

Environmental and Financial Aspects of Public Procurement

Judit Glavanits

Faculty of Law and Political Sciences, Széchenyi István University,
Hungary

Abstract

According to EU statistics governments and other public authorities are spending about 16% of the GDP through public procurement contracts. This way the regulation of the public procurement process highly effects the business environment, and can work as a catalysis for sustainable, eco-friendly and financially rational supply. In the paper presented on the conference I analyse the new directives of the EU on public procurement and their implementation in the national legal systems, and introduce some international “best practices” of sustainable public procurement, and how they could work as a role model for private businesses.

Keywords

Public Procurement; Sustainability; Green Public Procurement.

1 Introduction¹

Public procurement refers to the process by which public authorities, such as government departments or local authorities, purchase work, goods or services from companies. A substantial part of public investment is spent through public procurement (around € 2 trillion per year, representing 14% of EU GDP)², and high quality public services depend on modern,

¹ The work was created in commission of the National University of Public Service under the priority project KÖFOP-2.1.2-VEKOP-15-2016-00001 titled „Public Service Development Establishing Good Governance” in the „Az állam gazdasági szerepvállalásának hatásvizsgálata egyes ágazatokban” Projekt.

² Increasing the impact of public investment through efficient and professional procurement. *European Commission* [online]. Press release, published 3. 10. 2017 [cit. 1. 3. 2018]. Available: http://ec.europa.eu/growth/content/increasing-impact-public-investment-through-efficient-and-professional-procurement-0_en

well-managed and efficient procurement. In 2014, the EU adopted 3 new directives on public procurement regulation.³ The core principles of these directives are transparency, equal treatment, open competition, and sound procedural management. These new directives however contain a lot more on environmental and financial sustainability than just principles – they are forming the world of sustainable procurement. We define sustainable procurement as the pursuit of sustainable development objectives through the purchasing and supply process, incorporating social, environmental and economic aspects.⁴

The social and environmental issues has history in the EU regulation:⁵ in the previous directive (enacted in 2004)⁶ also contained important details on these among the awarding criteria and contracting. According the (45) preamble Article, in order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental and social requirements (in response in particular to the needs – defined in the specifications of the contract – of particularly disadvantaged groups of people to which those receiving/using the works) may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract. According to Article 26, contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

³ Directive 2014/24/EU on public procurement, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, Directive 2014/23/EU on the award of concession contracts.

⁴ WALKER, Helen and Stephen BRAMMER. The relationship between sustainable procurement and e-procurement in the public sector. *International Journal of Production Economics*, 2012, Vol. 140, 257 p.

⁵ See in details: EUROPEAN COMMISSION: Impact and Effectiveness of EU Public Procurement Legislation – Evaluation Report. *Commission Staff Working Paper*, SEC, 2011, 853 final, Brussels, 27. 6. 2011, p. IX.

⁶ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

The 2014/24/EC Directive⁷ has gone further: in the (47) preamble article the Directive called the Member States and the public authorities to buy innovative products, works and services, as they are playing a key role in improving the efficiency and quality of public services while addressing major societal challenges. There has been development even in the practical side of this issue: if the public authorities wish to purchase works, supplies or services with specific environmental, social or other characteristics should be able to refer to particular labels, such as the European Eco-label, (multi-)national eco-labels or any other label provided that the requirements for the label are linked to the subject-matter of the contract.⁸ There has been several development in this area in the last years as well, not only in the EU, but globally.

2 Sustainable procurement as strategic issue

The European Commission's public procurement strategy focuses on six strategic policy priorities. Among these, the first one is: “*Ensuring wider uptake of innovative, green, and social procurement*”. The Commission summarizes, that 55% of procurement procedures use lowest price as the only award criteria for public contracts, which indicates that public buyers are probably not paying enough attention to quality, sustainability and innovation.⁹ To support the further development of strategic procurement, the Commission is issuing new guidance documents on the use of innovative¹⁰, green¹¹ and social criteria.

2.1 Green procurement

The awareness on the role of green public procurement in supporting sustainable consumption and production patterns is strongly increasing and

⁷ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

⁸ See: preamble (75) of the Directive.

