on inspections on construction sites and other places of work to enforce them. Corruption needs to be the subject of criminal law and prosecution, disciplinary rules and career consequences, whistleblowing rules, and needs to be addressed through audits, not only procurement law. This relates to the point about the general legislative framework made under point (1) above. This general framework reinforces CSR beyond the public procurement context and as a factor in the balancing decision between sustainability and profitability in the public procurement context.

However, it is important that sustainability and CSR are reinforced through as many instruments – criminal law, tax law, environmental law, labour law, health and safety law, etc. – in addition to public procurement law to have an effect on CSR in practice. This is also connected to a crucial limitation of public procurement to promote sustainability and therefore also CSR in many public procurement laws such as the EU discussed further below, the link of the sustainability requirement to the subject matter of the contract. While the sustainability requirement and therefore its direct effect have to be limited to the subject matter of the public contract, the ambitions of the State go further.

The State wants to shape the CSR of companies beyond procurement, beyond the link to the subject matter of the contract. This might be achieved in part or in full through a spill-over effect from the government business of the company to its other business, although it would require extensive empirical research to verify such an effect on CSR. However, it is also possible that with respect to at least some sustainability objectives, for example renewable energy or equal pay for men and women, companies carefully limit their CSR to government contracts, and pay women less and use petrol, gas, and nuclear energy for their other business.



### 5.3 Not all CSR objectives in all circumstances

Not all horizontal objectives can effectively be pursued through public procurement rules and for some the negative effect on the primary objectives is disproportionate to the positive effect they can achieve. The fight against corruption, for example, often leads to the excessive or even exclusive use of the open procedure in which all interested companies can bid without any preselection stage in combination with an exclusive or excessive use of the price as an award criterion. This has a severe impact on procurement outcomes since the open procedure is not the best procedure in many contexts and price can be a rather crude criterion for certain contracts if not combined with other considerations, for example quality or delivery date.

The open procedure becomes expensive, staff-intensive, and onerous to run when there are many economic operators in the market for a particular product or service leading to a very high number of bids without a tangible effect on value for money when compared with a situation in which fewer bids are received. Awarding a contract to the lowest bidder works for many simple off-the-shelf standard products but can lead to poor outcomes in more complex services contracts. This undermines the efficiency of the procurement process and value for money. However, any transparent procurement procedure is in itself a measure against corruption, especially when combined with an effective review and remedies system. Thus, there is no conflict between the fight against corruption and value for money even when no specific adaptations are made to the procurement law designed to fight corruption.

In addition, procurement laws can balance the objectives by inserting rules allowing the disqualification or debarment of companies with a corruption record. More directly related to the CSR context, procurement laws can recognise CSR in this context, for example, by allowing mechanisms to overcome debarment after a conviction of the company through self-cleaning mechanisms.

In the context of the fight against corruption being promoted through public procurement legislation, the balance between CSR and profitability that the private company bidding for government contracts has to strike is a relatively straightforward one. If the procurement law contains a solid regime of sanctions against companies convicted of corruption including debarment from future contracts and an effective system of disqualifying such companies, the choice is between probity as a feature of the CSR of the company or no government business at all and consequently no profit from it.

The participation of SME in public procurement procedures can be facilitated by various measures, such as the division of larger contracts into smaller lots or by limiting qualification requirements. However, it is perhaps a paradox that sustainability in public procurement leads to more complex and complicated public procurement laws which in turn makes it more difficult for SMEs to bid for public contracts.

Due to their limited turnover and small workforce they find it difficult to adhere to a multitude of rules in the context of public tenders or CSR more generally. Many requirements relating to CSR, especially those relating to labour law, such as rules on pay, trade unions, employment of the long-term unemployed or the disabled, etc. often do not apply to smaller companies. This requires a limitation of the CSR agenda with respect to certain social and perhaps environmental objectives with respect to SME in order to avoid undermining the SME agenda which is also a sustainability policy.

In the context of many social objectives, such as health and safety at the workplace, the difficulty does not rest in accommodating these considerations in the procurement procedure. These requirements can be part of the technical specifications and contract conditions and there are also mechanisms by which this can be subject of the qualification stage or even an award criterion.

The main problem is the enforcement of these conditions during the lifetime of the contract. How can the contracting authority of a construction contract, for example, ensure that the health and safety standards promised in the tender documents and the signed contract are really upheld in practice? Ministries of labour and their specialised agencies often have staff and resources to enforce health and safety standards, for example through the visits of inspectors on the construction sites or other mechanisms.

