



# **Pushing the Boundaries of the Social: Private Agri-food Standards and the Governance of Fair Trade in European Public Procurement**

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**Abstract.** This article examines how fair trade and associated private standards are integrated into European public procurement. Procurement law is guided by principles of equity, non-discrimination, and transparency; one consequence is that legal obstacles exist to fair trade being privileged within public purchasing. Taking an agency-based approach, evidence from Wales reveals how fair trade's passage into procurement practice is negotiated and legal risk framed by different actors. This process exposes contestations over values that reflect wider dynamics between global civil society activism, public management bureaucracies, and neo-liberal rationales. Focusing on processes of governability, it is argued that there is a need to keep agency, power and knowledge in view within the dynamics of local transformation, rather homogenizing these dimensions as part of a technical process. Pushing the boundaries of the social in public procurement reveals how practices and knowledge on ethical consumption enter into a new governance arena within the global agri-food system.

## **Introduction**

Public procurement involves vast government expenditure and can be a powerful vehicle to enhance sustainability goals (Morgan, 2008; Arrowsmith, 2009; Le Velly, 2012; McMurtry et al., 2013). European social movement organizations (SMOs) promoting fair trade recognize this potential: 'contracting authorities have a significant role in stimulating socially-conscious markets, demonstrating socially responsible governance and setting the example for citizens' (EFTA, 2010a, p. 4). To this end, fair-trade products are purchased by public authorities, from institutions that include the European Parliament and United Kingdom (UK) House of Commons to schools, leisure facilities and offices run by local authorities (ICLEI, 2006; Fairtrade Foundation, 2007; EFTA, 2010b).

Nevertheless, incorporating fair trade and associated private standards into public procurement is not straightforward: a public procurer cannot simply decide to order a fair-trade certified product and proceed. Reasons why obstacles are experienced

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will be elaborated and relate, first, to the status of fair trade as a social consideration in public procurement, which generates legal ambiguity and policy controversy. Second, the obstacles relate to the fact that public procurers cannot privilege specific ethical trade labels/certification<sup>1</sup> if non-certified products that meet similar sustainable trade standards are precluded from access to the contract (EC, 2010a). These issues associated with procurement law raise broader concerns related to the motivation of public actors in purchasing products associated with civil society activism. In this respect, fair trade represents a minor area of spending within public budgets and the significance imputed to it by SMOs is not self-evident to procurement professionals, nevertheless it has gained a place within sustainable procurement. Having emerged from a different epistemic community, the process of incorporating fair trade is part of knowledge in the making, generated through transactions based on actors' agency (Knorr Cetina in Arce and Fisher, 2007).

To consider this topic, the article is guided by the following questions: first, how does public procurement in Europe incorporate a social movement to promote sustainability goals through fair trade? Secondly, as signifiers of quality, how and to what extent do private standards for fair trade achieve legitimacy within European procurement law and decision-making? Third, what issues does the example of fair trade in public procurement raise for an understanding of contemporary use of private standards in public governance?

Focusing on fair trade within public procurement helps reveal how practices and knowledge on ethical consumption enter into a new governance<sup>2</sup> arena within the global agri-food system. To do so, the article takes an agency-based approach (Arce and Long, 2007) to capture the role played by procurement actors in legitimizing the incorporation of private standards within procurement practice. Loconto and Busch (2010) argue that it is through the entanglement of standards, intermediaries and technologies into supply chains that forms of self-governance emerge. Strength of an agency-based approach is that it captures how private standards are framed and contested through actors' room for manoeuvre (Clay and Schaffer, 1984) in the generation of new practices within public governance. Published data examining fair trade in public procurement is limited; an understanding of the political process of negotiating values for fair trade within procurement functions, i.e. of incorporating standards and of managing associated risk, contributes to studies that demonstrate how the dynamics of standardization work, particularly at intersections between global, national, and local configurations of governing (Higgins and Lerner, 2010).

Methodologically, the discussion combines secondary analysis on procurement issues within the European Union (EU) and central UK government with primary research on the public sector in Wales, a devolved region of the UK. Methods of data collection include 25 semi-structured interviews with representatives of the UK fair-trade movement, procurement managers, and local authority sustainability and catering managers (in 2006, 2009 and 2010).<sup>3</sup> In addition a survey was conducted through telephone interviews with catering and/or procurement managers in 19 of 22 Welsh local authorities and one other public authority, the Welsh Government (2010). The survey identified three case studies for further analysis: Carmarthenshire County Council, Cardiff Council, and Welsh Government. Data from interviews is coupled with participant observation undertaken within Fisher's role as Senior Project Manager for Sustainable Procurement in the Welsh Government (2005–2008) with responsibility for fair trade (Fisher, 2012).

We turn to introduce the theoretical orientation of the article; this is followed by sections on private standards, fair trade in European procurement law and policy, UK government guidance on fair trade, and empirical data on public procurement in Wales.

### **Private Standards and Public Governance**

Private standards constitute a form of non-state regulation within the global agri-food sector (Henson and Reardon, 2005; Reed, 2012). Put forward by corporate and non-governmental actors, they have evolved out of state regulatory controls and in response to consumer concerns about food safety, quality, and production conditions (Henson and Humphrey, 2010). As such private standards perform two key functions: product differentiation and risk management (*ibid.*). They are part of a wider 'tripartite standards regime' (Loconto and Busch, 2010, p. 507) that includes standard setting, certification and accreditation, and reflects evolving governance processes in which state-based systems have shifted to networks of regulation that incorporate state, corporate, and non-governmental actors (Giovannucci and Ponte, 2005). These configurations permit a new modality of voluntary regulation intended to build consensus across different actors and their interests, as technical agreements central to the smooth operation of markets are negotiated. This raises important issues regarding what takes place as different actors' interests come together around these technical agreements, and whether or how these interests change through time, across contexts, and according to scale.

