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Working Paper

Socially responsible public procurement (SRPP) in multi-level regulatory frameworks: Assessment report on policy space for SRPP regulation and implementation in Germany and Kenya

Discussion Paper, No. 9/2020

Provided in Cooperation with:

German Institute of Development and Sustainability (IDOS), Bonn

Suggested Citation: Stoffel, Tim (2020) : Socially responsible public procurement (SRPP) in multi-level regulatory frameworks: Assessment report on policy space for SRPP regulation and implementation in Germany and Kenya, Discussion Paper, No. 9/2020, ISBN 978-3-96021-120-4, Deutsches Institut für Entwicklungspolitik (DIE), Bonn, <https://doi.org/10.23661/dp9.2020>

This Version is available at:

<https://hdl.handle.net/10419/215855>

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Socially Responsible Public Procurement (SRPP) in Multi-Level Regulatory Frameworks

Assessment Report on Policy Space for
SRPP Regulation and Implementation in
Germany and Kenya

Tim Stoffel

Socially responsible public procurement (SRPP) in multi-level regulatory frameworks

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implementation in Germany and Kenya**

Tim Stoffel

Bonn 2020

Discussion Paper / Deutsches Institut für Entwicklungspolitik

ISSN (Print) 1860-0441

ISSN (Online) 2512-8698



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Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data is available in the Internet at <http://dnb.d-nb.de>.

ISBN 978-3-96021-120-4 (printed edition)

DOI:10.23661/dp9.2020

Printed on eco-friendly, certified paper

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Supported by



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with funding from the



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Abstract

Public Procurement is a highly regulated process ruled by a complex legal framework. It comprises not only national but also, increasingly, sub- and supranational regulations, giving rise to a multi-level regulatory governance of public procurement. The integration of sustainability aspects into public procurement, as called for in goal 12.7 of the Sustainable Development Goals (SDGs) of the Agenda 2030, needs to take this multi-level character into account. This report focuses on social considerations, which are a central part of sustainable procurement – whether with a domestic focus or along international value chains. Social considerations have been somewhat neglected in Europe, whereas they feature prominently in procurement regulations in many countries of the Global South, especially in Sub-Saharan Africa (SSA) (see Stoffel, Cravero, La Chimia, & Quinot, 2019). The advanced process of regional integration in the European Union (EU) and the progress made towards integration in some regional economic communities in Sub-Saharan Africa call for deeper analyses of the influence of the higher levels of the regulatory framework on the lower levels, and the consequences of regulation. The question is whether public entities, from the national down to the local level, are required to integrate socially responsible public procurement (SRPP) into their procurement processes and tenders, or at least have the option to do so.

This report compares procurement in Germany and Kenya. The countries have some structural similarities as regards the role of regional economic communities in their multi-level regulatory framework. In the EU, however, the degree of harmonisation of public procurement regulation is much higher; also, the EU has turned from a purely price-based view on public procurement to a more qualitative one. These experiences may be valuable for the harmonisation of procurement regulations within the Common Market for East and Southern Africa (COMESA), of which Kenya is a member. Furthermore, comparing Germany, with a strongly decentralised system of public procurement, to the much more centralised Kenya provides insights into the effects of different political systems. Kenya is in an ongoing process of devolution and, as a consequence, procurement decisions are being partly shifted from the central level towards sub-national public entities. It might therefore benefit from insights into Germany's decentralised system of public procurement, and vice versa. In addition, Kenya is the only country in COMESA, and one of the few countries in SSA, that has already gained considerable experience of sustainable public procurement (SPP) and is therefore a good case for South–North learning.

This report is conducted as part of the project Municipalities Promoting and Shaping Sustainable Value Creation (MUPASS) – Public Procurement for Fair and Sustainable Production, implemented by DIE in cooperation with the Service Agency Communities in One World (SKEW) with funds from the Federal Ministry for Economic Cooperation and Development (BMZ). The main goal is to analyse the policy space that actors at the national and especially at the municipal levels have for implementing SRPP practices and policies within the multi-level regulation of public procurement. It will try to answer the following research questions: What are the effects of the multi-level regulatory framework of public procurement on the policy space for regulating and implementing SRPP? How is this policy space used at the national and local level? And what potential measures can be derived from the analysis of the two country cases to accelerate implementation?

Here are the main results:

1. In both countries, the multi-level regulatory frameworks allow for SRPP regulations and practices at the national and sub-national levels of government.
2. There is an implementation gap for SRPP in Germany and Kenya, which appears to be independent from the specifics of their respective regulatory frameworks.
3. Supportive measures such as capacity building are key to closing this implementation gap. They are also central to achieving other overarching objectives of public procurement, such as economic efficiency, good conduct and transparency.
4. Regional economic communities such as the EU and COMESA can play a role in promoting SRPP, even without introducing mandatory provisions. COMESA should include SRPP in its procurement regulation, and provide support for SRPP, for example through guidelines and expert exchange, as is happening in the EU. Further analysing the latest EU reforms related to public procurement might lead to policy recommendations for COMESA and other regional economic communities that enable their member states to reach economic, ecological and social goals. At the other end of the multi-level regulatory spectrum, municipalities in the EU had, and still have, an important role in SRPP implementation, and as catalysts for change that might be replicable by sub-national public entities in Kenya and other contexts.

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Abbreviations

| | |
|----------|---|
| AfDB | African Development Bank |
| AGP | Agreement on Government Procurement |
| AGPO | Access to Government Procurement Opportunities Initiative |
| ARC | Act Against Restraints in Competition |
| COMESA | Common Market for Eastern and Southern Africa |
| EAC | East African Community |
| EC | European Commission |
| ECJ | European Court of Justice |
| ECOWAS | Economic Community of West African States |
| EU | European Union |
| EPRCP | Enhancing Procurement Reforms and Capacity Project |
| GATT | General Agreement on Tariffs and Trade |
| GDP | gross domestic product |
| GPA | Government Procurement Agreement |
| GPP | green public procurement |
| ICLEI | International Council for Local Environmental Initiatives |
| ILO | International Labour Organization |
| MEAT | most economically advantageous tender |
| MRG | multilevel regulatory governance |
| OECD | Organisation for Economic Co-operation and Development |
| PPDA | Public Procurement and Asset Disposal Act of 2015 |
| PPDR | Draft Public Procurement and Disposal Regulations of 2016 |
| PPOA | Public Procurement Oversight Authority |
| SDGs | Sustainable Development Goals |
| SPP | sustainable public procurement |
| SMEs | small and medium-size enterprises |
| SRPP | socially responsible public procurement |
| SSA | Sub-Saharan Africa |
| TPRs | transnational private regulations |
| UN | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| VSS | voluntary sustainability standards |
| WAEMU | West African Economic and Monetary Union |
| WTO | World Trade Organization |

1 Introduction: Socially responsible public procurement (SRPP) in multi-level regulatory governance systems

This report analyses and compares case studies of Germany and Kenya in order to evaluate the influence of multi-level regulatory frameworks on the regulation and implementation of SRPP. SRPP covers the social dimension of the multi-dimensional concept of SPP, which also includes economic and environmental dimensions. SRPP involves using public procurement, estimated to represent expenditure of between 15 and 30 per cent of a country's GDP (UNEP, 2012, p. 3), as a lever to promote the societal goal of a broad-based and fair economy. Increasing social considerations in public procurement is one cornerstone of SDG 12, which calls for “sustainable consumption and production”. McCrudden describes this as using “government contracting as a tool of social regulation” (McCrudden, 2004, p. 257). Public procurement has been used successfully worldwide to achieve societal goals, as described comprehensively by McCrudden (2004, p. 258).

In many countries, regulations on public procurement are no longer only a national matter. International agreements and regional economic blocs, such as the EU in the case of Germany and the COMESA in the case of Kenya, have an increasing influence. When analysing the regulatory framework for SRPP, one has to take the complete multi-level regulatory governance system into account. In the EU, public procurement has become increasingly harmonised and at the same time has shifted from a purely price-based view to a more comprehensive and qualitative one, including SRPP and other sustainability considerations. This can be an interesting backdrop for the harmonisation of procurement regulation within COMESA. Based on the conceptual approach of multi-level regulatory frameworks for public procurement, this report sets out to first answer the question: What are the effects of the multi-level regulatory framework of public procurement on the policy space for regulating and implementing SRPP? Which leads to the second question: How is the leeway for SRPP used at the national and local level?

Both countries are struggling with implementation of SRPP practices, so understanding SRPP regulation and practices in Europe and Sub-Saharan Africa (SSA) can help generate policy recommendations for the respective other country. Differing experiences with common challenges offer possibilities for South–North–South learning. Furthermore, as with the process of harmonisation at the regional level, the process of devolution (the partial shift of decision-making processes, including public procurement, to lower levels of government) brings Kenya to a position where German experience of decentralised procurement systems and SRPP might help to inform decision-making processes and implementation. This leads to the third question: What potential measures can be derived from the analysis of the two country cases to accelerate implementation of SRPP?

The influence a multi-level regulatory framework has on SRPP in specific country contexts depends on its complexity at different levels. At the international level, the Agreement on Government Procurement (AGP) was signed by some WTO members, after the issue had originally been left out of the foundational document of the WTO. Most countries, especially in the Global South, did not want to liberalise and therefore open up their procurement markets to international competition. They feared that a trade-off might arise between required public procurement reforms aimed at transparent and non-discriminatory access to public-sector markets and pursued strategic objectives in public procurement, for example to promote specific industrial or social developments (Schmidt, 2017, p. 161). The

AGP was revised through the plurilateral Government Procurement Agreement (GPA) in 2014, which proactively deals with the question if and how to integrate SPP (Revised Agreement on Government Procurement, 2012, Art. XXII, 8). While experts make the case for an already existing policy space for SRPP in the AGP and GPA (Perera, Chowdhury, Convener, & Goswami, 2007, p. 18; Tosoni, 2013, p. 47f.), there is still legal uncertainty regarding SRPP. In contrast to environmental aspects, social aspects are not specifically mentioned in the GPA (Semple, 2017, p. 308). This uncertainty also affects the discourse on SRPP in Germany and the EU in general, as parties to the GPA. Kenya, however, is not party to the GPA.

At the regional level, economic integration has, in some cases, triggered common rules for procurement across national borders. New bi- and multilateral trade agreements, and the development of a common market within regional economic communities, such as the EU and COMESA, ease the way for suppliers from other countries to enter national public markets and bid for public tenders. With the development of the multilateral trading system, aspects of competition law have thereby been integrated into the regulatory framework of public procurement (McCrudden, 2007, p.106f.). In the past, this led to EU regulations that severely restricted policies and regulations from including societal goals in the procurement of public entities. Only through reforms of EU legislation in 2004 and 2014 were other aspects, such as sustainability, (re)introduced. Other regional economic communities are integrated to a lesser degree, which leaves their member states with more leeway in their provisions for public procurement. With the development of the internal market of the EU, national flexibilities have been limited in procurement law since the 1980s (McCrudden, 2007, p. 107). EU member states had to discard social and other objectives previously considered in procurement regulations, and the lowest price had become the most important criterion to choose from contractors for public tenders. This is partly due to the shift of procurement regulation from the area of budget law to competition law (see Kilian & Wendt, 2016, p. 202). Under the portent of free competition, purely price-based decisions in awarding tenders have been seen as a guarantor of fairness in public procurement.

This was not only the case for the EU Single Market. Since the 2000s, many countries in SSA have reformed their public procurement laws, often following the model law developed by the United Nations Commission on International Trade Law (UNCITRAL)¹ (Léon de Mariz, Ménard, & Abeillé, 2014, p. 112f.). Under the UNCITRAL model law, the lowest price is practically the only criterion for selecting offers on public tenders, much more so than under EU regulation (OECD, 2000, p. 16). Procurement reforms in SSA are generally aiming to limit the use of qualitative and strategic criteria, such as the integration of social considerations, in order to ensure fair competition and hinder corruption. COMESA's guidelines for public procurement tend to reinforce the trend to put transparency above social and other sustainability considerations.

1 "The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world." (UNCITRAL Secretariat (n.d.))

In the case of the EU, in contrast, ongoing reform of procurement regulation since the 2000s has made clear that the integration of societal goals into procurement practices is not only possible but also desirable, as will be explained in relation to Germany in Section 3.2.2. While EU regulation has been changed in favour of SRPP, many policy makers and practitioners, especially at the municipal level, are still not aware of their options regarding the integration of social objectives into their procurement regulations and tenders. An example for this is given by Hepperle in his study of municipalities in the German state of Baden-Wurttemberg (2016, p. 283).

To integrate societal goals into their approaches to public procurement, researchers, practitioners and political decision makers need to understand the ramifications of international and regional harmonisation of public procurement. The EU is a potential role model for how societal considerations, such as social aspects in domestic and international value chains, have been successively integrated into the regulatory framework at the regional level.

Assessing the leeway for SRPP and its implementation at the national, but especially the sub-national and down to the local level, is of increasing importance for Kenya, due to the growing competencies at those levels. Again, German experiences with decentralised organisation of public procurement and the integration of SRPP into this constellation can inform policy recommendations for Kenya. In addition, lower levels of governance, such as states, counties, and municipalities, are closer to the people affected by procurement decisions. They might pursue different strategies for the implementation of SRPP practices and can therefore act as testing labs.

In some countries, such as Germany, municipalities account for a high share of overall procurement expenditure. In many countries in Sub-Saharan Africa, municipalities control much smaller shares of overall procurement expenditure. In Kenya, there is very little public procurement at a local level, but sub-national entities, such as counties, have experienced an increase in their procurement function in recent years. Rapid urbanisation in the Global South (WBGU – German Advisory Council on Global Change, 2016, pp. 41–43) and government reforms aimed at decentralisation or devolution make local governments more independent and might enhance procurement by municipalities in other country contexts, too. In light of this development, sustainable government action, also at the municipal level, is important for the global sustainability agenda, as emphasised by the German Advisory Council on Global Change (WBGU – German Advisory Council on Global Change, 2016, p. 41). Ban Ki-Moon, former Secretary-General of the United Nations, summarises the need for sustainable action at the municipal level by asserting, “[o]ur struggle for global sustainability will be won or lost in cities” (Ki-Moon, 2012). This idea is also reflected in the Agenda 2030, where local authorities have been assigned a prominent role in the SDGs, formulated in SDG 11. This heightened attention to local and decentralised forms of government in the sustainability discourse calls for research on the policy space of municipalities in multi-level procurement systems.

This report consists of a description of the research design, the two case studies and a joint conclusion, followed by policy considerations. In the next section, the research design will be explained (Section 2). This includes a description of the selection process for the case studies, a model for the analysis of the regulatory framework for public procurement based on the theoretical foundation of multi-level regulatory governance, and the methodological

approach to the comparison of the two cases. This framework will be utilised to determine the influences of different levels on regulation for SRPP, down to the municipal level for the respective country cases of Germany (Section 3) and Kenya (Section 4). In this way, the agreements and government bodies with implications for public procurement are identified, and the regulations, laws, directives, etc. are examined regarding their impact on the different levels of the multi-level regulatory governance system of public procurement. This will enable the reader to assess the national and sub-national leeway in introducing regulation and practices in favour of SRPP. In each case, the legal leeway and policy space is contrasted with the actual implementation of SRPP regulation and practices. In the conclusion (Section 5), the results are compiled and compared to generate case-specific and general findings on multi-level regulatory governance of SRPP and subsequent policy considerations (Section 6).