⁹ EUROPEAN COMMISSION. *Public procurement strategy* [cit. 30. 12. 2017]. Available at: http://ec.europa.eu/growth/single-market/public-procurement/strategy_hu

¹⁰ See eg. the guidance supported by the Commission: SEMPLE, Abby. *Guidance for Public Authorities on Public Procurement of Innovation, Procurement of Innovation Platform ICLEI – Local Governments for Sustainability, Druckerei Kesselring GmbH*. Emmendingen [cit. 30. 12. 2017]. Available at: https://www.innovation-procurement.org/fileadmin/editor-content/Guides/PPI-Platform_Guide_new-final_download.pdf

¹¹ Eg: EUROPEAN COMMISSION. *EU GPP Criteria for Office Building Design, Construction and Management*. Brussels, 20. 5. 2016, SWD(2016) 180 final.

spreading through the public authorities both as a policy instrument and as a technical tool.¹² One of the most known tool is eco-labels. Following the Rio Earth Summit, Agenda 21 identified eco-labelling as a way to encourage consumers to adopt more sustainable consumption patterns through the purchase of products that are more resource and energy efficient.¹³ In this field, the public authorities can act as role models. Overall, purchasers increasingly need formal contracts with accurate information about the environmental, social and economic dimensions of products and services along the overall supply chain, from conception to recycling.¹⁴

“Greening” public procurement used to have a connecting phenomenon of being more expensive, than the “not-so-green” version of the same product or service. But if we examine the subject of the procurement from a different aspect, the result is different, and the turning point is the calculation of the life-long-costs. Functional and performance-related requirements are – according to the Directive¹⁵ as well as it is agreed in the academic literature¹⁶ – appropriate means to favour innovation in public procurement and should be used as widely as possible.

2.2 Socially responsible procurement

In practice the development of socially responsible public procurement may include a wide range of policy issues such as employment opportunities, decent work, compliance with social and labour rights, social inclusion,

¹² TESTA, Francesco, Fabio IRALDO, Marco FREY, Tiberio DADDI. What factors influence the uptake of GPP (Green Public Procurement) practices? New evidence from an Italian survey. *Working Paper*, Istituto di Management, Scuola Superiore Sant’Anna di Pisa, 2011, no. 6, p. 5.

¹³ HORNE, Ralph E. Limits to labels: The role of eco-labels in the assessment of product sustainability and routes to sustainable consumption. *International Journal of Consumer Studies*, 2009, no. 33, p. 175.

¹⁴ ORUEZABALA, Gwenaëlle and Jean-Charles RICO. The impact of sustainable public procurement on supplier management — The case of French public hospitals. *Industrial Marketing Management*, 2012, no. 41, p. 578.

¹⁵ See (74) preamble Article.

¹⁶ See e.g. DRAGOS, Dacian and Bogdana NEAMTU. Sustainable Public Procurement: Life Cycle Costing (LCC) in the New EU Directive Proposal. *European Public Procurement and PPP Law Review*, 2013, no. 1, pp. 19–30.

and equal opportunities.¹⁷ The Article 18 2. of the Directive says that the Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X. However, while interpreting this provision, we should take into consideration two recent judgements of the European Court of Justice. In case C-549/13¹⁸ the city of Dortmund had a procurement process, where the city applied a provision to guarantee payment of a minimum wage to the employees of subcontractors of tenderers, provided for by legislation of the Land to which the public contracting authority belongs, even in the case where the subcontractor concerned is established in another Member State and all of the services relating to the performance of the contract concerned are to be carried out in that other Member State. One of the bidders stated that it will fulfil the contractual obligations totally in Poland, and rejected to pay the fixed minimum wage for the subcontractors. The Court find that a tenderer intends to carry out a public contract by having recourse exclusively to workers employed by a subcontractor established in a Member State other than that to which the contracting authority belongs, Article 56 TFEU precludes the application of legislation of the Member State to which that contracting authority belongs which requires that subcontractor to pay those workers a minimum wage fixed by that legislation. In case C-115/14¹⁹ the city of Landau started a procurement process on postal services. The contract notice contained the following: “*the successful tenderer shall comply with the provisions of [the LTTG]*”. LTTG is for “*Landesgesetz zur Gewährleistung von Tariftreue und Mindestentgelt bei öffentlichen Auftragsvergaben*”. The documentation also contained a model statement for guaranteeing the minimum