Over the last two decades there has been substantial debate about the part standards play within wider processes of change in agri-food governance (e.g. Busch and Bain, 2004; Hatanaka et al., 2005; Henson and Reardon, 2005; Henson and Humphrey, 2010; Loconto and Busch, 2010; Fuchs et al., 2011; Tallontire et al., 2011). Far from being straightforward technical concerns, it is argued that standards simultaneously reflect and change social relationships and power dynamics, with diverse consequences for different actors (Hatanaka et al., 2005). These processes raise questions over how standards have become significant mechanisms for governance (Higgins and Larner, 2010), linked to the issue of how non-state regulation through standards transforms the public and private spaces within which social relations are enacted. Considering the relationships of standards to socio-political change, recent debates have focused on issues of democracy, legitimacy, inclusion, and sustainability (Fuchs et al., 2011; Henson, 2011). Discussions raise positive and negative aspects about quality standards, with potential for greater stakeholder engagement in regulatory mechanisms (O'Rourke, 2006) set against concerns over power dynamics favouring the private sector (Busch and Bain, 2004).

Exploring the dynamics of processes of standardization, post-structural studies have drawn on Foucault (e.g. 1991) to consider how standards act as technologies for governing conduct at a distance (see Higgins and Larner, 2010). When linked to wider organizational and social rationalities, these processes of governmentality are held to transform the domains of governance through which technologies are constituted. Such studies underline how standards reshape governance rationalities and wider political economies in both specific and contingent ways. Within broader discussions on neoliberalism, a focus on governmentality has permitted analyses of how techniques form part of assemblages in which a 'mobile calculative technique of governing can be decontextualised... and recontextualised in mutually consti-

tutive and contingent relationships' (Ong, 2006, p. 13). This perspective has value for understanding commonalities in governance dynamics across diverse organizational contexts; however, a common criticism is that it overemphasizes the power of formal organizational rationalities (Arce and Long, 2007; Higgins and Larner, 2010).

Arce and Long (2007) make a conceptual shift from governmentality to governability: in so doing they reject the idea that the state and other institutions simply impose on people's subjectivity and actions. Instead they argue that governability places greater weight on the dynamic of local transformations generated by actors bringing together different interests, resources, values and knowledge to shape political and organizational groupings, interests and ideologies. This permits elucidation of the social in processes of governance, rather than seeing the social or cultural field as a vagary unable to shape the abstraction, movement and contextualisation of global forms (e.g. Ong, 2006). What constitutes the social for Arce and Long remains abstract; however, in our view a strength of this orientation is that it permits actors agency to remain conceptually visible.

Part of the challenge then becomes the need to delineate how governance encounters can generate contradictions, ambivalence and discord in ideas, values and expertise, and not simply harmonious negotiation. This is different from Miller et al.'s position (2010, p. 26), in which 'calculative expertise' is a means through which the 'linking up and mixing up of so many actors, agents, and aspirations is achieved'. They argue that this enables a reconfiguration of processes of governing in ways that attenuate or break down conventional dichotomies such as state versus market or science versus economy. We agree with the notion of dichotomies breaking down but there is a need to take into account the politics of processes in which different knowledge and rationales come together and rather than being 'technically homogenized' through calculative expertise are situated in an edgy relationship, as actors seek to transform institutional practice.

Strathern (2004) reminds us of the need to question how knowledge is transmitted from one community to another: what happens to knowledge about fair trade when it enters new institutional contexts and what can we infer about procurement communities from knowledge on its travels? How do different understandings of trade justice become drawn into negotiations over the legality of fair trade and private standards (ethical trade labels/certification) in procurement? These questions point to a shift in the semiotics of fair trade: Goodman (2004) has argued that fair-trade commoditization processes incorporate morally charged links between fair-trade producers and consumers that are forged semiotically through discursive and visual narratives that are part of a 'political ecological imaginary' (*ibid.*, p. 892). In public procurement the semiotics of fair trade become dominated by a legal discourse, with the moral charge transformed into a language of the risk of litigation; the political ecological imaginary is glimpsed only occasionally within broader narratives on sustainability or the materiality of the real politik, such as mobilizing a sense of national identity and social justice as part of devolution in Wales (Fisher, 2012).

Ideas about risk necessitate clarification on how we use the term given an extensive theoretical literature. Here it is understood to be a legal notion, related to risk from uncertainty in interpretation of procurement law and regulations for public contracts in the context of the perceived threat of legal action by the European Commission or private companies, amongst others. For public procurement, risk is an 'organizing concept' embodying ideas of risk management that pervade contemporary service delivery in the face of public crises (Power, 2004, p. 9). This raises

questions over the values that underlie risk assessment; in procurement new ideas on fair trade and private standards introduce controversy over values, not because they relate to social values that are shared but internally inconsistent, but because established values – and therefore ways of perceiving and acting on risk – are brought into question through sustainable procurement (see Whipple, 1992).