2 Research design: Identifying the regulatory framework for SRPP

This report explores the effects of the regulatory framework of public procurement on the policy space for the regulation and implementation of SRPP. It does so, emphasising the municipal and local contexts, by analysing the two country cases of Germany and Kenya. The case analyses are based on the conceptual approach of multi-level governance, which is applied to the complex regulatory framework of public procurement. This framework reaches from the local to the national sphere of legislation and policymaking and beyond, to regional economic integration schemes. A concluding comparison of the two cases is used to derive inferences and policy considerations. Analytical conclusions will hold explanatory power for other country cases embedded in complex regulatory frameworks for public procurement and the effects of regional integration on SRPP. To explore and distinguish the dependencies and interconnections between levels of government concerning SRPP, an extensive study of available literature was conducted. The literature consists of primary literature, such as laws and regulations, agreements, information and reports presented by governments and government organisations, and secondary literature, mainly research on the topics of public procurement – and SRPP in particular.

The selection of country cases was partially guided by the aim of fostering North–South–South learning and policy transfer. There is evidence that countries in the Global South have accumulated plenty of experience in using public procurement for strategic policy goals and that it is therefore important to prepare the ground for a targeted exchange of knowledge and experiences and, thus, joint learning. Comparing the situation in the EU and SSA is a step in this process. From both regions, Germany and Kenya have been selected as case studies, as both countries have made efforts to implement SRPP. Analysing those two countries offers the opportunity to compare two very different cases as regards regional integration and their administrative systems. Kenya’s regional economic community COMESA is not as harmonised as the EU. Germany, with its highly decentralised political system and considerable autonomy of municipalities, represents a stark contrast to the centralised system in Kenya. Selecting explicitly diverse cases that present divergent expressions of the variables (Seawright & Gerring, 2008, p. 300f.) makes it possible to explore and compare effects of the regional level in the multi-level regulatory framework in different political and administrative settings. We expect that, based on this analysis, we can derive relevant conclusions for other countries and instances of regional integration.

Even if the two cases represent rather dissimilar features with regard to the multi-level governance framework, processes can be observed which lead to a certain approximation, such as the way public procurement regulation has been increasingly harmonised through regional integration. Devolution in Kenya implies an increasing decentralisation of procurement decisions. Thus, we assume that actors in Kenya may benefit from insights into Germany's decentralised system of public procurement. The ongoing process of devolution in Kenya is nurturing the policy space for county governments. This shift in the relevance of the sub-national level in Kenya's governmental system could have a significant impact on the future development of SRPP regulation and implementation.

Lessons taken from the situation in Germany and the EU – mainly the harmonisation of public procurement among member states and an opening up to decision-making not based purely on price – might help to inform the process of harmonisation of procurement regulation for Kenya within the COMESA. In SSA regional integration as well as procurement reform have been advanced rapidly by many countries in the last two decades (Williams-Elegbe, 2015, p. 11), but only in COMESA and the West African Economic and Monetary Union (WAEMU) have provisions been made that include agreements on public procurement (Asche & Brücher, 2009, p. 174; Williams-Elegbe, 2015, p. 24).

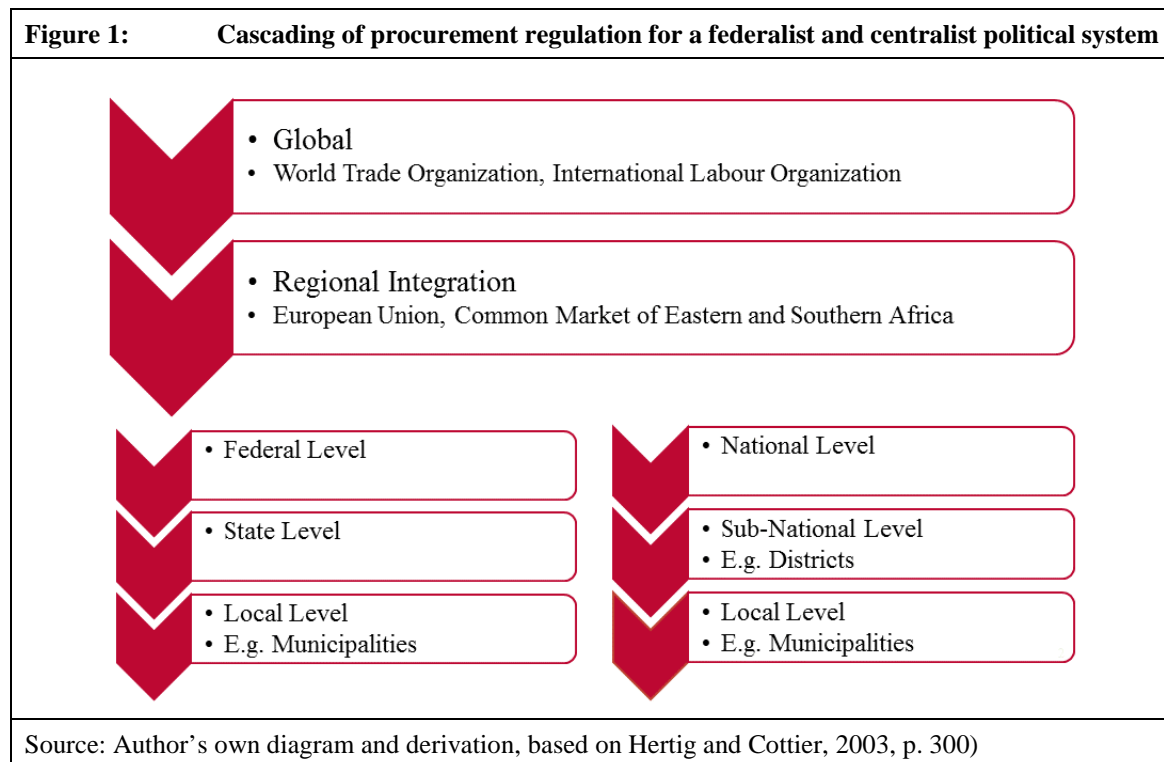
Germany, with its complex multi-level political system and its recent amendment of procurement law to transpose EU regulations into national law, can specifically shed light on the cascading of regulation from the international dimension (global and regional level) to the national level. Its highly autonomous local governments, in the form of municipalities with their own procuring entities, can provide insights into the functioning of SRPP in a strongly decentralised setting of multi-level governance of public procurement and how this affects implementation at the local level. The analysis of Kenya's multi-level regulatory governance system offers a view on the options of a regional economic community without a fully integrated common market for SRPP and presents a different picture of public procurement at the sub-national level, due to its still rather centralised public procurement practices.

Embedding the case studies into a theoretical concept, the regulatory framework has to be analysed as a whole. To do so, the framework is described as part of "Multilevel Regulatory Governance" (Doern & Johnson, 2006). This report conceptualises the regulatory framework for public procurement as a case of multilevel regulatory governance, as it is influenced by different levels of governance. Each country is different, depending on its constitution, which defines the role of the lower levels of government, and its membership of regional economic communities and international treaties, which defines the higher levels.

As part of multi-level governance research, this approach takes a point of view that is different from research on national politics or international relations among states, as it defines the multi-level governance architecture not as a function of the former, but as a research subject of its own (Doern & Johnson, 2006, p. 8). While concepts of multi-level governance are in general concerned with "the interaction between different governmental levels beyond the nation state" (Zürn, Wälti, & Enderlein, 2010, p. 8), this report follows the model of multi-level governance by Hertig and Cottier. They suggest five different levels of governance as a basis of analysis. The first three encompass the levels of governance within the nation state, from the level of the community to the federal. This is followed by the fourth level, the "framework of regional integration", such as the European

Union, and the fifth, encompassing “structures of global integration”, such as the WTO (Hertig & Cottier, 2003, p. 300).

The lower three levels of Hertig and Cottier’s model of multi-level governance are distinct for nation states that have more federal or centralised/unitary constitutions. Their political and practical leeway highly depends on political decisions, the design of regulations at the levels above them, and the degree of autonomy they have. Figure 1 depicts the general structure of the multi-level regulatory governance approach, adjusted to the situation of the two case studies.



The methodological approach of the comparison between the two cases is an exploratory one, as it does not set out to confirm any theory or hypothesis about the influence of the regulatory framework on policy space for SRPP. To answer the research questions, the report uses an interpretative case-study approach complemented by a comparative method, in which, in contrast to a statistical method, relatively few cases are compared (Lijphart, 1971, p. 691). The results of this report not only depict the regulatory status quo in the respective country cases. They also strive to generate more general insights into the regulation of SRPP at the sub-national level within multi-level regulatory frameworks through the comparison of the two distinct cases. Comparing the two cases, communalities and differences in the effects of multi-level regulatory frameworks on SRPP regulations and practices at the sub-national level can be identified. Setting the regulatory framework as an independent variable and the effects of policy space on the different levels of the regulatory framework as explanatory variable for the comparison, allows for generalisations along similar expressions of characteristics, such as the role of regional integration in the multi-level regulatory framework and its effects on policy space for SRPP.

3 Country case study: Germany

3.1 Scale and characteristics of public procurement

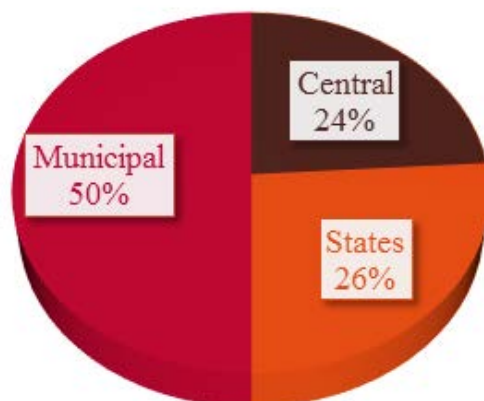
In terms of the economic significance of public procurement, Germany is among the upper third of EU member states, with public procurement representing around 15% of Gross Domestic Product (GDP) (European Commission, 2016, p. 8). The total expenditure, as well as the number of public contracts awarded, can only be estimated, as there are no databases on procurement below the thresholds for EU-wide tenders. Most calls for tenders are below these thresholds and it is estimated that three quarters of them are issued by sub-national entities in Germany (Sack, Schulten, Sarter, & Böhlke, 2016, p. 14). For Germany as a whole, estimation of procurement expenditure range from EUR 150 billion up to EUR 495 billion per year (Hepperle, 2016, p. 20). The European Commission (EC) estimated Germany's total public procurement expenditure on works, goods and services (excluding utilities and defence) at EUR 442 billion in 2014 (European Commission [EC], 2016, p. 7). Sack et al. (2016, p. 15) underline that even these numbers underestimate the total scope of public procurement, as many public entities, such as utility services (e.g. railway or dock services) and public companies in private legal form, are not considered. Data on sub-central government procurement expenditure and procedures is even more elusive. In general, municipal authorities cannot present exact numbers on their procurement activities. Reasons for that are at least twofold. First, there were no regulations on surveying procurement in Germany until the 2016 procurement reform, which includes a regulation on procurement statistics.² Second, municipal procurement in Germany is often rather decentralised and carried out by a range of departments. Only recently has a trend towards re-centralising procurement procedures emerged (Institut für den öffentlichen Sektor, 2013, p. 12).

The highly decentralised and subsidiary structure of the multi-level political and administrative system in Germany does, however, put local authorities in charge of many, if not most, procurement processes and decisions. German municipalities, despite being the smallest unit of local government, have a high degree of political autonomy. Based on the principle of subsidiarity, most public sectors and services are governed by municipal councils and municipal administrations. This is reflected by the share they are estimated to have in overall government spending on the procurement of goods and services. Compared to other countries of the Organisation for Economic Co-operation and Development (OECD), Germany is above average in sub-central government procurement. The OECD estimates the share of public procurement at a sub-central government level in Germany to be more than 75 per cent of overall procurement. Germany ranks fifth among OECD countries, topped only by Canada, Belgium, Spain and Italy. In comparison, the UK's share of sub-central government procurement is estimated to be below 40 per cent (OECD, 2015, p. 137). In the case of Germany, estimations of municipal procurement expenditure as a share of national procurement differ less than the estimates for absolute numbers; municipalities account for around 50 per cent of all public procurement (see Hepperle, 2016, p. 21). OECD country data from 2013 show that approximately 24 per cent of the volume of procurement is located at the central level (OECD, 2015, p. 137). The remaining 26 per cent

2 Verordnung zur Statistik über die Vergabe öffentlicher Aufträge und Konzessionen (Vergabestatistikverordnung – VergStatVO, 12. April 2016 (BGBl. I S. 624, 691).

can be estimated to be located at the state level (the German “Länder”), as depicted in the chart below.

Figure 2: Distribution of public procurement expenditure by level of government in Germany 2013

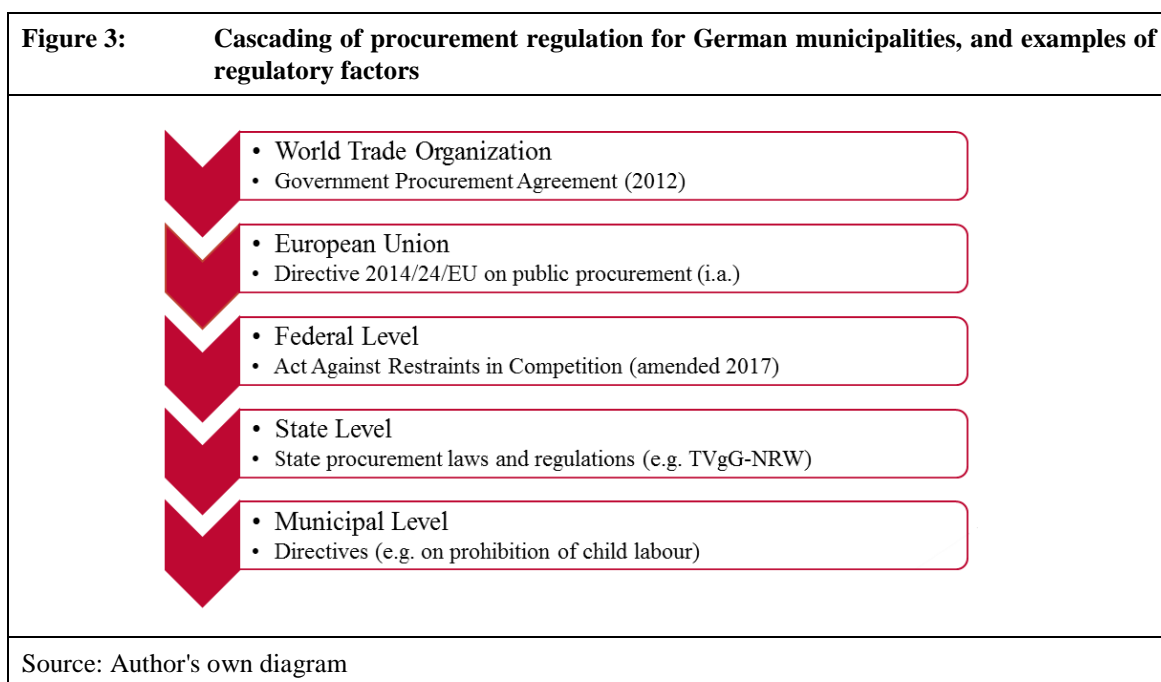


Source: Author's own chart, based on OECD 2015, p. 137 and Hepperle 2016, p. 21

3.2 Regulatory framework for public procurement

Public procurement law in Germany is characterised by a patchwork structure, based on multiple legal foundations for different levels of government and for specific sectors. From the point of view of local procuring entities, applicable laws for public procurement are not only made at the next higher level, by the German states, but also at the national level, and even at the EU level, depending on the financial thresholds of the respective tenders. However, the overall regulatory framework can be described as a cascading system (see also Hepperle, 2016, p. 60), where each level hands down regulations to the next lower level and each level in turn changes and adds aspects, depending on its sovereignty to do so. This is also the case for provisions by municipalities, emanating from the constitutional rights of local governments. The regulatory framework is not finalised but is still in process. Due to the rather open wording of the GPA and EU directives and the fact that not all areas and possible types of public contracts are covered, there are some grey areas. This is the case for SPP in particular. Legal experts, lawmakers and interest groups alike exert their influence on the different levels. These dynamics lead to changes of the regulatory framework, altering the provisions, and this process cascades down onto the municipal level.