Contracting authorities, especially at the level of local government, rarely have such resources. Here the question is not that of requiring and enforcing health and safety standards but whether a contracting authority is the right agent for that enforcement. Moreover, if not enforced effectively then there is a danger that a bidder merely promising high health and safety standards wins over an economically more advantageous offer that has the same low standards but does not pretend otherwise<sup>(46)</sup>. From the CSR perspective the

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(46) In certain contexts, for example in the case of a contract on sustainable or fair-trade coffee, not adhering to the sustainability requirement in practice could be considered a substantial contract modification which in some procurement laws would require to re-tender the contract and if this is not done would represent a litigation risk. Thanks to Marta Andhov for discussing this issue with me on the basis of an earlier draft of this paper.

level of the health and safety standards of a company will be a reflection of the relevant legal requirements that are actually controlled and enforced, and that will normally not be the ones contained in public procurement law.

## **6. CSR in public procurement: how and when?**

Horizontal objectives should be defined and implemented as early in the procurement process as possible.

### **6.1 Contract conditions and technical specifications**

Contract conditions, to be already determined with the technical specifications or contract requirements from the very beginning of the procurement process, before the procurement phase in the strict sense even commences with the publication of the contract, are the best moment and the best technique to implement most social and environmental objectives.

A first and crucial argument for this thesis is the fact that in contrast to nearly all other techniques, this leaves the other stages of the procurement procedure, where conflict with the primary competition and value for money objectives would arise more prominently, unaffected by the sustainability agenda.

Most importantly, the award decision at the end of the procurement procedure can be based exclusively on value for money considerations, not because the sustainability objectives would not matter but because they are already extensively accommodated at an earlier stage.

Implementing the horizontal objectives early in the technical specifications and contract conditions also allows an early and transparent communication of the objectives so that economic operators can adapt to these objectives as part of their general response to the requirements of the contracting authority or entity.

Moreover, the clear communication of the objectives from the contacting authorities to the economic operators in contract notices is essential to ensure that the social and environmental objectives of the government are transferred to the private sector, become part of what constitutes CSR.

Connected to the first point made above, contract conditions also have the advantage that as long as a couple of conditions are met, they are compatible with the remainder of the procurement law. This reduces the risk of making genuine mistakes at the qualification and award stages and thus the litigation risk. Enforcement remains an issue, but labels, computer software, and even cooperation with other enforcement agencies are only some of the possibilities

to address this weak point of the use of the procurement function to promote horizontal objectives.

### 6.2 Later stages of the procurement procedure

This advocacy of the technical specifications and contract conditions as the *locus* of sustainability in procurement does not completely exclude the accommodation of some sustainability considerations at some later stages of the procurement procedure. Some sustainability objectives have to feature at the qualification stage to ensure a level playing field for the economic operators and therefore serve competition, equal treatment, and non-discrimination.

A good example is the proof required that social security contributions have been paid or that the management has no criminal convictions. Sustainability criteria other than environmental criteria as award criteria are a difficult issue, they are not really necessary in open and restricted procedures where technical specifications can be drawn up, but probably inevitable in negotiated procedures where this is not the case.

### 6.3 Consistency with other laws

Connected to the point of *when* the horizontal objective is to be implemented and communicated is the question of *how* the consistency of this implementation and message is to be ensured. Consistency is crucial to ensure the desired effect of the sustainability policy on CSR. In other words, it is important that all contracting authorities implement the policy in as many public contracts as possible. Faced with a consistent policy on, say environmental protection, health and safety at the work place, or anti-corruption, the private sector doing business with the government will have to react in order to strike a balance between CSR and profitability as they otherwise risk losing that government business.

The safest way to ensure this consistency of the sustainability message is to enshrine the horizontal objectives in the binding procurement law as this binds the procurement officers to implement these objectives and thus increases the consistency of doing so in practice. This is preferable to non-binding soft law instruments, such as guidelines and best-practice approaches, as in practice they always might and often are overruled by the value for money imperative.

The message will only arrive at the private sector it is destined for, if the rules are binding and therefore result in a more or less consistent procurement practice bidders need to adapt their CSR standards to in order to win government business. The EU, for example, often tried soft law approaches,

for example with regards to facilitating SMEs<sup>(47)</sup>, before inserting them later in their binding procurement Directives<sup>(48)</sup>.

This importance of consistency goes beyond public procurement law, which needs to be consistent with other relevant laws and regulations. While procurement law needs to, for example, fight corruption through disqualifying and debarring companies convicted of corruption, criminal law needs to make corruption a criminal offence, civil service law subject to disciplinary action, and licencing laws a reason to revoke business licenses – not to mention the fact that bribes should not be tax deductible.

Similarly, while procurement law needs to promote health and safety at the work place through contract conditions, labour law needs to make this a requirement for all relevant activities. All relevant laws need to convey a consistent message on sustainability to effectively shape the corresponding CSR.

### **7. CSR in public procurement: the crucial limitation in EU law!**

A crucial limitation to the promotion of horizontal objectives in public procurement in EU law remains the requirement of a connection of the relevant sustainability objective to the subject matter of the contract established by the Court of Justice of the EU in *Concordia Buses*<sup>(49)</sup> and later confirmed in *EVN and Wienstrom*<sup>(50)</sup>. This case law is instructive for other jurisdictions as well.