It is in this milieu that the concept of authority gains importance. Legal authority is central to notions of legal risk, being closely linked to the enforceability of contractual arrangements that underpin the procurement process. Without regard to appropriate authority, decision-making within the procurement process and a subsequent contract may be challenged or be deemed invalid (Jones and McCracken, 2007). Procurement of fair-trade products is not supported by a well-established body of European case law and is associated by procurement professionals and their legal advisors with uncertainty due to fair-trade's origins in SMOs and legal ambiguity over the use of private standards. Authority is therefore contested and linked to 'interpretative flexibility' in institutional risk assessment (Rothstein and Downer, 2012, p. 796).

In the absence of European case law on fair trade (until May 2012, see below) different judgements are made about risk, generating varying responses: on the one hand, procurement professionals may proceed with extreme caution to avoid legal action and to retain the political credibility of public procurement. On the other hand, desire to act on sustainable procurement and lack of established law and practice may lead procurement professionals to approach risk in ways that seek to redefine authority from the point of view of the grassroots and public interest on sustainability. A question for processes of governability then becomes why different courses of action are followed.

### **Private Standards for Fair Trade**

Private standards for fair trade have specific (evolving) characteristics with significance for how they can be incorporated into public procurement. Henson and Humphrey (2010) distinguish between standards set by public and private entities and the degree to which they are mandatory and voluntary. Private standards 'are set (created) by commercial and non-commercial entities'; the extent to which they are voluntary 'depends on the form and level of power wielded by the entities adopting those standards' (*ibid.*, p. 2). Within this typology, fair trade represents international standards that are private and voluntary, although they connect to compliance with public standards, such as International Labour Organization conventions. They also focus on characteristics integral to the production process rather than intrinsic qualities of the product.

Private standards for fair trade started to emerge in the late 1980s. Driven by alternative trade organizations, standards were a means to ensure the conditions of production to consumers and to generate wider markets, permitting products to circulate within conventional retail networks (Tallontire, 2006). This led to the development of quality assurance systems, including standard setting and third-party certification by fair-trade organizations linked to accreditation by standards development organizations such as the International Standards Organization (ISO 65) and Social Accountability International (SA8000). At an early stage there was a bifurcation between quality assurance through standards and certification for fair-trade products (e.g. FLO/Fairtrade International accreditation) and for fair-trade

organizations (e.g. World Fair Trade Organization accreditation). The existence of multiple private standards for fair and ethical trade adds further complexity.

Governance challenges within processes of standard setting, certification and assurance for fair trade are well documented (e.g. Raynolds, 2009; Dolan, 2010; Tallontire et al., 2011). Important is how processes driven by civil society have opened up to include corporate actors but with variation within the dynamics of these processes (Gereffi et al., 2001). This manifests in a mix of corporate and SMO driven dynamics, ranging from those for whom fair trade standards and certification are a means to gain greater market share through product differentiation to others with broader social ends (Raynolds, 2009). To purchase fair trade products public procurers enter into this complex field, one complicated by obstacles to procurement, as we describe below.

### **European Public Procurement and Fair Trade**

The Public Procurement Directives adopted by the European Parliament and the Council of Ministers in 2004<sup>4</sup> are the overarching legislative framework for public procurement within the EU, although revised legislation is being adopted with agreement over change expected in 2013. These Directives, based on the single market and freedoms enshrined in the 2008 Treaty on European Union, harmonize requirements on public procurement in the EU above certain thresholds<sup>5</sup> by putting in place rules on 'how to buy' and ensure 'contracting entities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way' (Client Earth, 2011, p. 4).<sup>6</sup> Below these thresholds, principles of equity, non-discrimination and transparency must still apply.

The Directives 'encourage free trade by promoting a level playing field for international competition, developing non-discrimination through transparent award procedures, and fostering efficiency through ensuring effective delivery on the best possible terms' (EC, 2012). This interplay of efficiency, effectiveness and economy is encapsulated in the notion of value for money, central to contemporary procurement and linked, particularly following the global financial crisis of 2008, to efficiency savings. Value for money captures profound change to European public bureaucracies from the 1980s, reflecting, in the words of Power (1997, p. 43), a 'desire to replace the presumed efficiency of hierarchical bureaucracies with the presumed efficiency of markets'.

The Directives are consistent with and draw on the World Trade Organization's (WTO's) General Procurement Agreement (GPA) (Arrowsmith, 2003).<sup>7</sup> They are transposed into the national laws of each member state to ensure accountability and prevent fraud and corruption (EC, 2012). These governance processes mark a move away from protectionism towards the incorporation of market principles into public procurement and curtail the ability of governments to use public markets as policy vehicles that create barriers to open competition (McCrudden, 1998; Arrowsmith and Kunzlik, 2009). In effect, the Directives establish a technique of governance to integrate market principles and homogenise procurement practice across the 27 member states of the EU.

#### *The Technicality of the Social in Purchasing*

From the perspective of the EC, fair trade is categorized as a social consideration in public procurement (EC, 2010a). This raises issues for procurement law related

to the Directives. To explain, the primary objective of procurement is identified by the WTO/EC and member states as the acquisition of goods, services or works on the best possible terms. This objective is functional, relating to what is consumed by government, and is the basis upon which contract awards are made (Arrowsmith and Kunzlik, 2009). Policy objectives falling outside this functional aim are horizontal (or secondary) being defined by characteristics with aims beyond the main objective of procurement (EC, 2009). Seeking to benefit producers in developing countries through the procurement of fair trade goods is an example of horizontal policy. Fair trade also generates controversies over whether procurement law can differentiate goods according to their production characteristics, rather than material or functional characteristics of the end product.