In the case of EU member states, a “cascading down” of regulations from international legal frameworks, beginning with the WTO, through the EU at the regional level, onto the national and sub-national levels, and further down to the municipal level, is intended by design. An overview of the German structure is presented in Figure 3.



3.2.1 SRPP regulation at the global level: WTO

Even though public procurement becomes increasingly regulated at different levels of governance, as an inherent national policy field, it is still sparsely regulated at an international level. In this section, the influence of the WTO on public procurement and its significance for SRPP in Germany will be analysed by looking at how the topic has been dealt with over time under the umbrella of this international organisation. Even though there have been discussions as to whether SRPP is compatible with WTO provisions, parties to the discussions have acted as if this is not the case. Recent developments, however, show a tendency actively to include sustainability considerations in the GPA, although this is still work in progress.

In the initial General Agreement on Tariffs and Trade (GATT) regulations concerning public procurement were explicitly excluded (GATT Article III:8 and XVII:2) (see here and following, World Trade Organization [WTO] n.d.(a)). In the course of trade liberalisation within the context of the further development of the GATT, public procurement was first addressed as a plurilateral agreement in the Tokyo Round Code on Government Procurement of 1979. During the Uruguay Round, the Agreement on Government Procurement (AGP) was signed in 1994 by some of the GATT parties, including the European Commission. After the founding of the WTO in 1995, negotiations about a revised AGP started in 1997. They were concluded in 2012 and the revised agreement, now the GPA, entered into force in 2014.

The influence of WTO agreements on the global development of regulatory frameworks for public procurement is mainly limited to the industrialised world. Up to today, 48 of the 164 WTO member states have ratified the GPA, among them all 28 EU member countries, USA, Japan, Canada and Australia. Nine WTO members were in the process of acceding, among them China and the Russian Federation. Some large developing countries have observer status, e.g. Argentina, Brazil and Indonesia (WTO, n.d.(a)).

As the European Commission entered the GPA in 1994, the EU as a whole is party to the agreement and it has to be adhered to in EU procurement directives. EU regulations on public procurement in relation to fair competition are therefore not only aiming to establish a single European market but are also part of the implementation of the GPA. The underlying idea of the agreements within GATT and WTO has been to liberalise procurement markets by opening them up to the parties of the agreement and therefore “to bring government procurement under internationally agreed trade rules” (WTO, n.d.(a)). The GPA entails regulations for national procurement, regarding the non-discriminatory treatment of suppliers by the parties to the agreement, by binding the parties to “transparency and procedural aspects of the procurement process” and “transparency of procurement-related information” (WTO, n.d.(b)). In some instances, these regulations have been interpreted as potentially inhibiting SRPP, as social objectives in procurement could be interpreted as obstacles to trade. In the case of voluntary sustainability standards (VSS), which are used as proof of compliance with sustainability criteria of public tenders, Corvaglia comes to the interpretation that they “may raise considerable doubts about the compliance of these practices with the application of the principles of non-discrimination at the international level” (Corvaglia, 2016, p. 608).

The question of whether social and other sustainability criteria are in violation of the principle of non-discrimination was already answered in the negative by some scholars with regard to the AGP. Even though the AGP from 1994 does not mention SPP, Perera et al. (2007, p. 18) argue that, as the AGP operates within the WTO framework, it is subject to the general declarations within the preamble of the WTO Agreement. The agreement includes the principle of sustainable development and therefore Perera et al. conclude “that sustainable procurement practices would principally be legally valid within the ambit of AGP” (Perera et al., 2007, p. 18). Furthermore, they argue for the possibility of including environmental and social aspects in public procurement, i.e. labour standards, as they can be justified by the stipulations of the AGP to emphasise the adoption of international standards and regulations. This leads to the final conclusion, that those aspects would “be able to withstand the ‘unnecessary obstacle to trade’ test in the case of a challenge within the dispute settlement mechanism” (Perera et al., 2007, p. 18).

While Perera et al. present a compelling case, there is still a debate around the issue. According to Tosoni the integration of SPP in national procurement regulation and practice can be described as limited but not legally barred through the GPA framework (2013, pp. 41, p. 47f.). Despite this, missing coverage of social objectives and some potential legal contradictions between the GPA and EU directives (see Semple, 2017, p. 308) are still spurring legal discussions. This also accounts for the widespread use of transnational private regulations (TPRs), for example VSS, to verify compliance with sustainability criteria of bidders for public tenders. This leads to the question of whether this is in accordance with international regulations on the principles of non-discrimination within the GPA, but also with the Agreement on Technical Barriers to Trade, as summarised by Corvaglia (2016, p. 608). As regards the compliance of regulations for SPP within the GPA, there is no definitive answer to the question of whether transnational private regulations comply or not (2016, p. 626f.). However, the regulation and practices within the EU and its member countries are based on the assumption of compliance with the GPA.

The problem that sustainability objectives were not directly mentioned was also identified by the WTO. In the revised GPA of 2012, SPP is addressed in Article XXII as a topic for

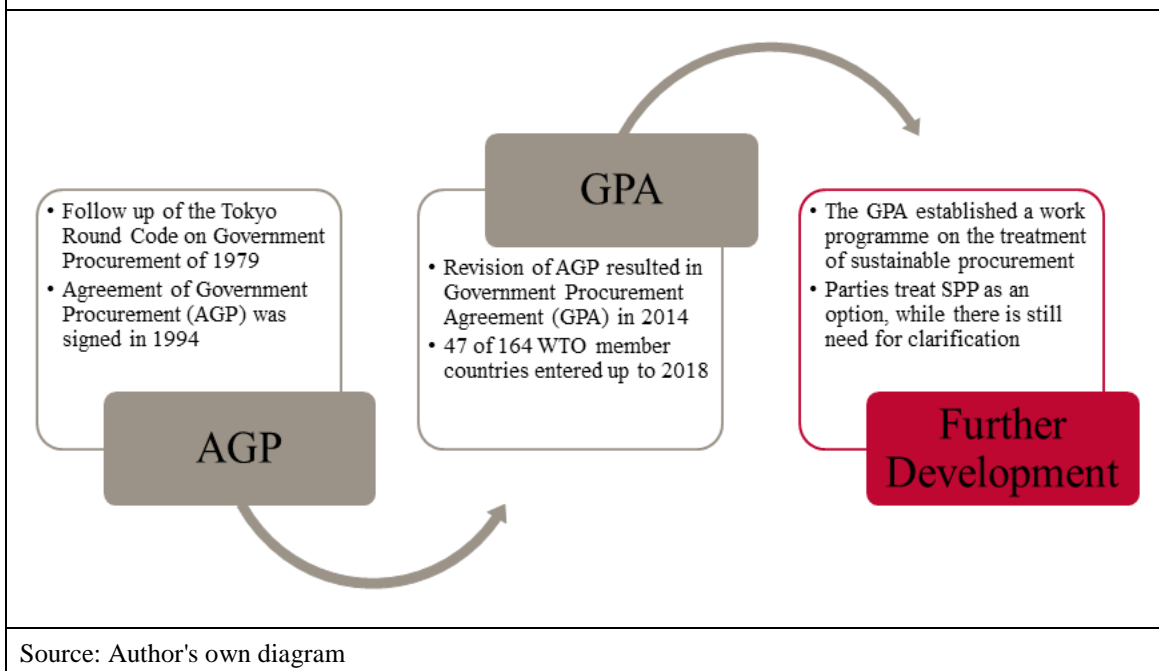
implementation and further negotiation of the agreement (Revised Agreement on Government Procurement, 2012). However, while environmental specifications are explicitly mentioned in Article X on possible technical specifications of the revised agreement, social specifications are not. This still affects the interpretation of GPA regulation in regional and national contexts. Semple concludes that mandatory as well as optional regulations within the EU directives, concerning social criteria in public contracts, “are not specifically sanctioned under the GPA” (2017, p. 301). Therefore, there is obvious leeway for regulations in favour of SPP, but still room for doubt as long as SRPP is not explicitly integrated into the agreement.

Such an integration of SPP into the GPA is an option that has been on the table since the latest GPA symposium, convened by the Work Programme on Sustainable Procurement of the Committee on Government Procurement of GPA, in February 2017. There, many speakers expressed the view that sustainability objectives can already be implemented in compliance with the GPA principles (WTO Secretariat, 2017, p. 26). This is underlined by the takeaways from the symposium, formulated by the WTO Secretariat. These include three options for parties to the GPA wishing to “proceed with a further elaboration and/or endorsement of the importance and legitimacy of sustainability objectives within the GPA framework” (here and following WTO Secretariat, 2017, p. 27):

- using the already provided policy space within the GPA
- officially clarifying the “scope for implementation of sustainability objectives under the Agreement”
- adding amendments to the GPA “to more explicitly reflect, in the Agreement, the social in addition to the environmental dimensions of sustainability”.

The status quo might even change in favour of SPP, as the GPA itself obliges the Agreement’s committee to undertake “further work to facilitate the implementation of this Agreement [...] through the adoption of work programmes” on “the treatment of sustainable procurement”, amongst other topics (GPA 2012 Art. XXII, 8.). Marc Hidson, Deputy Regional Director for Europe of ICLEI – Local Governments for Sustainability, outlined, in his contribution to the symposium, that the EU and its member states, in particular, made use of the first option with increasing intensity (WTO Secretariat, 2017, p. 4). The symposium mentioned above is part of a process that can be summarised in the diagram below, which shows the recent trend towards the acceptance of SPP within procurement regulation.

Figure 4: The development of procurement regulation within plurilateral agreements under the WTO



The discourse about compliance or non-compliance of sustainability objectives with international trade regulation plays only a limited role in practice, as regulation at EU and national level assumes such compliance. Within the overall discourse on SPP, the missing clarification within the GPA is present in the overall discourse and serves as an argument for critics of “secondary objectives” (such as sustainability objectives) in public procurement. Until now, no further actions have been taken to officially clarify the scope for sustainability within the regulation of trade by GPA or to amend the GPA. Parties to the GPA should therefore push for clarification, e.g. in the form of a stronger commitment to sustainability in international trade regulation.

3.2.2 SRPP regulation at the regional level: EU

For the member states of the EU, public procurement is highly regulated at the supra-national level, as the economic integration of the European Union is based on the “progressive convergence of the economic policies of member states” (Bovis, 2007, p. 1) to ensure the functioning of the European common market. In the wake of market integration and through the focus on the prerogatives of free and undistorted market access among the member states, regulation of public procurement in the EU has shifted public procurement from the area of budget law to the area of competition law (Kilian & Wendt, 2016, p. 202). Aspects of equal treatment within the common market have become more important than the spending preferences of EU member states. Accordingly, the European Commission defines that:

European public procurement rules apply to all public contracts that are of potential interest to operators within the Internal Market, ensuring equal access to and fair competition for public contracts within the European Procurement Market (European Commission, 2011, p. 6).

Public procurement is not regulated by the treaties of the EU (primary law) but through EU directives (secondary law). This legislation, such as procurement regulations and procurement procedures for Europe-wide public tenders, must be transposed into national law by EU member states. These procedures apply to procurement above certain monetary thresholds.³ Below these thresholds, member states can draft their procurement procedures via national laws and regulations as long as they adhere to the EU's principles for public procurement.⁴ EU regulations on public procurement should guarantee freedom of competition among EU member states, while, on the other hand, preserving the freedom of procurement decisions the member states agreed upon. This means that social objectives and the goals of EU regulations on public procurement are (potentially) in conflict, when the former are not explicitly integrated in the latter.

As described above, in the past, any objective within public tenders not related to cost considerations was seen as a distortion of equal access and fair competition. There was no leeway to integrate strategic goals, such as sustainability. However, EU directives on public procurement have been subject to changes since the 2000s. The EU procurement directives of 2004 already made it possible to integrate ecological and social criteria into public procurement procedures (see also Meißner et al., 2009, p. 7), but their focus was on ecological criteria only (see also Perera et al., 2007, p. 25f.).

These changes of regulation in favour of SPP and SRPP in particular, have been triggered, amongst other things, by the lower levels of the governance system in the EU-context. Sub-national entities such as municipalities played a key role in promoting change towards integrating sustainability aspects into public procurement, by initiating a policy cycle of local action, court decisions and regulatory reform. Even before the 2004 directive, public entities partially designed procurement processes to cater for ecological and social objectives. Procurement practices, court decisions, and discourse among practitioners, experts and institutions, such as the European Commission and later the European Union themselves gradually shifted the meaning, the practical possibilities and, finally, the regulation at EU level. Those frontrunners explored and demonstrated the possibilities for sustainable procurement and fostered discourse on the topic. More important, in terms of regulation, was that in some cases those practices led to court decisions, as they were in legal grey areas. In this way, frontrunners had an immense influence on the harmonisation of EU procurement law towards SPP by triggering court decisions by the European Court of Justice (ECJ) (see also Kilian & Wendt, 2016, p. 203). The interpretation by the Court played a significant role in the drafting of the procurement directive of 2014, as Tosoni points out (2013, p. 42). This was already the case with the inclusion of Article 26 into Directive 2004/18/EG (Meißner et al., 2009, p. 7), which made it possible to add social and environmental considerations to procurement contracts. The decisions of the ECJ opened up policy space for using sustainability objectives in public tenders (Leinemann, 2016, p. 19; see Meißner et al., 2009, p. 7; Sack et al., 2016, pp. 25–27). This way more options for integrating social and environmental standards were lifted out of a legal grey area. Basic principles of modern public procurement, such as value-for-money, as well as qualitative

3 For example, EUR 5,225,000 for works contracts and EUR 209,000 for supplies contracts. (In public procurement, three procurement categories are distinguished: goods, works and services. Goods are tangible products and works are, for example, construction work.)