¹⁷ SCHULTEN, Thorsten, Kristin ALSOS, Pete BURGESS and Klaus PEDERSEN. *Pay and other social clauses in European public procurement - An overview on regulation and practices with a focus on Denmark, Germany, Norway, Switzerland and the United Kingdom. Study on behalf of the European Federation of Public Service Unions (EPSU)*. Düsseldorf, December 2012. Available at: <https://pdfs.semanticscholar.org/94e8/9b651b07b7e78600226263bc6bd-facb3e847.pdf>

¹⁸ C-549/13 *Bundesdruckerei GmbH v Stadt Dortmund*, 18 September 2014.

¹⁹ C-115/14 *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz*, intervening parties: PostCon Deutschland GmbH, Deutsche Post AG, 17 November 2015.

wages. It is important, that at the time of the facts in the main proceedings, there was no. collective agreement setting a minimum wage and binding the undertakings in the postal services sector under the national law, nor were the undertakings subject, at that time, to the obligation to pay the general minimum wage. One bidder, the RegioPost complained that the declarations relating to the minimum wage referred to in Paragraph 3 of the LTTG were contrary to public procurement law. It enclosed with its tender, which was submitted within the prescribed period, declarations by its subcontractors, which it had itself drawn up. It did not, however, submit a minimum wage compliance declaration for itself. The Court of Koblenz asked the European Court of Justice if TFEU 56 Article is precluding a national provision which makes it mandatory for a contracting authority to award contracts only to undertakings which undertake, and whose subcontractors undertake, in writing, at the time of submitting the tender, to pay their employees who perform the contract a minimum wage fixed by the State for public contracts only but not for private ones, where there is neither a general statutory minimum wage nor a universally binding collective agreement that binds potential contractors and possible subcontractors? Similarly to the previous case, the European Court of Justice decided that a contractual term binding a party to pay a minimum wage for subcontractors from a different Member State is an economical burden surplus, which can have the effect of excluding economic operators from the proceeding.

2.3 Innovative procurement

Public procurement of innovative solutions happens when the public sector uses its purchasing power to act as early adopter of innovative solutions which are not yet available on large scale commercial basis. According to the (47) preamble article of the 2014/24/EU Directive, public authorities should make the best strategic use of public procurement to spur innovation by buying innovative products, works and services, as they are playing a key role in improving the efficiency and quality of public services while addressing major societal challenges.

Examining the USA's strategic public procurement system in 2005, Darin Matthews states that *“Innovation and possibly creativity tend to be limited when*

government agencies follow uniform and routine standards”.²⁰ Helen Walker and Steve Brammer also found, that non-routine purchasing is a key factor of sustainable procurement. They state that “*communication is positively related to environmental supply practices and labour, health and safety*”. Those public sector organisations that communicate more with suppliers may have greater impacts on these aspects of sustainable procurement.²¹ But how is this connection between the purchaser and the supplier in line with the rigorous regulation on the freedom of competition and limitations on the exchange of information during or before the public procurement process. It is not easy to define whether a meeting with a potential supplier is a legal preparatory action before a concrete procurement is started, or the information exchanged here is optionally against the free competition. In the Hungarian public procurement law there is an institution called “*preliminary market consultation*” in the Public Procurement Act, which is a valid tool for the purchaser that before launching a public procurement procedure it may “*conduct preliminary market consultations with independent experts or authorities, or market participants with a view to preparing the procurement and informing economic operators of their procurement plans and requirements*”. During this process, the contracting authorities shall take all measures deemed necessary - including the communication of relevant information and the fixing of adequate time limits for the receipt of tenders – so as to ensure the fairness of competition and to enforce the principles of equal treatment and non-discrimination of economic operators involved in the procedure.²² We found similar regulation in the 2014/24/EU Directive, where in the (45) preamble Article it is highlighted, that in the competitive procedure the negotiations may concern all characteristics of the purchased works, supplies and services including, for instance, quality, quantities, commercial clauses as well as social, environmental and innovative aspects, in so far as they do not constitute minimum requirements.