Beyond general issues of whether and how fair trade can be purchased, public procurers can not privilege specific ethical trade labels/certification (i.e. related to private standards) because they may introduce discrimination by precluding products that meet similar sustainable trade standards from access to the contract (EC, 2010a). Given that private standards are extensive within fair and ethical trade, this goes directly to the question of how they can be encompassed within public procurement. The EC is clear (in non-legally binding guidance) that when a contracting authority wishes to purchase 'ethical trade goods', 'it can take appropriate considerations into account in the tender specifications, but it cannot require the products to bear a specific ethical trade label/certification' (EC, 2010a, p. 31). An issue that emerges is that a range of labels signify ethical trade but they are not all equal with respect to qualities such as labour standards and producer empowerment or, pertinently, to legitimacy within the fair trade movement, given that some labels are more closely associated with corporate interests than others.

The parameters of value for money and how fair trade and relevant private standards can be incorporated into public procurement is the subject of policy boundary shifts shaped by the evolution of case law, EU politics, and SMO advocacy. There is growing acceptance of the use of horizontal policies in procurement but nevertheless their use is open to interpretation due to the dynamic nature of case law (Arrowsmith, 2003; Arrowsmith and Kunzlik, 2009; Client Earth, 2011).

An example of legal dynamism relates to a 2012 ruling from the Court of Justice of the European Union (CJEU), which is the first piece of European case law on fair trade (Fairtrade Foundation, 2012).<sup>8</sup> In May 2010 the EC referred the Netherlands to the CJEU over a call for tender for the supply and management of automatic coffee machines by Noord-Holland Province (EC, 2010b), due to a complaint to the EC by Douwe Egberts<sup>9</sup> (Scholten Verheijen, 2011). The Province wanted to procure sustainably with regards to environmental and socially responsible methods of production. The EC argued that it was infringing EC procurement regulations because the notice for tenders requested bidders to supply beverages with specific labels: EKO and/or Max Havelaar (EC, 2010b). Although equivalent labels were acceptable, the Province did not specify substantive criteria regarding which labels would be considered equivalent.

Passing judgement on the 10 May 2012, the CJEU concluded that the Province had not respected the current EU Public Procurement Directive by requiring products to bear a specific label and for the way it required bidders to prove suitability requirements and minimum capacity levels. However, the Court clarified that it is compatible with the current EU Public Procurement Directive to define the minimum requirements of products in the technical specifications plus to give extra points in

the award criteria based on considerations of environmental or social nature and to products 'of fair trade origin' (CJEU, 2012). It also gave advice that to incorporate an ethical trade label, the underlying criteria should be identified and the label used as means of proof. This ruling is the subject of SMO advocacy for incorporation of a more progressive position on fair trade into procurement law (Fairtrade Foundation, 2012), assuming no legal appeal is successful.

### *The Politics of the Social in Purchasing*

In focusing on legal technicalities, we would argue that socio-political dimensions should not be obscured. Different institutional actors contribute to a politics of relevance for fair trade in public governance, framing how questions of value and risk are played out in debates over social issues and horizontal policies in procurement. Amongst European actors shaping this field are the European Parliament (EP),<sup>10</sup> the European Commission (EC),<sup>11</sup> the Committee of the Regions (CoR),<sup>12</sup> the European Economic and Social Committee (EESC),<sup>13</sup> and fair trade SMOs, including the Fair Trade Advocacy Office and the European Fair Trade Association.

The EP has taken a progressive stance on fair trade in procurement, calling on public authorities to integrate fair trade criteria into their purchasing policies and asking the EC to support this position (EP, 1998, 2006, 2010). The CoR and the EESC have also called on European institutions to develop strategies for fair trade in public procurement (COR, 2010; EESC, 2010). Closely associated with these public calls has been engagement by fair trade SMOs, for example through the Cross Party Fair Trade Working Group at the EP, the Advisory Committee for Public Contracts of the EC Internal Market and Services Directorate General, and the Network on Sustainable Development in Public Procurement.

In contrast to the EP, the EC's stance on fair trade is restrictive, recognizing its importance for poverty reduction and sustainable development but intending it to remain non-governmental (EC, 1999, 2009, 2010a). Although gradually changing, this is in keeping with an underlying orientation towards restricting legal options for opening up of public procurement to social concerns and related horizontal policies (Client Earth, 2010; Martens, 2010).

Knowledge and practices associated with fair trade, including the role of private standards, are subject to policy shifts and marked by dispute over what constitutes authority for legal risk. These disputes open up the techno-normative logic of the procurement regime to reveal struggles for legitimacy between European institutions, SMO actors challenging the status quo, and multinational corporations and the EC regarding the role of private standards in liberalized markets. In effect, an ensemble of elements that constitute fair trade – objects, actors, and knowledge – are transformed over time by political groupings and market interests. This leads us to ask how processes of governability are played out within a specific context: We therefore turn to consider how the EC Public Procurement Directives are interpreted in the UK and enter into procurement practice in Wales.

### **Situating Fair Trade within UK Guidance on Procurement**

Public procurement in the UK is overseen by the Office of Government Commerce (OGC), which publishes guidance on fair and ethical trade (OGC, 2005, 2008) as part

of UK interpretation of EU procurement law (OGC, 2010, 2011). The OGC Guidance (2008, p. 3) refers to 'positive steps' to incorporate fair trade, namely: 1. advertisements and invitations to tender welcoming fair trade options in supplied products; and 2. post-contract award encouraging fair trade options. It makes clear, however, that 'specifications for catering services and supplies cannot be framed in terms of fair or ethically traded requirements' and in 'the possible inclusion of fair trade options, particular labels, marks or trade names are not specified to the exclusion of others' in effect introducing discrimination (*ibid.*). With respect to private standards, it indicates 'where providers offer fair trade options, asking for products bearing the Fairtrade Mark "or equivalent" is a helpful way of demonstrating fair trade standards are being met' (*ibid.*).