#### **7.1 Concordia Buses**

In *Concordia Buses* the City of Helsinki in Finland had included environmental award criteria for the buses used in a contract for the operation of its bus networks. Additional points were awarded in comparing bids for the use of buses with nitrogen oxide emissions and noise below certain levels. This effectively favoured buses powered by gas for reasons linked to the protection of the environment. While the Court considered the environmental criteria to be linked to the subject matter of the contract in this case, it still established this important requirement for sustainability objectives in public procurement.

#### **7.2 EVN and Wienstrom**

In *EVN and Wienstrom* the City of Vienna in Austria had required the energy it procured to be from renewable energy sources, wind, sun, water

(47) European Commission, *European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts*, Commission Staff Working Document, Brussels, 25.6.2008, SEC (2008) 2193

(48) See Trybus and Andrecka, *supra* note 42 for an assessment of these legal rules in inter alia Article 46 of Directive 2014/24/EU.

(49) Case C-513/99, *Concordia Bus Finland v. Helsinki* [2002] ECR I-7213.

(50) Case C-448/01, *EVN and Wienstrom v. Austria* [2004] 1 CMLR 22.

rather than oil, gas, or nuclear. There was clear environmental policy behind this requirement. However, in addition to defining this requirement for the energy it procured for the purposes of the contract, Vienna required all energy produced by the successful bidder to be from renewable sources. In other words, the sustainability objective was not only pursued within the confines of the contract but wanted to change the energy sources of the private energy company also in relation to all other business, with other private or public partners.

The objective was to shape the CSR of the energy company in its entirety. The Court ruled against the requirement and that while a renewable energy requirement was permissible as such there must be a link to the subject matter of the contract. In other words, Vienna could require renewable energy but only within the limits of the contract, not for the other business of the energy company which lacked the crucial link to the subject matter of the contract.

### **7.3 Link to the subject matter and CSR**

This requirement of a link to the subject matter of the contract limits the pursuit of horizontal objectives though public procurement and the desired effect on the behaviour of economic operators doing business with the government to the government contract itself. The contracting authority may not require the economic operator to adapt its behaviour to develop CSR beyond the contract. It can still hope that there is a spill-over effect to the other parts of the economic operator's business, but it cannot require that.

This is probably an appropriate approach also for other jurisdictions beyond the EU as without this limitation there would be an overstretch of the procurement function. Why and how would a contracting officer control and enforce compliance with social and environmental requirements beyond the contracts they have awarded – and without control you might as well drop the idea altogether as you are only producing legislative lyrics? Other functions – tax law, environmental law, labour law – and their respective control and enforcement instruments - are better suited to pursue these objectives outside of government contracts.

However, in practice the effect of this crucial limitation on CSR beyond the subject matter of the contract will depend on various factors. Firstly, it will depend on the consistency of the sustainability requirement being demanded by contracting authorities, for example because it is required in the procurement law rather than left to the discretion of contracting authorities. If for example all contracting authorities in a large jurisdiction and procurement market

demand certain levels of nitrogen oxide emissions and noise as in *Concordia Buses*, then it might make economic sense to adapt all buses produced by a company to these requirements. In contrast, energy can be from fossil, nuclear, and renewable sources so that even a consistent public demand for renewable energy might not have an effect beyond the subject matter of the public contracts.

## 8. Conclusion

Sustainability objectives should be promoted through public procurement. Procurement should be green and social, fight corruption, slave and child labour, facilitate SMEs, and foster innovation. However, a balance must be struck with the other objectives – especially with primary objectives such as competition and value for money. This is best done early, by accommodating the horizontal objectives in the technical specifications or definition of requirements, where appropriate through qualification, and to a more limited extent as an award criterion. This makes the procurement laws more complex and this must be accepted.

Most importantly though, is control and enforcement. Otherwise competition and value for money will be distorted by economic operators who make empty promises and win over more honest and quite possibly better offers. With regards to the private sector side, a balance has to be struck between CSR and the profitability of the company. Essential is the consistency of the CSR message of the legislator with regards to public procurement law and practice but also with regards to the overall legal framework – all relevant laws have to send the same CSR message.

The requirement of a link to the subject matter for the contract is a crucial limitation for the fostering of CSR through public procurement as this objective really targets the CSR of companies as a whole and not limited to a particular contract or even government business. However, this limitation is also part of the balance to be struck between CSR and profitability and that balancing exercise has to be conducted by the private sector companies themselves. Nevertheless, an effect on CSR beyond the public contracts is not unlikely.

Moreover, public procurement is not the only pressure instrument to foster CSR, legislation in other fields, public opinion, customers, shareholders, and the management have to do their bit as well.

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Article 70

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Preamble

Articles III

Article IV(4)(c)

Article X(6)

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Section (e) Preamble

Articles 9

Article 10

Article 11

Article 21

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