4 The following five principles are agreed upon in the preamble of EU directive 2014/24/EU: equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

selection criteria were introduced and strengthened in the new procurement regulations, to comply with the jurisdiction of the ECJ (Kilian & Wendt, 2016, p. 204). The interplay between the experience of applying sustainability objectives at local level and the discourse and court decisions triggered by this led to the formulation of a new policy. This series of reactions could be interpreted as a specific policy cycle, which works in favour of a gradual, regulatory improvement of sustainability objectives in public procurement in general and SRPP in particular, and might be replicable in other contexts of regional economic integration or directed at national regulations in other country contexts.

The following analysis of regulations on social objectives is solely based on the latest changes to the main directive on public procurement in 2014,⁵ as it is most relevant to the current multi-level regulatory framework.

With the reform of EU procurement regulation, public procurement is redefined to the degree that it is not only an instrument for spending public money efficiently, but also for achieving “smart, sustainable and inclusive growth” (Directive 2014/24/EU, Preamble, paragraph 2). Directive 2014/24/EU entails a wide range of options for the inclusion of social objectives during different stages of the procurement process. To understand the impact of significant changes in the provisions on the successful integration of social objectives in public procurement within the EU, one has to distinguish between regulations that address specific social considerations and those that open up public procurement to the integration of a wider range of social and environmental considerations. To the former category belong provisions that are very explicit and limited to specific objectives, such as reservations for sheltered workshops etc. (Art. 20) or the exclusion of bidders for reasons of corruption, child labour and human trafficking (Art. 51(1)).

Other regulations are formulated in more general terms and can therefore be used to pursue a wider range of social and environmental objectives. Central to that is the general option to include “special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract” (Art. 70).⁶ On one hand, the integration of performance criteria widens the leeway public entities have in determining the conditions for goods and services of their procurement. On the other hand, the link to the subject matter presents a possible limitation of the scope of conditions in a tender. It was considered an impediment, especially for social criteria, which could be seen as too distant from the subject-matter of the contract. However, this was overturned by court decisions (Hepperle, 2016, p. 62). Another “door-opener” for a wide range of SRPP provisions is Art. 67, which establishes the option to consider the most economically advantageous tenders (MEAT). As price does not have to be the decisive factor when awarding a public contract, procuring entities are entitled to integrate conditions for the production process of goods, such as social criteria, into the award criteria.

Furthermore, regulations have been put into place that also support the identification and integration of such objectives into tenders. Art. 43 permits explicit reference to third-party labels, such as VSS, when calling for qualitative criteria in tenders, in contrast to the limitation of price being the sole or main criterion. In procurement practices this is of major

5 Directive 2014/24/EU on public procurement, repealed and replaced 2004/18/EC as procurement directive.

6 Conditions for the performance of contract refer to mandatory conditions that have to be observed by successful bidders on public tenders when fulfilling their obligations of the contract.

importance for the inclusion of social objectives, as criteria of existing standards can be cited quite easily, while bidders still have the option to fulfil and prove the criteria by other means than the standard cited. This reduces the complexity of defining and formulating criteria in those cases where the market already provides standards, for example in the form of sustainability labels. For those instances where the situation is less clear, or when the procuring entity has to establish an overview over the market first, Art. 40 mentions the option of market consultations. With these regulations, procuring entities obtained a new set of tools for including social objectives in their tenders.

Procuring entities also gain new leeway to deter and punish economic operators that do not adhere to social laws and regulations. Provisions in regard to the selection criteria make it possible to exclude economic operators from tenders in the case of misconduct. A bidder can be excluded from the tender if the contracting authority can demonstrate a breach of labour law, including international agreements, such as the core conventions of the International Labour Organization (ILO) (Art. 57(4a)). Compliance with social provisions and labour law is also mandatory during the performance of the contract (Art. 18(2)), which includes subcontractors (Art. 71(6)) (see here and following Semple, 2017, p. 298). Procuring entities can also define appropriate bidders, based on their technical and professional ability (Art. 58), including social aspects, such as recruitment and training of apprentices or their ability to manage their supply chains.

This relates to the question of which markets are targeted and affected by the integration of social considerations in public procurement. With regard to where the provisions take effect, two categories can be defined. The first entails the provisions aimed exclusively at social objectives, which have an effect within the *domestic* market, in this case the European Market. The second category encompasses provisions that also or exclusively have a potential effect on social conditions along international value chains, and therefore on *international* markets. Reservations of public contracts for sheltered workshops, unemployment programmes and others (Art. 20), as well as mandatory provision to guarantee the accessibility of procured goods or services to persons with disabilities (Art. 42 and Art. 67) gear directly toward domestic social linkages. Others, such as the introduction of the MEAT-principle (Art. 67) and the permission to refer to third-party labels (Art. 43) present the opportunity to integrate social objectives along international value chains in public procurement. Semple even judges the latter to be one of the biggest changes concerning international social objectives (Semple, 2017, p. 299).

In conclusion, the regulation for public procurement at the EU level introduces a wide range of instruments, such as exclusion grounds, third-party labels, and general provision through which social objectives can be integrated into public procurement. With the reform of the EU procurement directives, the political leeway for national regulations in favour of SRPP, and even its implementation in the absence of national regulation, has been further clarified. However, the implementation of these open SRPP provisions and practices at the national level is entirely optional. Even though the depiction of EU procurement reform in favour of SRPP above shows that social objectives in general have become an integral part of EU regulations on public procurement, nearly all provisions have in common that they (only) provide the *opportunity* to include social objectives. Exemptions are the mandatory provisions of granting accessibility for people with disabilities (Art. 42) and the need for bidders to comply with labour law (Art. 18). For the new, explicitly optional, leeway to integrate social objectives, geared towards domestic markets and/or international value

chains, the decision to make such objectives mandatory lies within the legislative competence of the individual member states.

The gap between regulation and implementation is already visible at the regional level of the multi-level regulatory governance system. At the supra-national level of the European Union, social objectives of public procurement have been integrated into regulations and discourse alike, and today SRPP is one of the six goals of the EC for strategic public procurement (European Commission [EC], s.a.). At the same time, the EC criticises the fact that an estimated 55 per cent of procurement procedures still apply the lowest price as an award criterion, despite the option to choose the most economically advantageous tenders (MEAT) (in accordance with Art. 67, see also above) (EC, 2017, p. 2).

The optional nature of the provisions for SRPP makes it worthwhile looking into other than purely regulatory aspects when analysing the scope and leeway of SRPP at the regional level of the multi-level regulatory governance framework. Measures that support the implementation of SRPP might be more important than legal provisions. Such measures might entail various forms of communication, e.g. guidelines and handbooks, to inform stakeholders in the procurement process about new regulations and ways of implementation.

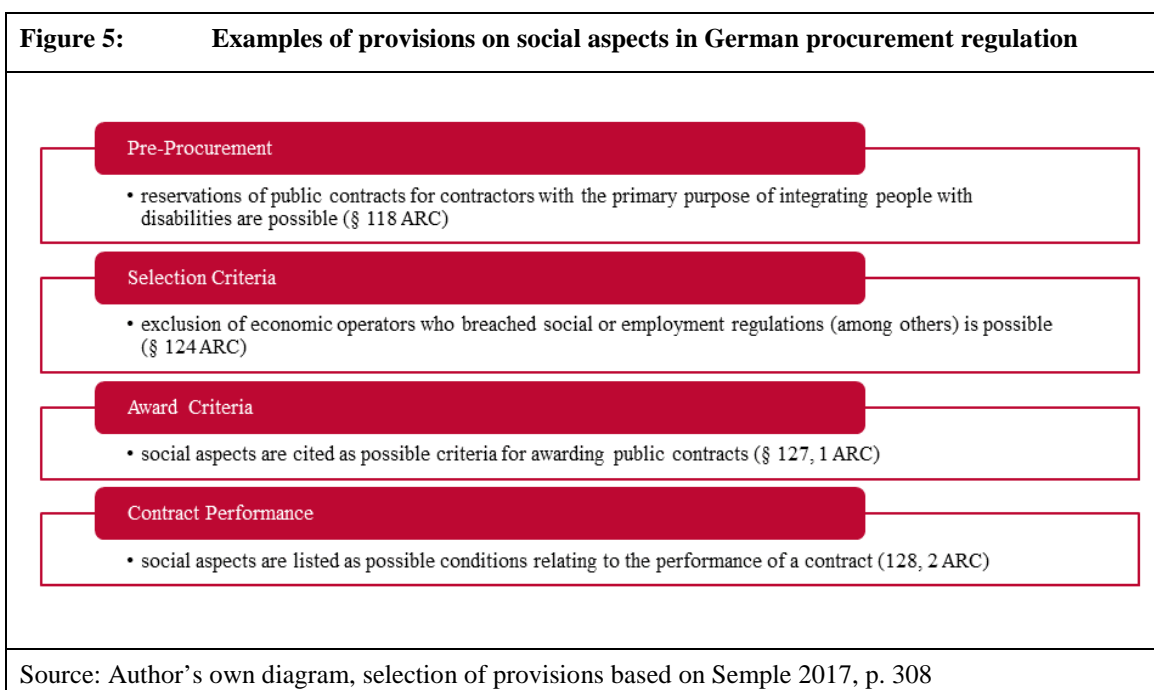
The supportive measures within the EU context also mirror the gradual change from the purely environmental focus of SPP to the increasing integration of social considerations. The discourse within the European Commission itself changed between the two regulatory reforms of 2004 and 2014. The first *Buying Green* handbook of 2004 focused solely on ecological objectives (EC, 2004). Also, the EC Communication “Public procurement for a better environment” was concentrated solely on the possible positive influence of public procurement on the environment and almost entirely related to the predominant concept of green public procurement (GPP). An extension of the concept that includes the social costs of environmental depletion widens the debate to include the social dimension of sustainability, and the possibility is mentioned that “legal guidance on GPP may imply advice on the inclusion of both environmental and social aspects and hence open the door also to more ‘social’ public procurement” (EC, 2008, p. 29).

Two years later, the *Buying Social* guide of 2010 entailed a more comprehensive definition of SRPP and extended the scope for social objectives in public procurement (European Commission, 2010). This, however, was not part of the Green Paper on the modernisation of EU public procurement policy towards a more efficient European Procurement Market of 2011, which constituted a key element within the Europe 2020 strategy. It did not encompass social aspects but focused on the potential of public procurement to guarantee the most efficient use of public funds, the potential of public procurement to inspire businesses to innovate, the improvement of the business environment for small and medium-sized enterprises, and to support the shift towards a greener economy (EC, 2011, p. 3). These supportive documents depict a still existing bias towards the ecological dimension of SPP at the expense of the social dimension in the EU context, as analysed in greater detail by Stoffel et al. (2019). But they also indicate a trend towards increasingly incorporate social objectives, with a new version of the *Buying Social* guide due to be published soon.

3.2.3 SRPP regulation at the federal level

Because of the new EU directives that entered into force in 2014, German procurement law had to be amended. The EU procurement directive regulations on the integration of social and environmental considerations have been transposed into federal procurement law in Germany on an optional basis, leaving the decision to implement more specific regulation and to act based on the regulation largely at the sub-central level: the German states and municipalities. Other member states of the EU, such as the Netherlands and Austria, have gone further and, for example, have withdrawn the option to establish price as the only award criterion in public tenders (Wiesbrock, 2016, p. 84), which strengthens the weight of other, qualitative, aspects, such as sustainability criteria.

The recent amendment of the Act Against Restraints in Competition (ARC)⁷ in 2017, which regulates public procurement, specifically states that innovative, social and environmental aspects have to be considered in public procurement (ARC, §97(3)). Social objectives are therefore part of the foundations of public procurement, but only to the degree the ARC provides.⁸ Semple presents an exhaustive overview that categorises the provisions that are related to social objectives (Semple, 2017, p. 308). Figure 5 depicts some of the numerous provisions in the ARC that directly or indirectly allow the integration of social objectives into the procurement process. Categorising the provisions along the stages of the procurement process shows where and when the provision is applicable, thereby illustrating the wide range of options available to practitioners of public procurement for integrating social aspects in tenders.



While aspects of SRPP have become part of German procurement regulation under the ARC, policy makers, legal experts and practitioners alike are still averse to accepting strategic objectives in public procurement. Incorporating social objectives into national law,

⁷ Gesetz gegen Wettbewerbsbeschränkung (GWB).

⁸ See Figure 5 for an exemplary overview.

even though disputed, was already possible under the EU directive on procurement of 2004, albeit the German government was previously reluctant to integrate this into the regulatory framework at the federal level (Bundesministerium für Wirtschaft und Technologie, 2007, p. 7f.). Strategic objectives, including SRPP, used to be and are partly still termed “secondary objectives”, or even “extraneous objectives”⁹, in the German discourse on the topic (Leinemann, 2016, p. 19). Even though sustainability aspects are no longer officially regarded as extraneous objectives in public procurement, due to the integration into EU and German law, the discussion among policy makers, experts and practitioners on the issue is still controversial (Kilian & Wendt, 2016, p. 202). Some experts and practitioners still deny the legality of such objectives or are unaware of the political leeway concerning SRPP that stems from European regulation of the issue, even though the new regulatory framework on the federal level finally clarifies the options for SRPP.

Social considerations along international value chains are not mentioned specifically in the ARC, which does not inhibit their integration into tenders, but limits their visibility and suggests that they are secondary goals at best. In general, social objectives relating to international value chains are sparsely transposed. In §24, ARC international agreements are not mentioned specifically as grounds for exclusion, while the relating Article 57(4a) of 2014/24/EU does mention international agreements, such as ILO core conventions. Other (former) EU member states have transposed this into national law. For example, in England and Wales reasons for exclusion specifically include violations of “environmental, social or labour law obligations *anywhere in the world*” (Telles & Ølykke, 2017, p. 248).

While the regulatory framework has been broadened at the federal level, and now offers federal bodies options for SPP above and below the thresholds for EU-wide tenders, implementation constitutes a continuing challenge. In 2013, Müller even called for an overdue “implementation offensive”¹⁰ (Müller, 2013, p. 33). Provisions for optional implementation of SPP have been introduced, however, implementation through federal bodies is lacking, and the use of provisions in favour of SRPP is more prevalent at the lower levels of government. For procurement by public entities at the federal level, there are some guidelines and provisions on the integration of environmental objectives. Social objectives, with regard to international value chains have only recently gained attention. Currently, the German government is working on a guideline on the sustainable procurement of textiles by public entities at the federal level, geared, amongst other things, towards the armed forced.

The supportive measures for SRPP at the federal level are also rather sparse. Furthermore, they are divided among different ministries. There are funds and support for the topic through the service agency Communities in One World (SKEW) of Engagement Global, financed by the Federal Ministry for Economic Cooperation and Development (BMZ) for promoting fair trade and SRPP. The Federal Environment Agency offers tools and support on green public procurement (GPP), and the competency centre for SPP at the Ministry of the Interior¹¹ provides guidance and capacity building for the federal, the state and the municipal level on SPP in general, but has insufficient capacity to counsel and train the more than 11,000 German municipalities plus state and federal entities. Although in 2020

9 In German: “Sekundärzwecke”, “vergabefremde Zwecke”.

10 Translation by the author.

11 Beschaffungsamt des BMI – Kompetenzstelle für Nachhaltige Beschaffung.

the staff of the competency centre was extended, an “implementation offensive” for SRPP would need additional resources at all political levels.