Interviews for this research suggest that the OGC guidance is considered restrictive in scope by fair trade SMOs and limited in detail by UK procurement managers. The restrictive orientation of the OGC with respect to fair trade can be appreciated when placed in wider institutional context. The OGC's creation was part of a modernization drive that followed the Gershon Review of procurement in central government. This consolidated the notion of value for money, shifting the idea that government procurement decisions should be on the basis of lowest cost to a wider notion of value (OGC, 2010). These notions of value encompass sustainability goals, and typically raise questions regarding whether and how horizontal policies can be mechanisms to deliver sustainable procurement.

In principle value for money in procurement can embrace sustainability objectives, including fair trade, through frameworks such as most economically advantageous tender or life-cycle costing. However, how cost is situated within value for money and its relation to sustainable procurement remains an unresolved tension (NSPP, 2012). Indeed, in the present climate of public austerity, wider notions of value find it hard to retain a foothold in the value for money agenda. Reflecting these dynamics over value and sustainability, the OGC's position on fair trade in EU public procurement law follows a conservative line, little influenced by more progressive interpretations within EU member states such as France, Italy and Spain (EFTA, 2010). Indeed fair trade is considered peripheral, warranting limited attention (interviews X162006, X232007). We now turn to consider how procurement professionals within Welsh Government grapple with these issues when trying to incorporate fair trade into procurement practice.

### **Embedding Fair Trade in Welsh Public Procurement**

The context to the Welsh Government's<sup>14</sup> initiative on fair trade procurement was a campaign to make Wales the first Fair Trade Nation. The campaign is explored elsewhere (Fisher, 2012); it is salient, however, that it represents a political commitment to fair trade in the context of Welsh devolution, harnessing an emergent mode of legitimacy from civil society to formulate a pragmatic strategy for international development. Also pertinent is the legal duty in Welsh legislation for sustainable development to be promoted.

When work on fair trade was started in 2005, the National Assembly for Wales (2001) was consolidating its approach to public procurement. After (partial) Welsh devolution in 1999, procurement became a devolved issue (although legislation does not supersede that of the UK). In 2001 a review of Welsh public sector procurement, led to the creation of the Welsh Procurement Initiative in 2005 later renamed Value

Wales (Procurement) (i.e. the procurement section of Welsh Government) to facilitate 'smarter procurement' through value for money, to release value from efficiency savings, and to implement sustainable procurement (Value Wales, 2005).

To address Wales' contribution to international development, the (then named) Strategic Policy Unit of Welsh Government financed a secondment to Value Wales in 2005 (held by one author, Fisher) to identify and advise opportunities to build ethical procurement into public sector supply chains. Early discussions interpreted ethical procurement as focusing on fair trade, in line with the agenda of creating a Fair Trade Nation (interview X172006). This entry point for fair trade was significant; it was not integral to achieving better value in procurement, but nevertheless a focus on ethical supply chains resonated with Welsh desire to be a leader on sustainable procurement: 'Value Wales is looking beyond traditional procurement methods to deliver wider benefits [and advancing] the international focus of Welsh sustainable procurement activities' (Value Wales, 2005, p. 2).

Little prior knowledge on how to procure fair trade products was held within Value Wales, this prompted a process of web searching (e.g. the OGC, ICLEI), discussion with contacts in SMOs (e.g. UK Fairtrade Foundation, Oxfam, Welsh Fair Trade Forum), and baseline research across Welsh public authorities. It became apparent that external (non-Welsh) guidance was limited in 2005; that some public authorities were purchasing small quantities of fair trade products but others were deterred by poor knowledge, lack of legal clarity, and perceived cost implications. Procurement and catering managers demanded guidance and legal clarification from Value Wales.

Here governability is apparent, stimulated by the wider government and SMO-led Fair Trade Nation campaign, revealing knowledge in the making as procurement actors sought to frame and legitimize the incorporation of fair trade and relevant private standards into procurement practice. This involved questioning trade-related and sustainability values in procurement, assessing legal risk and establishing legal authority, and generating the 'how to buy' on fair trade in procurement practice.

### *Legal Risk and Fair Trade*

Developing guidance on fair trade was not straightforward: a representative of the Strategic Policy Unit expressed the desire to see 'Welsh guidance that sets out what can be done in contrast to the OGC Guidance on fair trade which explains what can't be done'. It was considered naive to expect that Wales could follow Italy's 'creative interpretation of the Procurement Directives' (EFTA, 2010b) but nevertheless there was 'scope for a positive approach' (interviews X232007, R12010). By this time in 2006, Wales' commitment to becoming a Fair Trade Nation had been announced, with senior politicians stressing the need for fair trade procurement.

While the Sustainable Procurement Team within Value Wales held the view that they should, in the words of the Team Leader echoing a common discourse in sustainable procurement, 'push the boundaries' to incorporate fair trade and generate 'guidance that was more progressive than the OGC's position', it was also recognized that the process needed to be legally informed (interviews X192007, R12010, R262010). This was considered imperative in order, as the Team Leader explained, 'to assess potential risk of legal action from a supplier on the grounds that a public authority was acting in a discriminatory manner in favour of fair trade products' (interview X232007).