While the optional integration of social objectives in general was transposed in national law through a reform of the ARC, the German federal government decided not to integrate mandatory provisions for SRPP. For the German states it is, however, legally possible to include mandatory provisions for SRPP for tenders below the EU-thresholds.

3.2.4 SRPP regulation at the state level

Federal procurement law only applies to procurement above the EU thresholds. Regulation of procurement below the thresholds is within the jurisdiction of the 16 German federal states. Under the new ARC, German states still have the legal opportunity to add further regulations that apply to public procurers within the respective state, including municipalities. Most of the German states made use of this and decreed state procurement laws. Some even introduced mandatory provisions on the inclusion of social objectives.

Most of the mandatory provisions under state law concern domestic social objectives. Bidders for public tenders must, for example, adhere to collective agreements, train apprentices, support women and families, pay minimum wages etc. in order to be eligible for public tenders, or must implement such provisions during contract performance (see also Sack et al., 2016, pp. 30–51). Many states also include provisions on social objectives along international supply chains. While there is no mention of the ILO core conventions in the ARC, in 2016, 11 of 16 German states directly refer to the ILO core conventions in their procurement laws (Sack et al., 2016, p. 55). Most of them limit the mandatory adherence of ILO core conventions to specific product groups, and four do not specify adherence at all (see Sack et al., 2016, p. 54). Only North-Rhine Westphalia¹², Mecklenburg-Western Pomerania and Bremen introduced the ILO core conventions as general mandatory criteria in public tenders. Where mandatory regulations on ILO core conventions are in force, municipalities and public contract authorities must integrate them in their tenders and oblige bidders to confirm or even verify that the ILO core conventions are adhered to in their supply chains. Before the latest revision in procurement law, North-Rhine Westphalia was regarded as a frontrunner in this, as the former state law and regulation introduced comprehensive optional provisions and some mandatory provisions for public tenders (Becher, 2007, p. 19). These provisions obliged bidders to sign a commitment to observe the ILO core conventions for the goods they were delivering if they had no other means of proving this, such as third-party certification. In practice, this did not guarantee changes in labour conditions and was often regarded as simply “ticking a box” on the already extensive tender documents.

Regarding third-party certification, for example through VSS, three of the 16 German states (Hesse, North-Rhine Westphalia, and Schleswig-Holstein) additionally mention the option

12 After a change of state government, North-Rhine Westphalia revoked the changes to its procurement regulation and removed provisions on sustainability objectives, in particular those on labour conditions along international value chains.

to procure products that fulfil Fair Trade¹³ standards (Sack et al., 2016, p. 59f.). This is possible for all procurement, independent from state law, through third-party certification of tender criteria.¹⁴

State legislation on public procurement of the German states not only presents a mixed picture when it comes to optional or mandatory provisions on SRPP, the influence of those provisions is also limited. At least three factors limit the influence that (mandatory) provisions in state laws and regulations have on the uptake of SRPP through procuring entities:

- the fact that only one stage of the procurement process, the conditions for executions, can be addressed by state law
- the limited effects of mandatory regulations without effective means of verification and control
- limits regarding the monetary range of tenders that fall under state regulation.

First, state law can only make provisions on specifications of tenders and contract performance as, for example, the award criteria are under the full control of contract authorities. In those states where mandatory provisions for SRPP have been introduced, they have been integrated as provisions for the performance of contracts. In other words, they had to be formulated as criteria that have to be observed in full when the contract is fulfilled. This poses a problem for certain products, such as information and communication technologies, as it is at least debatable whether the ILO core conditions are observed in the main production countries. More fitting approaches, such as using targeted measures in cases where there is no simple way of verifying adherence to ILO core conventions, can be used in addition to, but not instead of, existing mandatory provisions. For markets in which sustainability and especially social standards and their verification and control is already established, such as food products and, to a certain extent, clothing, this is less of a problem. However, even there, simply integrating SRPP through a clause within the contract might fall short of generating a change within the supply chain for the goods procured, if there is no verification and/or control of adherence included.

Second, mandatory provisions are the exception within the sub-central procurement regulation of the German federal system, and even they do not provide ideal conditions for the practical implementation of SRPP in tenders, as described above. The regulations, as they are, do not include provisions on verification and control of the mandatory criteria. While mandatory regulations on SRPP can be described as an important stepping-stone for more widespread implementation, despite their shortcomings, they might be more effective when they include those provisions, and when they are accompanied by supportive measures for state- and sub-state procuring entities, such as municipalities.

13 “Fair Trade is a trading partnership, based on dialogue, transparency and respect, that seeks greater equity in international trade. It contributes to sustainable development by offering better trading conditions to, and securing the rights of, marginalized producers and workers – especially in the South.” World Fair Trade Organization and Fairtrade Labelling Organization (2009, p. 6).

14 This is defined in §34 of the German Regulation on Procurement and Article 43 of the EU Procurement Directive (2014/24/EU).

Third, the mandatory provisions for SRPP in some state laws only apply to a part of all tenders. State procurement laws and regulations only apply to tenders above a certain monetary threshold. They are set in order to reduce the administrative effort for implementation and allow for easy and faster procedures for tenders of lower value. Therefore, the sparse mandatory provisions only apply to a limited range of tenders, as a significant amount of public procurement falls under those thresholds. There are a lot of products, such as office supplies, clothing and food products (coffee, cacao), that are easily available in a quality that ensures the compliance with social objectives along international value chains, and that are bought in smaller amounts but on a regular basis and from a large number of procuring entities.

In summary, the decision and the responsibility for SRPP lies predominantly with the respective procurement entities, and especially with those at the municipal level. They decide on the integration of SRPP into most tenders, and even when provisions are mandatory additional effort on their part is needed to ensure the effectiveness of SRPP.

3.2.5 SRPP regulation at the municipal level

Municipalities, as contract authorities, have the right to determine performance and price aspects within their tenders and therefore the option to set award criteria on their own, along existing legal provisions. Based on the legal situation described above, procuring entities on the municipal level can include sustainability criteria into public tenders. Many municipalities go a step further and integrate sustainability objectives into their local procurement regulation, based on decisions by municipal governments, i.e. municipal councils. According to a (non-representative) survey in 2013, 66 per cent of municipalities in Germany use directives to implement sustainable procurement practices (Institut für den öffentlichen Sektor, 2013, p. 23). Other sources are much more pessimistic and estimate that around 200 of the 11,000 municipalities in Germany use municipal directives to procure more sustainably (Müller, 2013, p. 30). This discrepancy shows the insufficient state of knowledge and unavailability of data on public procurement. The numbers also show that there are frontrunners who use their political leeway to create their own regulatory framework that specifies and embeds SRPP at the municipal level, although this is not widespread. The high number (66 per cent), in the non-representative study from 2013 might be due to the higher likelihood of asking and/or getting answers from those municipalities that already have an interest in SPP.

Early examples for municipal directives on SPP include ecological objectives, such as the use of recycling paper, and also social objectives such as the prohibition of child labour. Over time, ecological objectives in public procurement became more frequently integrated into such regulations and in tenders (Heinrichs & Sühlsen, 2015, p. 11; Müller, 2013, p. 30). Some German municipalities have already started reforming their internal regulations on procurement with the aim of integrating social objectives, mostly the exclusion of child labour in procured products, even before the transposition of EU regulations into German law (Falk, Fincke, Lübke, Neumann, & Schmitz, 2011, p. 11). That way, local governments and procuring entities could create their own regulations for sustainable procurement, and by so doing include social objectives in tenders. EU and federal laws and regulations enable municipal actors to introduce additional provisions for SRPP, even exceeding those already in place by regulation at the state level.

3.3 Leeway and implementation of SRPP in German municipalities

In the case of Germany, the overall regulatory framework in the multi-level regulatory governance system enables public entities to integrate social objectives into their individual procurement regulation and procedures. Municipalities therefore have full leeway to integrate social objectives in procurement processes at any stage within the framework provided by EU regulations and national laws and regulations. However, they have nearly the same leeway not to integrate these objectives because of the limited cases of state procurement law with mandatory provisions, and the option to fall back on using the lowest price as the only award criterion (see also Hepperle, 2016, p. 61).

Even when mandatory provisions are in place, they only apply within certain thresholds. Many tenders with low contract value that amount to a high overall number of contracts are therefore left out of the picture. Relatively high lower thresholds at state level exempt a lot of everyday procurement from mandatory social provisions in state laws.

At the same time, available sources indicate that implementation of optional provisions is largely lacking, as regards sustainability criteria and social objectives in particular. Cases of municipalities including sustainability objectives in their procurement procedures and tenders are still exceptional. Where social objectives are made legally binding, for example by state law, implementation can be described as problematic. Most often, domestic social objectives, such as the limitation of working hours and mandatory traineeships for economic operators awarded public contracts, are not integrated into public tenders (Heinrichs & Sühlsen, 2015, p. 11f.). Social objectives along international supply chains are disregarded to an even greater extent (Sack et al., 2016, p. 56).

With regulatory limitations for SRPP removed, other preconditions have been studied more thoroughly. In a more recent strand of research, SRPP implementation is analysed through the lens of organisational change (Grandia, 2015; Grandia, Groeneveld, Kuipers, & Steijn, 2014; Kuipers et al., 2014; Müngersdorff & Stoffel, 2020). Müngersdorff and Stoffel show that besides the regulatory dimension, the institutional and individual dimensions are key to successful implementation of SRPP. Furthermore, the interplay among different factors and their triggers is far too complex for a single blueprint for implementation (Müngersdorff & Stoffel, 2020). Some of the overarching preconditions for the factors and their triggers described by Müngersdorff and Stoffel can be subsumed under the terms political will, personnel resources and capacity building for SPP. A lack of them is a likely reason for the persistent implementation gap. Institutional shortcomings, such as a lack of capacity building and training and other organisational aspects are also covered by additional research. Sack et al. mention a lack of knowledge about ILO core conventions, and missing know-how among procuring entities as core reasons. This results from evaluations undertaken on behalf of the state governments of Mecklenburg-Western Pomerania and North-Rhine Westphalia (Sack et al., 2016, p. 56). In addition, practices of verification and control of social standards are not widely implemented and tested. Future research should focus on the analysis of organisational reasons and the preconditions for generating the political will to integrate sustainability objectives into public procurement at the municipal level and in general.

In Germany, but also in other EU member states, municipalities have been the driving force for SPP practices. Those practices influenced regulations within the multi-level governance

structure, inducing a policy cycle from practices to court rulings to legal reform (as described in 3.2.5). This could be a potential strategy in other regional and country contexts.

However, there is not enough support for the municipal level by the states, the federal level and EU-level institutions. Supportive measures, such as guidelines, handbooks, online resources and capacity-building services are sparse, and are not coordinated within and between the different levels, let alone different EU member countries. Within the highly decentralised public procurement in Germany, the build-up of parallel structures in different municipalities is not entirely avoidable, although some aspects could be more centralised. Municipalities have only limited resources to invest in capacity building for SRPP. At the time of writing, they are largely forced to create their own good practice regarding SRPP. Here, state and federal institutions could provide municipalities and other public entities with more information and capacity building. There is some development at the EU level. The European Commission is already invested in the topic. An update of the *Buying Social* guidebook is planned (EC, 2010), and information campaigns such as *Buying for Social Impact* and other EU-financed projects deal with SRPP and are aiming to promote its implementation.

4 Country case study: Kenya

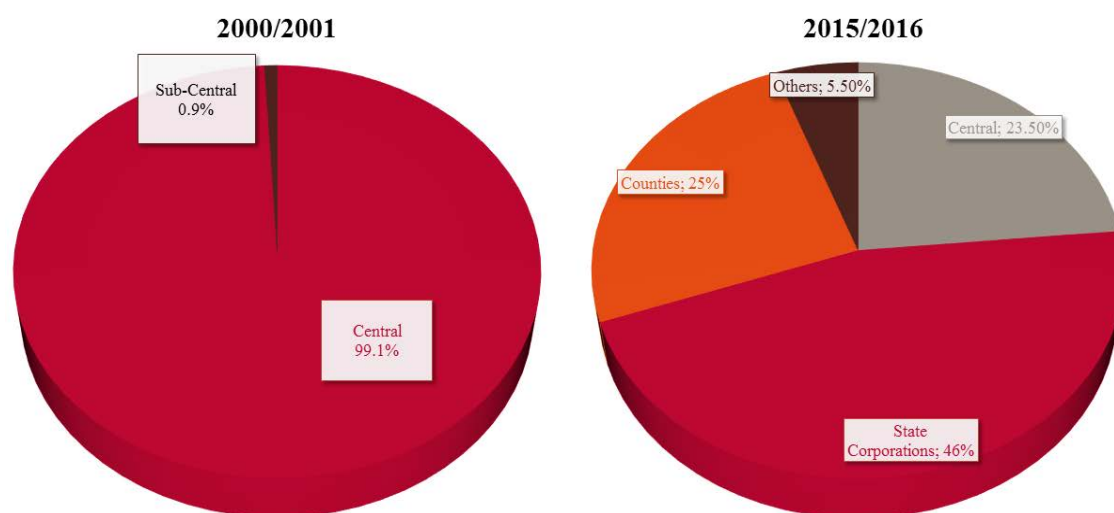
4.1 Scale and characteristics of public procurement

Any numbers on public procurement in Kenya are, just as in Germany, based on estimates. The exact share of public procurement in Kenya is uncertain. While public procurement in relation to GDP is, in many cases, higher in developing countries, a share of 30 per cent of GDP as indicated by Kim (2016) is rather the exception than the norm, and outliers are often caused by sharp increases of public spending, for example in the case of conflicts. On average, public procurement accounts for 14.5 per cent of GDP for low-income countries and 13.6 per cent for upper-middle-income countries (Djankov, Islam, & Saliola, 2016).

While there is no recent data on municipal procurement, the Public Procurement Oversight Authority (PPOA) of Kenya published the latest procurement expenditures by central and county governments for 2015/2016 (Public Procurement Oversight Authority [PPOA], 2016, p. 49f.). According to these, county governments account for 25 per cent of the total procurement budget, ministries and state departments for 23.4 per cent and state corporations for 46 per cent. The state corporations' high share could be attributed to central-level procurement, as they are owned by the government. The rest is made up of universities and colleges (3.2 per cent) and commissions and independent offices (2.2 per cent).

Compared with data from the beginning of the century, there is a strong increase in the share of public procurement at the sub-central level. In 2015/2016 a quarter of the procurement budget was allocated to county governments. Fifteen years earlier, in the fiscal year 2000/2001, the combined procurement below the central level, consisting of former county, municipal and town procurement, accounted for less than 1 per cent of GDP, while the central level amounted to 99 per cent (Odhiambo & Kamau, 2003, p. 13f.).

Figure 6: Public procurement in Kenya as a share of GDP by level of government in 2000/01 and share of public procurement expenditure by public entities in 2015/16



Source: Author's chart and calculations based on Odhiambo & Kamau 2003, p. 13f and PPOA 2016, p. 49f.

Recent reform, based on the process of devolution that characterises Kenya's governance structure,¹⁵ has changed the distribution of public procurement spending among the political levels in Kenya's multi-level governance framework. Devolution in Kenya led to an increased autonomy of counties and sub-county public entities and a less centralised distribution of competencies and funds. Consequently, an increasing amount of public funds is distributed to be spent on a decentralised basis (Kenya School of Governance Centre for Devolution Studies, 2015, p. 1). After a revision of the constitution in 2010, the national government and the county governments constitute the two arms of government under devolution within a unitary system (Onyango, 2013, p. 7). Municipal government is now defined by the Local Governance Act (revised in 2010) and the Urban Areas and Cities Act of 2011. Both acts delegate more power to municipalities and local governments. The latter led to the establishment of 47 counties, with the two metropolitan areas of Nairobi and Mombasa constituting counties of their own, replacing the former 69 rural districts with limited power of decision making. County assemblies gained the ability to raise revenue and to decide on expenditures. Below the county level, councils of cities, municipalities and towns have been established, which are also public bodies with the ability to generate revenue, make spending decisions and mandate their own procurement entities, as declared in Part II of the Urban Areas and Cities Act (Urban Areas and Cities Act, 2011). However, municipal procurement is hard to assess. Many parastatal, county and central government entities cover fundamental aspects of public demand, e.g. infrastructure. Additionally, public institutions, such as schools, universities and colleges, that are active on a local level,

¹⁵ According to Wagana et al. devolution in Kenya includes "the transfer of responsibility, but also authority over decision-making and accountability to autonomous and legally constituted sub-national governments" (2016, p. 460).

are independent of municipal and local governments, as regards their procurement activities (Public Procurement and Asset Disposal Act, 2015). Therefore, municipal procurement, apart from metropolitan areas, has to be estimated as rather low. Ongoing trends, such as the process of devolution in Kenya and the growing relevance of municipalities due to the accelerating urbanisation in Sub-Saharan Africa, might have the potential to further increase public procurement at subnational levels. The sharp increase of procurement activities of counties shows that devolution leads to real changes in the distribution of power and funds. Kenyan counties might be able to play a similar role in exploring strategic public procurement and SRPP through their design of calls for tenders and procurement decisions as municipalities and states in Germany.

4.2 Regulatory framework for public procurement

In the case of Kenya, not all five levels of the multi-level regulatory framework for public procurement influence procurement regulation. The analysis in the case of Kenya will therefore be limited at the regional and the national level. As regards the higher levels of the multi-level regulatory framework, Kenya's procurement regulation is subject to agreements at the regional level. However, it is not subject to international agreements, as explained below. Due to the unitary nature of the Kenyan government system, the regulatory framework for public procurement below the national level is more uniform than in Germany. Entities at the central government level, county governments and their entities, as well as municipalities and towns, are under the same national laws and regulations for their procurement (see 4.2.2).

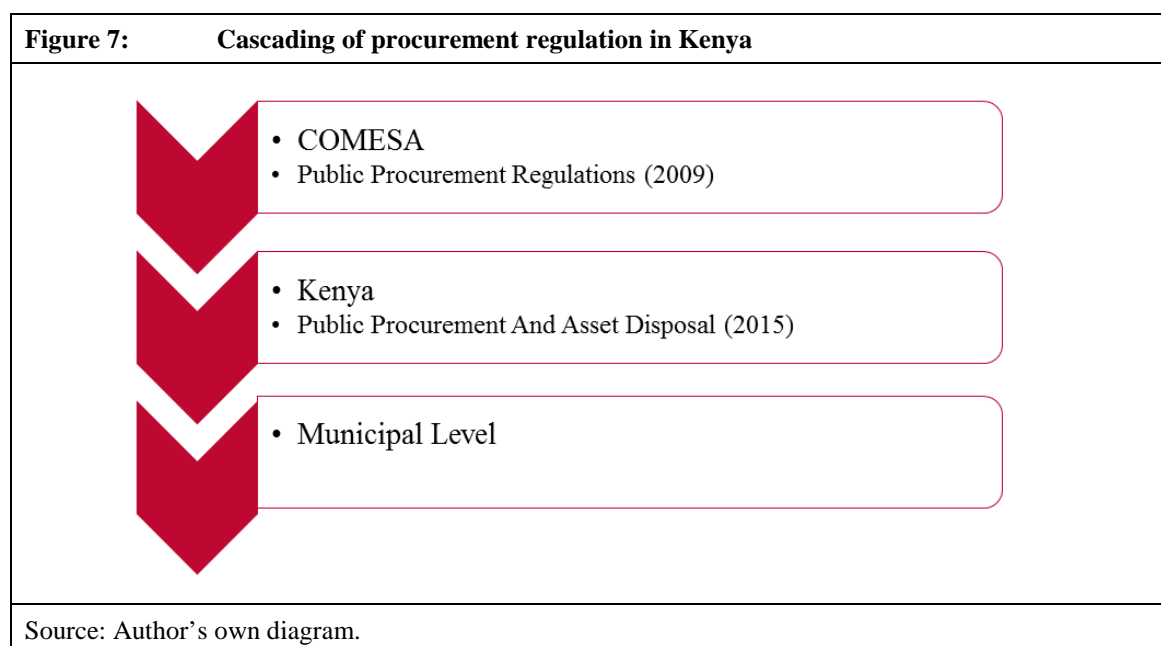
At the global level, Kenya is party to the WTO and has signed the ILO Convention 94. While a member of the WTO, Kenya is not a party of the Government Procurement Agreement (GPA) within the WTO framework. The 46 parties of the GPA are almost exclusively OECD countries, even though Article V of the revised Agreement of Government Procurement (AGP) of 2014 that resulted in the GPA,¹⁶ focuses on the situation of developing countries and grants them "special and differential treatment" (Revised Agreement on Government Procurement, 2012, Article V (1)). The reluctance of many developing countries to join the agreement is rooted in different sources; a short overview on the discussion is presented by Léon de Mariz et al. (2014, p. 9). Two of the main reasons discussed are that the necessary effort to implement the provisions of the agreement into national law and especially into practice may be seen as impracticable, and that further trade liberalisation could be to the disadvantage of the national economies. Additionally, opening the public procurement market for other, economically stronger, countries could complicate fostering the national economy through government contracts. Conclusively, the WTO is not considered within the regulatory framework for public procurement in Kenya. The ILO Convention 94 from 1964 could also exert influence on the design of procurement regulation (Labour Clauses (Public Contracts) Convention (No. 94), 1949). The scope and transposition of this convention aim at the procurement of work-contracts for the public sector. Its main provision is that working conditions for contracts with public authorities must be at least as beneficial as provisions for private contracts. Therefore, if national labour laws exceed the provisions of the convention, and if public authorities are bound to these

¹⁶ See 3.2.1 for a detailed overview on the development of the GPA.

laws (with is the situation in Kenya) there is no need to further address ILO Convention 94 regarding regulations on public procurement.

At the regional level, Kenya is a member in two regional economic communities, the East African Community (EAC) and the COMESA. The EAC Customs Union has only a limited role when it comes to regulations on public procurement, as the EAC Common Market Protocol only states that there shall be no discrimination against economic operators from partner countries to achieve “free competition in the field of public procurement” (Protocol on the establishment of the East African Community Common Market, 2009, Art. 35). This might change in the future, as there are voices arguing for a unification of procurement regulation among EAC Custom Union members (Trade Mark East Africa, 2015). But instead of further promoting intra-regional trade, especially with so called “sensitive goods” (East African Community Secretariat, 2010, p. 51f.), the focus of national procurement regulations of EAC member states is on protecting their respective national markets (Tamale, 2017). Based on this assessment, the EAC will not be considered within the multi-level regulatory governance system of Kenya. COMESA on the other hand, adopted regulations on public procurement in 2009 and its influence on national and sub-national procurement regulation will be analysed in the following section.

The diagram below highlights only those levels of the multi-level regulatory governance system that have an influence on public procurement regulations in Kenya, down to the municipal level.



4.2.1 SRPP regulation at the regional level: COMESA

Kenya is one of the founding members of the COMESA and joined its Free Trade Area in 2000. The central goal of the Free Trade Area is to establish a “comprehensive Regional Competition policy” (Karangizi, 2003, p. 2), as stated in the COMESA Treaty (Treaty Establishing the Common Market for Eastern and Southern Africa, 1994). All member states shall “harmonise or approximate their laws to the extent required for the proper

functioning of the Common Market” (Art. 4, 6 b) and “any practice which negates the objective of free and liberalised trade shall be prohibited” (Art. 55). Within this context, harmonisation and standardisation of procurement regulation and procedures are seen as necessary to reach this goal (Karangizi, 2003, p. 4) and have been gradually implemented within COMESA and its member states, taking the form of national procurement reforms.

Other reasons for a procurement reform within COMESA is the member states’ desire to improve the national procurement systems, to promote accountability and the ability to control donor-financed procurement (Karangizi, 2003, p. 4). Kenya struggled with the problem of parallel procurement structures due to donor-controlled regulations and procedures, too (Akech, 2006, p. 30). Regulations by international donors on procurement with aid-funds already influenced the procurement reform in other country contexts. Procurement reform became a condition for receiving financial support after the mid-1990s (Léon de Mariz et al., 2014, p. 49) and regulations for procurement with donor-funds still take precedence over COMESA regulations.¹⁷ But internal pressure by civil society and problems with corruption also gave rise to procurement reforms (Léon de Mariz et al., 2014, p. 51f.). These motivations for a procurement reform at the national level can be found in nearly all country contexts in Sub-Saharan Africa. However, the inclusion of public procurement as part of harmonisation within COMESA in order to promote intra-regional free trade, is exceptional for regional economic communities in Sub-Saharan Africa (Dube, Johannes, & Lewis, 2017, p. 454). Therefore, procurement reform in Kenya is promoted and influenced by the regional level. In Sub-Saharan Africa it is usually determined exclusively by the national level, apart from influences by donors.

Since 2001 COMESA has actively supported its member countries in the effort to harmonise their procurement (Schmidt, 2017, p. 206f.). The African Development Bank (AfDB) financed two projects of COMESA to reach this goal. The first project, to harmonise procurement rules and procedures, was the Public Procurement Reform Project (PPRP) from 2001 to 2004 (Karangizi, 2003, p. 2). Within the project period, the COMESA Procurement Directive was adopted by the Council of Ministers in 2003. It aimed at the adoption of common standards based on the UNCITRAL model law (Schmidt, 2017, p. 208). Although the implementation of this directive was optional, most member countries started a reform process of national procurement regulation based on the model law (Mampuzhasserli, 2012, ix), as did Kenya with its Public Procurement and Disposal Act of 2005. The second project was the Enhancing Procurement Reforms and Capacity Project (EPRCP), starting in 2006, which focused more on implementation and capacity building (Schmidt, 2017, p. 207). However, according to the AfDB’s own Evaluation Report, the effectiveness of these AfDB programmes was limited by inadequate funding and the rather short project periods (Mampuzhasserli, 2012, p. 7f.). Both projects did not include specifications on SRPP. A lack of resources and missing specifications for SRPP are also to be found in procurement reforms at national level and might unintentionally impede SRPP and other forms of SPP, by simply not including them.

COMESA adopted more detailed procurement regulations in 2009. While the regulations aim to establish minimal core values for public procurement, “competition and openness,

17 COMESA Public Procurement Regulations of 2009 explicitly exempt donor financed procurement from the regulations (COMESA Treaty, Art. 6(5)) (see also Schmidt, 2017, p. 211) and even state that donor regulations on procurement override those of COMESA (Art. 2(2)).

fairness, accountability, transparency and value for money” (Schmidt, 2017, p. 210), they also do not include any provisions to integrate sustainability objectives. However, they entail the reservation, that “[n]othing in these Regulations shall be construed as to prevent any Member State from adopting or maintaining measures” that are “necessary to protect human, animal or plant life or health” (Art. 2(10b)). They also include the protection of SMEs (Art. 2(10e)) and reservations for “goods, works or services of handicapped persons or philanthropic institutions or prison labour” (Art. 2(10d)) (COMESA Public Procurement Regulations, 2009).

This can be interpreted in a similar way to the cases of GPA and early EU regulations depicted above. Even though sustainability aspects are not directly mentioned, they are also not prohibited within the COMESA regulatory framework. In her analysis of the COMESA procurement regulations Schmidt also comes to this conclusion, stating that there are no additional references to secondary objectives (apart from Art. 2(10), but “there is also no prohibition of the application of secondary objectives through, for example, tender specifications, evaluation criteria or contract requirements” (Schmidt, 2017, p. 219). Also, the UNCITRAL model law, on which the regulations are based, “offers room for the application of socio-economic policies in nearly all phases of the procurement process” (Schmidt, 2017, p. 192).

Additionally, Kenya shows little interest in a comprehensive transposition of COMESA regulations on public procurement into national law. Mandatory provisions on the regional level that would enable regional competitive bidding have not been transposed into national law. Kenya simply did not set the respective thresholds, even though the country is required to do so by COMESA’s Public Procurement Regulation (Udeh, 2013, p. 101, Fn 64). Kenya is in general more reserved against competitive bidding than some other African countries such as Ghana, as it allows only for international competitive bidding¹⁸, “where there will not be effective competition unless foreign persons participate” (Williams-Elegbe, 2015, p. 17).

In conclusion, the COMESA Public Procurement Directive, at the regional level, demonstrates an overall flexibility regarding provisions at the national level. This leeway is utilised in Kenya’s national procurement regulation, as will be shown in the following section.

4.2.2 SRPP regulation at the national level

As there are no provisions against sustainability objectives in public procurement within the global or regional framework for Kenya, the country has considerable leeway for national policy formulation. Procurement reforms in general were already initiated in the 1990s, with the objective of “ensuring that the procurement laws were streamlined to conform to international procurement laws and standards” (Ngari, 2012, p. 6). The World Bank’s Country Procurement Assessment Report (CPAR) in 1997 can be seen as one of the starting points for procurement reform in Kenya. It highlighted the problem of inconsistent and even contradictory fragmented procurement regulation (Williams-Elegbe, 2015, p. 16). The first concise procurement regulations were established with the enactment of the Exchequer and Audit Regulations in 2001. Léon de Mariz et al. observed a push for procurement reform i.e. through a heavy critique of corruption by the civil society in Kenya, but also of Côte

¹⁸ See also Section 71 PPDA 2005.

d'Ivoire, Ghana and Uganda since the 2000s (2014, p. 52). However, COMESA had a significant influence on the drafting of overall public procurement regulation in Kenya. The "Era of Public Procurement Reform", as the Procurement Department of the University of Nairobi calls the years between 2001 and 2010, in an historic review of the evolution of public procurement in Kenya, was highly influenced by the projects and regulations by COMESA mentioned above (Mokaya, 2013).¹⁹ The 2001 regulations were rapidly followed by the Public Procurement and Disposal Act of 2005 (The Public Procurement and Disposal Act, 2005) that was repealed by the Public Procurement and Asset Disposal Act 2015 (PPDA) (Public Procurement and Asset Disposal Act [PPDA], 2015), which came into effect on 7 January 2016. Its enactment fulfils the constitutional obligation of Section 227 of The Constitution of Kenya (The Constitution of Kenya, 2010) and gives public procurement a sound legal basis that was missing before (Akech, 2006, p. 17).