For the Sustainable Procurement Team, the crux of the issue was whether it was possible to 'only specify *Fairtrade or equivalent*'<sup>15</sup> and therefore to exclude potential suppliers that did not offer fair trade products as part of a contract on the basis that there are enough options in the market for this approach to be considered non-discriminatory under European law (interview X192007). Furthermore, stating *or equivalent* is standard practice in public procurement; however, debate was ongoing regarding what would be equivalent to the Fairtrade Mark if, as understood from the Fairtrade Foundation, this is one of the most stringent agri-food standards for fair trade. A fear was risk of litigation by corporations selling products to the Welsh public sector bearing the Rainforest Alliance label (e.g. Nestlé). A solution, then acted upon, was incorporation of a description of elements of the standard into the technical definition of fair trade used by the Welsh Government (interview R122010).

Legal advice was sought from independent lawyers in the hope this would give scope for progressive action. Almost to the letter this advice replicated the OGC's interpretation of the EU Public Procurement Directives (Morgan Cole, 2006). Frustrated by the quality of the advice, the Sustainable Procurement Team sought a second opinion from the Welsh Government's legal team (interviews X192007, X232007). Again this advice reflected the OGC's position: in short specifications could not be framed in terms of fair or ethically traded requirements and bids could not be rejected because they did not include fairly traded options. The Sustainable Procurement Team considered the risk of legal action to be low, particularly as contracting was conducted through distributors who could draw on goods from different suppliers; nevertheless it was decided that OGC guidance had to be followed (Sustainable Procurement Team, discussion, 2007).

Frustration caused by legal advice that gave no scope for doing things differently in Wales, led Value Wales to try to influence the OGC to change the orientation of its guidance. The OGC guidelines were being revised and it was consulting on this process. Discussions were held between Value Wales, a representative of the OGC, and a representative of the central UK government Department for International Development (DFID) tasked with advising the OGC on fair trade (interviews X152006, X162007). Value Wales' desire to push the boundaries encountered reluctance by the OGC to change the orientation of guidance and equal reluctance by DFID to encourage the OGC to move towards a more progressive position; this was in the context of wider tension between DFID and the Welsh Government over international development, which is not a devolved issue (Fisher, 2012). Notable by omission was the Fairtrade Foundation as a major stakeholder in the consultation process, reflecting a period when public procurement was peripheral to the Foundation's strategic agenda (Deputy Director Fairtrade Foundation, personal communication, April 2008). Indeed further leverage could not be exerted through the UK Fairtrade Foundation, partly reflecting tension with Wales' plan to become a Fair Trade Nation, but also the limited attention the Foundation gave to public procurement. Having failed to influence the OGC, and having accepted legal guidance, the Welsh Government issued advice on fair trade in line with that of the OGC (Value Wales, 2008).

Later, after a ruling at a district-level court in the Netherlands (see note 8), further legal opinion was sought by Value Wales from legal teams in both the Welsh Government and the OGC to see whether this would find legal justification for progressive guidance and practice. Judgements from a civil court in the Netherlands were deemed to give no legal precedence although the lawyers considered whether underlying arguments were persuasive enough to use (interview R192010). It was con-

cluded that although invitations to tender could not specify only *Fairtrade or equivalent* to the exclusion of other bids, a minimum requirement (non-fair trade) and a variant (Fairtrade or equivalent) might be possible, with fair trade factored into an award decision based on an appropriate scoring mechanism, a course of action later followed by the Welsh Government, as we describe below.

The Welsh Government had sought to follow a distinctive path on fair trade procurement. This coalesced around legal advice over the perceived extent of risk generated by pushing the boundaries of social sustainability, with conflicts over authority regarding EU procurement law, its interpretation through UK guidelines, and knowledge of more progressive European best practice. The process was underpinned by an edgy relationship between Welsh government actors promoting fair trade in procurement, and other actors (the OGC and DFID) that challenged Wales' authority to push the boundaries with respect to assessment of legal risk and incorporation of fair trade into public procurement.

### *Incorporating Fair Trade through Procurement Practice*

This penultimate section focuses on how legal risk, private standards and political accountability are played out in procurement practice on fair trade within three public authorities in Wales: the Welsh Government, Carmarthenshire County Council, and Cardiff Council.

#### *The Contract as Route to Fair Trade Procurement: Welsh Government*

In 2009 the Welsh Government took, in the words of a senior procurement manager, a 'calculated risk' on incorporating fair trade into an aggregated catering contract for eight office complexes, which was subsequently won by Eurest, a multinational contract caterer (interview R192010). This calculated risk was taken because the contract was for offices of high public profile for Welsh government, which wanted to demonstrate leadership on sustainable procurement and being a Fair Trade Nation. According to a facilities manager 'we were empowered to push the boundaries on this one' (group interview R182010).

The contract was distinctive because an equal weighting of 25% was applied to cost and sustainability during tendering, including 3% weighting on fair trade. This cost/sustainability parity is uncommon. As the procurement manager explained:

'the words... fairly traded were used liberally... as the procurement of the goods was being done by a third-party contractor, we were unlikely to be accused of being discriminatory because all contractors were required to do the same thing. [Anyway] these below radar procurements do not attract the attention of the big food manufacturers and so go unchallenged, as did this catering contract. Of course I am not advocating this formally for obvious reasons, but [through] this approach to risk we now have the result we wanted' (interview R192010).

Regarding private standards, the *Fairtrade Mark or equivalent* was specified so as not to discriminate against other quality assurance schemes; however, catering managers suggested that disputes over equivalence were not an issue because the Fairtrade Mark<sup>16</sup> is so pervasive (interview R182010).

Recognition of legal risk emerges in this example when procurement officers judged room for manoeuvre while taking into account legal requirements. Unlike

the Netherlands case of the Province of North Holland described above, where the interests of the major beverage supply company Douwe Egberts were directly challenged, the perception was that the threat of litigation was low. Political visibility of the contract provides a rationale for emphasis given to fair trade as part of sustainability within regional political dynamics. Interviews conducted in 2010, when public austerity measures were starting to bite, suggested procurement officers would not have sought to push the boundaries through weighting sustainability on parity with cost (interviews R192010, R182010). As the subsequent comparisons show, authorities at local government level were far more concerned about risk of litigation and cost from the outset.

*Influencing Suppliers after Contract Award: Carmarthenshire County Council*

Carmarthenshire County Council has a good reputation for sustainability and for being a Fairtrade County (certified by the UK Fairtrade Foundation). Nevertheless, current public austerity contributes to the perception that the price premium associated with fair trade makes these products luxury items and a potentially unreasonable use of public expenditure, particularly given public demand for local produce to support Welsh production (interviews R62010, R72010, R82010). Despite this, the local fair trade campaign encourages Carmarthenshire County Council to use fair trade products in meetings and to source fair trade bananas and juice for schools.

Within Carmarthenshire County Council, contracting is the responsibility of individual departments, with project officers relying for guidance over sustainability upon Carmarthenshire's Sustainable Procurement Policy, the UK Environment Agency's Sustainable Risk Assessment, and the OGC guidelines on Fair and Ethical Trade. The limited extent of this guidance on fair trade, coupled with lack of procurement specialism, does not instil confidence that fair trade options can be specified within tendering processes. Instead, bidders are requested to volunteer information about how they fall in line with Carmarthenshire County Council's sustainability policies. In addition, due to limited knowledge of the differences between Fairtrade Mark products and those carrying equivalent labels, the words are avoided completely to ensure no risk of litigation.

Purchasing fair trade products occurs after a contract is in place, relying on good personal relations with the contract holder, and their relationships to suppliers. This permits coffee, tea and sugar bearing the Fairtrade Mark to be used within Carmarthenshire County Council and bananas and juice to be purchased for schools; regarding dry goods (e.g. rice), employees of Carmarthenshire County Council feel their 'hands are tied' because product costs would be considered politically unjustifiable (interview R62010).

In this example, concern over legal risk is prominent, especially over quality assurance pertaining to private standards, which is identified as a reason not to introduce fair trade during tendering. Despite some public support, public accountability and political sensitivity create countervailing pressure for the Council to buy local produce and to demonstrate cost savings. Nevertheless fair trade products that bear the Fairtrade Mark are regularly bought and used, with Carmarthenshire County Council employees feeling they have scope to act through building good personal relations after contract award. The Carmarthenshire County Council case contrasts with a case from the capital of Wales, Cardiff, where there is a more positive approach to fair trade sourcing.

*Sidestepping Regulations through Resale: Cardiff Council*

Demand for fair trade items to join other sustainably sourced products within Cardiff Catering, Cardiff Council's Direct Service Unit catering for primary, secondary and special-needs schools, came from secondary pupils in 2004 and was in keeping with Cardiff being a Fairtrade Capital city (interviews R02006, R92010). Students argued that fair trade was an important issue which complemented other nutritional, ethical and local concerns guiding caterers' menus. 'We have put lots of energy into bringing fair trade items in... secondary students tell us that fair trade is essential and are willing to pay a little extra' (interview R92010).

Fairtrade tea, coffee, juice, chocolate, snack bars and fruit are available for resale in secondary schools. Supplying items for resale has been a success indicated by fair trade products' share of £306,969 of a total turnover of £3.9 million in 2009–2010, having grown steadily from £255,000 out of £3.1 million total turnover in 2005–2006 (figures: Direct Service Unit). As items are resold, procurement decisions are not restricted through procurement regulations pertaining to fair trade and are sourced through a flexible snacks, drinks and confectionary contract.

Despite this positive approach, representatives of Cardiff Catering argue that they have struggled to incorporate fair trade items into procurement due to the 'complicated minefield' of the EC procurement regulations, plus the additional cost of the items (interview R92010). Cardiff Catering, like the Welsh Government and Carmarthenshire County Council, has sidestepped the issue of fair trade in procurement and legal concerns related to use of private standards by presenting fair trade products for resale, which is unproblematic within European procurement law. However, even this lawful action was threatened by Welsh legislation to promote healthy food in schools, removing availability of sweet snacks and juices. To enable Cardiff Catering to retain its level of fair trade consumption, it would need to incorporate fair trade products into kitchen ingredients – e.g. rice and sugar – with a narrow margin, the cost was deemed prohibitive.

The socio-political context of Wales being a Fair Trade Nation and the legal duty to promote sustainable development generates political commitment to fair trade in public procurement, with public support for promotion of social justice and sustainability. However, incorporating fair trade and associated private standards into procurement raises questions of legal risk, cost, and political accountability. These examples demonstrate how a procurement community has introduced fair trade in ways that involve interpretative judgement of legal risk. Processes of governability emerge in this process of local transformation, as judgements are made over the actions that can be taken to incorporate fair trade into procurement without breaking legal regulations or threatening public accountability. The dynamic nature of these processes, and shifting of procurement boundaries back and forth between cost/efficiency and sustainability, is all too apparent.