As part of these ongoing reforms, aspects of SPP have been integrated into the regulatory framework at the national level. In contrast to the Act of 2005, the Act of 2015 includes "sustainable development and protection of the environment" (PPDA, Section 3) in its guiding principles. These general but non-specific principles for public procurement in Kenya are supported by mandatory as well as optional provisions to achieve domestic social goals. Regarding preferences and reservations, the PPDA allows for positive discrimination, diverging from the general principal of non-discriminatory procurement proceedings. Candidates for preferences or reservations in public procurement can be "persons or groups previously disadvantaged by unfair competition or discrimination", such as but not limited to "micro, small and medium enterprises" and "disadvantaged groups" (Section 157(4)). Thirty per cent of the annual procurement value of procurement entities shall be allocated to the youth, women and persons with disability (Section 157(10)). This is described as an "attempt to provide economic opportunities for disadvantage[d] groups through government contracts" (Churchill, 2016). A provision on the extent of the mandatory reservations had already been introduced in 2012 and the percentage covered was increased from ten to 30 in 2013 by a Presidential Directive issued by President Kenyatta. To back its implementation the Kenyan government even introduced the Access to Government Procurement Opportunities (AGPO) initiative, as a supportive measure, mainly to help and facilitate the target groups participating in government procurement (Access to Government Procurement Opportunities [AGPO], n.d.). Furthermore, the act also includes grounds for exclusion related to social objectives. Bidders that are "guilty of any serious violation of fair employment laws and practices" have to be excluded from bidding on public contracts (PPDA, Section 55(h)).

The integration of SRPP in the guiding principles is substantiated through a number of concrete provisions. Linking public expenditure to societal goals, such as the economic integration of local communities through the redistribution of funds, is in the process of being integrated into procurement regulation. In the upcoming regulation for the Act of 2015, the Draft Public Procurement and Asset Disposal Regulations (PPDR), "Community Participation" can be chosen as a specific procurement method (Draft Public Procurement and Asset Disposal Regulations [PPDR], 2016, Section 131)²⁰. This allows the procuring

19 The starting point of procurement reform in Sub-Saharan Africa can be set even earlier, with the African Public Procurement Conference at Abidjan, Côte d'Ivoire in 1998.

20 The final version was not accessible. The 2016 regulation replaces the Public Procurement and Disposal (Preference and Reservations) Regulations of 2011.

entity to give the local community the preferential right to the public contract and to deliver the procured works or goods itself (e.g. in the case of road construction or other infrastructure tenders). It opens the possibility not only to procure what is needed, but also to distribute public funds at the local level. According to the draft of the PPDR, procuring entities might choose this method if it contributes to “socio-economic objectives such as creation of employment” (PPDR, Section 131) and ensures that “the project has positive social outcomes with the community as its main beneficiary” (PPDR, Section 132).

The provisions on technical requirements in Section 60 of the Public Procurement and Asset Disposal Act (PPDA) entail a wide spectrum of applicable requirements that concern social and environmental objectives directly and indirectly. Technical requirements of procured goods and services shall “factor in the socio-economic impact of the item” (PPDA, Section 60(d)) and shall be “environment-friendly” (PPDA, Section 60(e)). Technical requirements may also be based on “national or international standards whichever is superior” (PPDA, Section 60(b)). As it might be debatable in which cases these requirements are applicable, it can be argued that this is an optional provision. However, at the initiation of the procurement process (PPDA, Section 73), the user department shall provide “environmental and social impact assessment reports” if applicable (PPDR Section 85(2c)), which might set the basis for this decision. The indefinite formulations in the technical requirement for public procurement, “factor in the socio-economic impact of the item” and “be environment-friendly” (PPDA, Section 60(d,e)), as well as the reference to international standards (Section 60(b)), potentially open the scope of the provision and make it applicable to the inclusion of domestic and international social and environmental objectives within public procurement procedures.

Although sustainable development and protection of the environment are part of the guiding principles of the PPDA and its regulation, there are only a few specific provisions in the Act to promote these objectives, such as extensive reservations for disadvantaged groups. However, the existing provisions are setting the basis for the integration of domestic and international sustainability objectives into procurement processes, by procuring entities as well as user departments, and enabling SRPP practices for national and consequently sub-national procurement processes.

4.3 Leeway and implementation of SRPP in Kenya

As specified above, procurement laws and regulations (as laid down in the PPDA 2015 and the PPDR 2016) are applicable to all levels of government. Counties, cities, municipalities and towns therefore have the same obligation to fulfil mandatory provisions, for example by reserving 30 per cent of government procurement for disadvantaged groups, based on Section 157 PPDA. They also have the same opportunity to integrate socio-economic and environmental considerations and objectives in their procurement processes.

There is, however, an implementation gap regarding the mandatory as well as the optional provisions for SRPP and SPP in general. Even mandatory domestic social objectives, such as reservations for disadvantaged groups, are not fully adhered to. Muraguri (2013) analysed their uptake for 70 state-owned enterprises in Nairobi. He shows that those public procurement entities have not implemented the preferences and reservations for youth and other disadvantaged groups (Muraguri, 2013, p. 36). Assessments of compliance with

preferences and reservations in accordance with Section 157 PPDR in the annual reports of the Public Procurement Overdraft Authority (PPOA) indicate that a clear majority of procuring entities do not include any, or only a portion, of the minimal 30 per cent as reservations in their procurement plans (PPOA, 2016, p. 26). Both levels of government, central and county, allotted around 21 per cent for these preferences (Public Procurement Overdraft Authority [PPOA], 2016, p. 50), thus missing the mandatory target.

While mandatory targets for SRPP are missed to a large extent, the optional environmental aspects in public procurement are even less likely to be implemented and to be limited to pilot projects. However, over the years, there seems to be a nascent tendency towards the integration of environmental objectives in public procurement decisions. The use of optional provisions in procurement regulations, not only for social but also environmental objectives in Kenya, is an indicator of a broadening of the use of strategic objectives in public procurement. Many relatively recent studies that deal with SPP focus on analysing GPP by central government procurement entities and those of parastatals, such as green procurement by Kenya Airways Limited (Mudanya, 2013), the Kenya Pipeline Company (Nasiche & Ngugi, 2014), and the Water Resources Management Authority (Telewa, 2014). These pilot projects are among the first approaches to integrate environmental considerations into public procurement decisions. Stoffel et al. highlight that this uptake of environmental considerations in public procurement is a rather new development, which can also be observed in many other countries in SAA (2019).

There has been some research on the reasons for the general lack of implementation of procurement regulations in Kenya. Some studies are even looking directly into reasons for the implementation gap regarding SRPP. The analysis below shows that many studies converge on two main reasons: a lack of knowledge and capacity among procuring entities and procurement officers. The regulations themselves cannot be identified as having a negative impact on implementation. Other causes mentioned, such as a lack of transparency and failure to exercise procurement processes according to planning procedures, might be partly based on the two main reasons as well. While a lack of integrity and transparency, and neglect of regulations may be rooted in corruption, capacity building and training appear to be vital to good conduct in public procurement. Only sufficiently trained staff can be expected to exercise a strategic view on public procurement that includes SRPP and SPP in general. Until 2016, the PPOA offered trainings to tender committees as well as to disadvantaged groups to counteract the shortcomings. Since then, the National Treasury has provided technical assistance on public procurement (PPOA, 2016, p. 3). These efforts might not be sufficient to ensure the required capacity building. This is especially the case, if there are no structures or training in place within the procuring entity that require or promote good conduct and the adherence to regulations. To identify potential structural constraints and shortcoming, further research is needed on the organisational shortcomings of procuring entities at all levels.

In the case of state-owned enterprises failing to adhere to mandatory preferences and regulations relating to SRPP, Muraguri describes organisational challenges, such as a lack of strategic measures to improve the competency of the staff, as having a negative effect on the implementation of reservations in tenders (2013, p. 36). Ngari (2012) analyses the widespread non-compliance of procurement regulation in general by parastatals. The reasons identified in the study, range from misconduct (such as procurement-related abuse of power by ministries) to a simple lack of awareness of regulations (Ngari, 2012, p. 7). The

latter seems to apply particularly to officials at the local level, as Ngari describes it: “On the provincial, district and local authority levels, many Purchasing Officers [...] were not aware of these provisions and did not appear to apply them” (2012, p. 7).

Considerations, that this lack of knowledge and implementation of the regulations might be rooted within the regulations themselves, cannot be confirmed. The need for regulatory changes appears not to be crucial. Even though Muraguri criticises the regulations for procurement as being “not clear” (2013, p. 37), he does not back up his argument. In contrast, the regulatory framework for public procurement in Kenya, as depicted in the overview in Section 4.2.2, entails very precise provisions, especially on social objectives. In 2006, an assessment by the PPOA of the procurement system in Kenya evaluated the legislative and regulatory framework. It concluded it to be relatively strong and identified the biggest lack in the fields of integrity and transparency, institutional framework and management capacity, procurement operations and market practices (PPOA, 2007, p. 8). Additionally, non-compliance with procuring planning procedures as diagnosed in the PPOA assessment (PPOA, 2007, p. 14), might further hinder strategic public procurement, and with it SRPP in general.

Results of a study of the county level by the Africa Centre for Open Governance (2015) mirror the challenges identified by the PPOA. Basic principles for public procurement, “value for money, ethical standards, competition, transparency and accountability” (Africa Centre for Open Governance, 2015, p. 18), are the core challenges for public procurement in the three analysed Kenyan counties. As causes for underperformance in the implementation of public procurement according to laws and regulations, the study refers to five problems, all related to organisational and capacity-building challenges and also to non-ethical behaviour, in the sense of misconduct: “Inadequate qualified procurement professionals”, “[i]nadequate procurement planning”, “[l]ack of pre-qualification of suppliers”, problems in “following due process” and “[p]oor inventory management”, (Africa Centre for Open Governance, 2015, p. 20f.).

The four challenges subsequently described are primarily connected to the first one: inadequately qualified and/or overburdened procurement professionals are key to many aspects of the four other challenges for effective public procurement practices in Kenya at the county level, and probably beyond.

Other studies on ethical procurement support the analysis above in concrete cases and find a lack of training the more profound reason for missing implementation, clearly more relevant than misconduct. Their results indicate that the widespread failure to initiate procurement procedures according to regulations might not only be due to intentional misconduct and corruption, but also to a lack of communication and capacity building regarding public procurement principles and practices. Ngugi and Mugo analyse government procurement in the healthcare sector and find a lack of transparency, while procurement procedures were generally based on ethical behaviour (2012, p. 2332). A study on the procurement committees of secondary schools in Kisii County, identifies a “general lack of sufficient information about the legal framework, principles, procedures and processes” as the main problem (Onsongo, Okioga, Otieno, & Mongare, 2012, p. 9189). Ayoyi and Mukoswa also call for a “procurement training policy” in their study on the ethical dimension of public procurement, analysing challenges of corruption and misconduct (2015, p. 3). These are no favourable conditions for SRPP and any strategic

procurement. SRPP is dependent on the awareness of regulations in force, especially the mandatory provisions but also the legal options available to procuring entities.

Research and reports about local-level public procurement are scarce and therefore it is not possible to determine the extent to which procuring entities at the different levels of government use the potential leeway to “factor in the socio-economic impact” (PPDA, Section 60(d)). Specifically, to analyse implementation by local governments and their procuring entities is even less feasible. While there are some sources on public procurement on the sub-central level, there is no data and research available on how the theoretical leeway for social objectives in public procurement is used by municipalities and local governments.

It can be concluded that there are no restrictions on SRPP practices at any levels of Kenya’s multi-dimensional regulatory framework for public procurement. Counties and local governments in general have legal leeway to implement SRPP, through integrating social objectives in the pre-procurement phase, and making them part of the procurement decisions. The cited cases at the national level show a rising awareness of public procurement as a tool to promote sustainable development within Kenya. However, there is a lack of implementation of ethical procurement, optional green procurement and fulfilment of the goals set for mandatory provisions on domestic social objectives.

5 Conclusion: “mind the gap” between regulation and implementation of SRPP

The analysis of the two case studies, Germany and Kenya, provides the following main conclusions:

1. In both countries, levels of the multi-level governance framework above the national level have an impact on national and sub-national regulations that affect the leeway of sub-national entities, such as municipalities and counties, when implementing SRPP.
2. The current state of regulations in both cases gives national and sub-national procuring entities leeway for SRPP and makes some aspects of SRPP even mandatory for some entities.
3. Regional economic communities do not necessarily restrict the policy space for SRPP. While the COMESA does not explicitly hinder SRPP, regional economic communities can also promote its implementation, as the example of the EU shows.
4. In order to incorporate social and environmental concerns, the restrictive UNCITRAL model that so far has guided public procurement regulations in the SSA needs to be revisited. The reformed EU procurement directives might be a good orientation for future reforms.
5. In the case of Germany and the EU, a policy cycle can be identified where municipal frontrunners can trigger court rulings and legal reforms. Similar developments seem to be possible in Kenya, if the model is adapted to the specific context.

6. International regulations for public procurement only affect Germany, as Kenya is not party to the GPA. There is a (disputed) leeway for sustainability objectives for national governments in the GPA. In addition, there is a development towards the integration of those objectives into the agreement.
7. Both country cases reveal an implementation gap when it comes to SRPP. This gap is mainly triggered by organisational factors, such as lacking capacity and inefficient PP structures. International and national regulations seem to be less important.

Comparing the two multi-level regulatory frameworks shows how important the specific regulations on the supra-national levels can be. Without the exemptions for social and environmental considerations in national procurement regulation of COMESA member states SRPP would not be possible. The situation is similar to that of the EU before the reforms of the directives on procurement in 2004 and 2014. Germany's and Kenya's respective regional economic communities have the ability to define the setting of their regulatory framework. The analysis shows that both the EU and COMESA leave the leeway necessary for the integration of social (and environmental) objectives in national procurement regulations and practices. The EU made the integration of regulations that enable SRPP at least an option at the national and sub-national level of its member states. The COMESA does not promote SRPP but leaves its members the option to integrate it in national law without violating the agreement on the harmonisation of public procurement.

Regional economic communities do not necessarily hinder ambitious SRPP regulations; they can also have a role in promoting them. The EU Directives on public procurement have become more comprehensive on the issue over time. There, SPP has found its way into regulations and even sets the agenda for national regulations for public procurement. For Kenya, the national exemptions within the regulatory framework of COMESA enable the country to integrate sustainability objectives. In contrast to the case of the EU, there is no positive regulation regarding SRPP or SPP in general, and the policy space for SRPP on the national and sub-national levels is based on national exemptions for societal goals in the COMESA procurement regulation.

It has to be noted that regional integration can be a push factor for harmonisation of procurement procedures, with the processes at the European Union described above being a case in point. However, regional integration efforts in Africa have had, apart from COMESA and the WAEMU, no significant impact on procurement regulation. COMESA has started a process to harmonise procurement rules and procedures to increase intra-regional trade, but national exceptions, widespread reservations and preferences for national bidders have potential adverse effects on this goal. The trend within the EU specifically to integrate sustainability aspects in public procurement, at least as optional provisions, cannot be observed within COMESA or procurement reform in Sub-Saharan Africa (SSA) in general. The COMESA Public Procurement Regulations leave room for policy leeway on the national level. First, to introduce regulations in favour of SRPP into national and sub-national regulation and, second, to implement sustainability objectives into procurement procedures on this basis. This general leeway was used in reforms of Kenya's procurement act to introduce regulations on positive discrimination in the form of affirmative actions and reservations of public tenders to reach societal goals through public procurement. This is the basis on which public entities such as state corporations, counties and municipalities integrate sustainability objectives into their procurement processes.