### **Conclusion: Pushing the Boundaries of the Social**

This article has considered the role of fair trade in public procurement in Europe, demonstrating how it is linked to contestations over value attribution for social phenomena and over the position of private standards as mechanisms for quality assurance and risk management. Contestations emerge through the way legal risk is framed and authority questioned in decision-making over procurement law. In this respect, the semiotics of legality and risk management reveal epistemological differ-

ences between SMO-driven knowledge on ethical issues, public management understandings of value for money, and private sector rationales for promoting liberalized markets. In this sense, public procurement of fair trade plays out a decentring of the vertical organization inscribed in the hierarchy of state institutions, generating encounters with a governance orientation linked to the politics of network relationships between public, private, and civil society actors.

Despite procurement guidelines on fair and ethical trade, procurement practice is endowed with ambiguity as procurement managers seek to encompass new knowledge, be publically accountable, and fulfil demands coming from different institutional domains. Perceptions of legal risk are brought to the fore as risk management processes are enacted and legal authority disputed. Governability comes into play within the dynamics of local transformations, with actors' agency played out in attempts to redraw boundaries for sustainable procurement, generating the potential to create new and dispersed points of influence and decision-making through partial connections that link and delink the private and public. In effect, introducing fair trade into public procurement involves a situational ability to govern, encompassing different claims to legitimacy to serve the common good.

European procurement law accords legitimacy to private standards for fair and ethical trade but this remains contested. Communications from the European Commission have been clear that private standards for fair trade are part of consumer assurance schemes of non-governmental nature, with guidance stating that the *Fair-trade Mark or equivalent* can be referred to within tendering processes. This may provide quality assurance and mitigate reputational risk with regard to public demand that ethical values are upheld by the public sector. Within procurement, however, private standards bring to the fore approaches to risk related to legal processes that inform a risk-based approach to public management. With lack of precedence for fair trade in public procurement, this generates interpretative flexibility over risk, as highlighted in the contrasting ways fair trade is approached by different public authorities. Moreover, that there are a range of private standards for fair and ethical trade, and questions over equivalence between them, reveals that technically this is not a level playing field. Thus debates over equivalence expose underlying issues of power, social access, and legitimacy between different actors within and outside the fair trade movement; these processes are not a simple technical homogenization of standards for fair trade within procurement practice.

Whether private standards become a tool that governments readily use to orient ethical consumption within the public sector remains to be seen and is an issue that is difficult to extricate from wider issues pertaining to fair trade in procurement. Ideas and practices on fair trade have entered into European public procurement through a route in which values, knowledge and social dynamics associated with SMOs encounter public management rationales and private sector interests. This is not simply a question of ready integration into formal organizational rationales; people as agents remain important for how fair trade is taken up, rejected, or simply ignored and how wider thinking on sustainability is drawn on to negotiate change. In effect this reveals the way processes of governance are changing, generating complex interactions over political accountability, market principles, and expressions of civic voice concerning the value of the social in public procurement.

## Notes

1. Ethical trade labels/certification (also called social labels) are defined by the EC as ‘any non-governmental trade related sustainability assurance scheme (for example, Fair Trade, Fairtrade, Max Havelaar, Utz, Rainforest Alliance, etc.)’ (EC, 2010a, p. 31).
2. Governance refers to conceptions of governing that are not exclusively based on state mechanisms of government but incorporate new regulatory arrangements between state/private/non-governmental actors, moving towards network-based systems of regulation (Stoker, 1998; Locanto and Busch, 2010).
3. Research funding was from Welsh Government/TWIN (2010), and Swansea University (2009–2010). Between 2006 and 2008 Welsh Government funded Fisher to develop a quantitative baseline on fair trade in public procurement the Welsh Government (2006–2008); these data are not presented here. Sheppard was research assistant in 2010.
4. Directive 2004/17/EC (OJ L 134 30 April 2004, pp. 114–240) and Directive 2004/18/EC (OJ L 134, 30 April 2004 pp. 1–113); fair trade procurement falls within Directive 2004/18/EC.
5. The current thresholds under which Directive 2004/18/EC does not apply (unless an EU Member State decides otherwise) are: €130,000 for contracts for supplies/services for central governmental authorities, €200,000 for contracts for supplies/services for other public contracting authorities; and €5,000,000 for works contracts (Commission Regulation (EU) 1251/2011 of 30 November 2011).
6. Article 2 of Directive 2004/18/EC and Article 10 of 2004/17/EC.
7. Public procurement has been part of agreements within the GATT/WTO since the Tokyo Round (1973–1978) but remains a ‘plurilateral agreement’, binding only WTO members that accept it (Arrowsmith, 2003, p. 31).
8. Cases in the district courts of the Netherlands (Scholten Verheijen, 2011) are heralded as legal precedence by SMOs (Fairtrade Foundation, 2010a/b); however, procurement is reliant on the evolution of CJEU case law.
9. Douwe Egberts is now trading as D.E. Master Blenders 1753.
10. The EP is the directly elected parliament of the EU, exercising the legislative functions together with the European Commission and Council of the EU.
11. The EC is the executive body of the EU with responsibility for proposing legislation, implementing decisions, upholding treaties, etc.
12. The CoR is an EU assembly of sub-national authorities, providing a direct voice within the EU’s institutional framework.
13. The EESC is an EU consultative assembly composed of different economic interest groups.
14. The Welsh Government is the executive of the Government of Wales. The National Assembly for Wales is the democratically elected body that represents the interests of Wales and its people, makes laws for Wales and holds the Welsh Government to account.
15. Fairtrade is a trademark for products certified by Fairtrade International (FLO-cert.).
16. The label of the Fairtrade Labelling Organizations/Fairtrade International quality assurance system.

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