Based on the analysis of the multi-level regulatory framework of Kenya, some observations on the future trend of SRPP at the regional level in SSA are possible. The dominant role of the UNCITRAL model law in Kenya, and generally in SSA, might have been a hindrance for the integration of sustainability considerations into public procurement regulation. A new orientation to other concepts of procurement regulation, such as the EU, and/or a reform of the UNCITRAL law that includes sustainability aspects, seems to be necessary for a widespread change in procurement regulations in SSA. There is no development visible to establish sustainability objectives in general as a genuine part of public procurement regulation on the continent, apart from frontrunners. The UNCITRAL model procurement law, which served as the foundation of procurement reforms in SSA, does not entail suggestions for regulations on sustainability objectives either. Countries in the Global South that follow the suggestions of the model law in their procurement reforms are not encouraged to integrate provisions on sustainability objectives into their procurement laws and regulations. The current orientation of the sparse procurement harmonisation within COMESA and the negligence of the topic in the UNCITRAL law might pose a challenge for SRPP. Up to now, harmonisation of public procurement in COMESA and first attempts in other regional economic communities in SSA focus on competition-oriented objectives and general principles of public procurement, such as fair competition and transparency. Not mentioning sustainability considerations can lead to uncertainty over their possible integration into national laws and their implementation in procurement practices, as was the case with the EU Directives before the reforms in 2004 and 2014 and still is the case with the GPA. In contrast to the UNCITRAL model law, EU procurement directives may make for a better future orientation for procurement regulation, in favour of integrating social and ecological objectives in public procurement. Telewa suggests that the Kenyan government mirrors the EU procurement directives in order to enable the integration of strategic goals in public procurement (Telewa, 2014, p. 12).

Further research should determine if a transfer of the policy cycle in the EU, where municipal frontrunners initiate the adaptation of procurement regulation through their procurement practices, is promising within African procurement reform, for example in the case of Kenya. Over time, it might be possible that those practices by frontrunner municipalities or other sub-national public entities, such as counties, influence the regulations at the regional level for SRPP and other forms of SPP, as occurred through the actions of municipal and other frontrunners in the EU.

Transformative research, in cooperation with municipalities and counties, could promote the use of existing political leeway when it comes to the integration of sustainability objectives in procurement procedures and trigger adjustments of regulations to clarify the legality of linking public procurement to domestic and international social objectives. However, in both of the country case studies regulatory issues appear to be secondary reasons for the implementation gap, regarding the translation of policy leeway for SRPP into practice.

When assessing the effects on SRPP of the international levels within the multi-level regulatory framework for public procurement, it has to be concluded that this is only of relevance to the German case. The recent enabling of SRPP regulation and practice in Germany is based on a shift away from the lowest price as a guarantee for fair competition and equal treatment, to the integration of SRPP in procurement regulation at the EU level and changes in the interpretation of GPA provisions. Within the framework of the GPA at the

WTO, provisions that have been interpreted as potential barriers against SRPP in the past have been reassessed by experts and could even be entirely changed in favour of SRPP regulations and practices in the future. Up to now, the GPA has been the standard for procurement regulations for all its parties, but it leaves enough leeway for regional and national policies to include sustainability objectives in procurement regulation, and there has been a tendency for some actors in the WTO context to fully integrate sustainable public procurement into the GPA. As most developing countries are not party to the GPA, changes of this agreement will not directly affect them. However, clarification of sustainability objectives in public procurement in international regulations on trade within the WTO framework would be preferable, to ensure compliance with national regulations on and practice of public procurement and therefore making sustainability in procurement a prerogative, especially as social objectives are still not explicitly mentioned in the GPA. The current trend in the discussion on the adjustment of the GPA, as summarised in section 3.2.1, points towards an integration of social objectives as an option for public procurement practices.

In the analysis of how both Germany and Kenya use the existing leeway for SRPP, some similarities are evident. While this report clearly shows that sustainability objectives within public procurement in both countries are not constricted at any level of their respective multi-dimensional regulatory frameworks for public procurement, when assessing how public entities make use of the leeway they have, there is a lack of implementation in Germany and Kenya alike. While there are differences in how the two countries regulate SRPP, optional as well as mandatory regulations for SRPP have not led to an overall implementation of SRPP practices. In Kenya, the mandatory quotas for reservations in public procurement due to social considerations are not met; similarly, the mandatory provisions on SRPP along international value chains in some German states are only sparsely implemented. In addition, the reasons for the lack of integration of social aspects into public procurement in both cases are comparable.

The implementation of SRPP is limited in both countries for similar reasons. Organisational factors, such as capacity building and the structuring of public procurement, appear to be more important to the integration of sustainability objectives, when compared to international and national regulations. Capacity building is a shared challenge for the development of both public procurement in general and SPP in particular. Capacity building here has to be understood as teaching and training of procurement officers and as the “building up” of staffing and supportive structures (at the local, sub-national and national level). The ongoing process of building up procurement offices and training staff in Kenya and other countries in Sub-Saharan Africa during procurement reform could be used to strengthen capabilities to include sustainable procurement practices as well. In general, attempts to professionalise public procurement are an opportunity also to integrate strategic objectives, such as social and environmental considerations.

The different political systems in Germany and Kenya, and the degree of decentralisation or centralisation they present, influence SRPP implementation. While decentralisation might have the benefit of bringing the planning processes and administrative decisions closer to the people affected by them, it leads also to an increase in procurement entities, which need staff and resources. As in Germany, Kenya needs to increase its efforts at capacity building and support for procuring entities and political decision makers at all levels of government as well. With the ongoing process of devolution and the increase of procurement spending at the sub-national level, Kenya faces a similar challenge as

Germany, with its already highly decentralised procurement system. Processes of decentralisation and centralisation of administrative tasks depend on societal discourses. There are good reasons for movement in both directions; in the two country case studies, there are hybrid forms in place that are anchored in their constitutions. Apart from capacity building for every procuring entity, partial centralisation, by leaving some procurement decisions to higher levels of government, predominantly in Kenya, or through pooling of procurement activities in purchasing groups, as regularly practised in Germany, may reduce pressure on the lower levels. If decentralisation is politically intended, the procuring entities have to be provided with the capacities and financial resources they need to successfully and efficiently fulfil their tasks in general, and specifically with regard to SRPP. Be it through capacity building inside the respective administrative unit or in the form of supportive measures, such as support through competence centres or NGOs etc.

In both countries, supporting measures for the implementation of procurement regulations, including SRPP to different degrees, are present. Examples are public advisory services for consultancy and capacity building and the provision of official guidelines. Even though the PPOA in Kenya planned to integrate provisions on sustainability aspects of procurement in a more systematic way into regulations (Roos, 2013, p. 10f.), and Germany established a national competence centre for sustainable procurement (Kompetenzstelle für nachhaltige Beschaffung, KNB), supportive measures for any kind of strategic public procurement are still marginal. While in Germany, regional as well as national supportive measures for procurement include support for SRPP, in Kenya the focus is on ethical procurement and good conduct. The extension of such supportive measures in the form of procurement authorities and capacity-building programmes in many countries in Sub-Saharan Africa might play an important role in the integration of SRPP in the future, if it is integrated into such frameworks. Perera et al. also mention non-governmental organisations and voluntary procurement networks as important actors (2007, p. 18). These are better developed in Germany, but are gaining importance in SSA countries, e.g. South Africa and Ghana, and might also play a role in Kenya. Further (comparative) research is needed, in order to determine the possible extent and the most promising concepts and methods of such supportive measures.

Currently, all levels of the multi-level regulatory governance systems of Germany and Kenya are enabling or even promoting SRPP. However, the implementation gap, including the mandatory provisions in Kenya and in some German states, shows that the regulatory framework alone is not a sufficient precondition for SRPP. Even when there is policy space, the success and future development of SRPP still depends on the ability to initiate organisational change on all levels of government to facilitate its implementation. In the end, every regulation is only as good as the ability to implement it in practice by the procuring entities within different public bodies on all levels of government, including counties, municipalities and local governments. For both country cases, capacity building and other organisational matters have been shown to be more important for the implementation of SRPP than the overall regulatory framework, as long as the latter is not explicitly prohibiting SRPP. Based on the diversity of the two case studies regarding the expression of the regulations for procurement at the different levels of the multi-level regulatory framework, and the differences in their political systems, one can assume that similar challenges and policy considerations to tackle those challenges may apply also to other countries.

Regarding the effects of regional integration on SRPP, it can be concluded that policy space to introduce SRPP regulation cannot be taken for granted. Regional integration that ignores and overrules social and sustainability considerations, might restrict SRPP practices, as was the case within the EU before the 2000s. Therefore, to promote SRPP practices the multi-level regulatory framework above the national level cannot be ignored. Because of its increasing international dimension, procurement law is often characterised by a patchwork structure, a product of missing harmonisation and different legal foundations in multi-level regulatory governance. On the one hand, SRPP appears to be adding to the complexity of public procurement regulation and processes and it is therefore often met with scrutiny. On the other hand, this situation allows for frontrunners, at the local as well as the national level, to implement regulations and procurement procedures and to integrate sustainability objectives.

The results of this report also suggest that policy transfer and policy learning within national, regional and especially international contexts might be more fruitful than often assumed. The regulatory framework is not the only and often not the most important factor in enabling or hindering SRPP. International examples, such as the comparison of regulatory frameworks in two countries that sheds light on national situations from a different angle might inspire political actions and SRPP practices that reach beyond nationally and regionally established practices.

6 Summary, policy considerations and further research needs

Despite the regulatory leeway, and after considerable reforms of procurement law and regulations across the multi-level regulatory framework, implementation of SRPP is still rather low in Germany and Kenya alike. One challenge shared by both countries is the lack of capacity in public bodies to facilitate the use of SRPP within the scope of optional provisions, and even in the case of mandatory ones. This capacity gap is especially pronounced at the sub-national level. There are other issues, in which joint learning may be promising. One of these issues is the most suitable mix of centralised and decentralised administrative structures. While a highly decentralised procurement system may worsen the “capacity gap”, a highly centralised system will lead to decisions too far from the concrete needs of the users for goods and services in the public sector. Both Germany and Kenya have to find a balance between decentralisation of procurement and fruitful cooperation of procuring entities.

In light of the analysis above, the following conclusions can contribute to the effective uptake of SRPP practices at the national level:

- Even though Germany already has advanced structures for capacity building in place and provides supportive measures for public procurement, the focus on sustainability is still weak. A better overview and coordination of public procurement at the federal level, as can be found in more centralised cases, such as Kenya, could help in setting and reaching goals for SRPP implementation. Stronger support of municipal actors in terms of provision of information on the topic and targeted additional capacity building could help to disburden municipalities and increase effective implementation of SRPP practices.
- Kenya, after a quarter of public procurement has been shifted to the county level, is still in the process of establishing structures and services for capacity building. Here, the

ongoing process of building up procurement offices and training staff for the general adaptation of procurement reform could be used to strengthen capabilities to include sustainable procurement practices as well. This could be an opportunity to integrate further social objectives into public procurement. Using the professionalisation of public procurement to push also for the integration of SRPP practices, is also a promising path for OECD countries, such as Germany.

- All of the above can be facilitated by strengthening supportive measures, such as the establishment of national and local consulting structures, guidelines and handbooks, and strengthening the role of NGOs at regional, national and sub-national levels. More coordinated consulting, capacity building, and advocacy for SRPP practices can support municipalities and other public entities in utilising their policy leeway in more decentralised and more centralised political systems alike.

As regards the regional level of the multi-level regulatory framework, the comparison of the two countries suggests that a pro-active stance on SRPP and SPP at the regional level, as developed within the EU, might support SRPP practices, even without introducing mandatory provision.:

- Taking the latest EU reforms as a reference, COMESA and other regional economic communities might further encourage and enable member states to reach their economic, ecological and social goals through public procurement. A proactive integration of SRPP at the regional level of the multi-level regulatory framework for public procurement sends a clear message about existing leeway to all public entities at the different governance levels, which helps to raise awareness and to strengthen SRPP practices.
- Additionally, procurement reforms within regional economic communities, as well as within the WTOs GPA, should proactively integrate the issue of SRPP in order to avoid potential conflicts with national and subnational efforts to enable and integrate SRPP regulation and practices. Efforts to strengthen international and regional trade and economic growth through public procurement can be combined with efforts to strengthen sustainability. The leeway of national governments to include social and environmental objectives into procurement practices can be seen as an enabling factor. The example of the EU shows that such positive linkages can also be mobilised at the supra-national level. Harmonisation of public procurement is not necessarily in conflict with sustainability objectives, if they are accounted for.

At the lower end of the multi-level regulatory framework, sub-national entities, such as counties in the case of Kenya and municipalities in Germany, have an important role in SRPP implementation. This is particularly the case in a decentralised system such as that of Germany. Their engagement with the topic might also be a potential transformer towards SPP in more centralistic political settings, such as Kenya, especially with its ongoing process of devolution and decentralisation.

- One possible way for sub-national actors in Kenya to contribute to reforming the current orientation of the COMESA and other regional economic communities, is to act as frontrunners. In Europe, the display and diffusion of municipal SRPP practices inspired others, triggered regulatory changes and made evident the need for organisational changes. Frontrunners at all political levels can potentially influence the direction and speed of SRPP integration into procurement practice and regulation.

- The practice of piloting procurement processes at the local level, together with research and capacity building, for example, can act as a catalyst and supports the transfer of SRPP practices through supportive measures by processes of diffusion.

Even if the concept of SPP has been on the international policy agenda for several decades, implementation is still under-researched. This is more so in the case of SRPP, compared to GPP, and more so in the case of public procurement in the Global South, compared to the Global North. Some topics for further transformative research are as follows:

- Is the transition towards SRPP in the Global North conducive to more inclusive development patterns in the Global South or should negative effects to be expected? The concern that more demanding criteria redirect global supply chains towards more developed countries is one of the main reasons for the conflict over sustainable procurement practices within the United Nations (Lund-Thomson & Costa, 2011, p. 69)
- How are local and regional value chains targeted at public procurement in the Global South organised? How many and what kind of goods and services are sourced locally, and what comes in through intra-regional trade? How are these value chains affected by public procurement rules and regulations?
- How can joint learning processes be made effective to improve not only performance but also common understanding and communication between procuring entities? For instance, Kenya might learn, from Germany's experience of a highly decentralised procurement system, about the positive and negative aspects of coping mechanisms, such as unifying procurement of specific items in central procuring units in municipalities or purchasing groups among municipalities. How effective are supportive measures for the implementation of SRPP?
- Is it possible to come to a common understanding of sustainability objectives for public procurement in the Global North and South? This might increase the possible influence of public procurement on supply chains and value creation.

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