²⁰ MATTHIEWS, Darin. Strategic procurement in the public sector: A mask for financial and administrative policy. *Journal of Public Procurement*, 2005, no. 3, p. 397.

²¹ WALKER, BRAMMER, 2012, op. cit., p. 266.

²² Act CXLIII of 2015 on public procurement, 28. § (4).

3 International best practices

There are several great examples of sustainable procurement strategies in practice. The EU Commission itself collects those best practices through different programs and publications, like the Green Public Procurement brochure²³. In the international literature we also find important publications or analyses on the success stories of regions or countries²⁴. Here I would only like to highlight my personal favourites that may influence other public authorities the most.

3.1 “Ökokauf Wien”

One of the most successful program is the “ÖkoKauf Wien” started in 1999, which makes an essential contribution to the international reputation of Vienna as an exemplary model of an environmental city. The program has won several prizes: in 2010, the International Dubai Award for Best Practices in Improving the Living Environment²⁵, the ESPA-award in 2011, and the Guangzhou International Award for Urban Innovation in 2012, and also the Austrian FAIRTRADE@work award in 2015. The EU has documented “ÖkoKauf Wien” as a role model with film in which the EU Commission recommends that all EU members following the example of the City of Vienna.²⁶ Thanks to “ÖkoKauf Wien“, the Vienna City Administration has applied ecological criteria to procurement procedures for more than ten years now, thus cutting annual carbon dioxide emissions by about 15,000 tons and saving approximately EUR 1,5 million per year.²⁷ The program is divided by 3 main parts:

1. “**eco-friendly working**” is a balanced combination of ecological, social and economic aspects. Main ecological impacts are resource efficiency and reduction of damage to the environment. Important

²³ EUROPEAN COMMISSION. *Green Public Procurement – A collection of good practices*. Brussels, 2012 [cit. 28. 12. 2017]. Available at: http://ec.europa.eu/environment/gpp/pdf/GPP_Good_Practices_Brochure.pdf

²⁴ See eg: OECD: *Going Green: Best Practices for Sustainable Procurement*. OECD, Paris, 2015.

²⁵ „ÖkoKauf Wien“ mit Dubai-Award ausgezeichnet [cit. 28. 12. 2017]. Available: <https://www.wien.gv.at/umwelt/natuerlich/dubai-award.html>

²⁶ “ÖkokaufWien – a better plan...” [cit. 28. 12. 2017]. Available at: <https://www.wien.gv.at/english/environment/protection/pdf/oekokauf-engl.pdf>

²⁷ „ÖkoKauf Wien“ - programme for sustainable public procurement [cit. 28. 12. 2017]. Available at: <https://www.wien.gv.at/english/environment/protection/oekokauf/>

social impact potential lies in the fact that with the procurement of environmentally sound working tools employees of the Vienna City Administration typically adjust their user behaviour (from “double-sided printing” to turning off electronic devices outside office hours to training for cleaning staff and drivers). Adopting working routines for private consumer behaviour is an important contribution towards raising environmental awareness among people.

2. “**eco-friendly building**” impacts on establishing an environmentally friendly working and living environment are limited due to the focus on building products and services. The adoption of the “ÖkoKauf Wien“ compliant products into other market segments support the expansion of the market supply of environmentally friendly building products and building services.
3. “**eco-friendly living**” program activities effected food, events, nano-technology and PVC. The procurement of organic food accounts for a big share of the overall impact on climate change mitigation due to the “ÖkoKauf Wien” programme. Another important impact in this respect is the fact that the implementation of the programme counteracts the “killer argument” that organic food is too expensive.²⁸

The lesson we should learn about “Ökokauf Wien” program is the complex thinking: it is not enough to fix or regulate some aspects of the public purchase, the governance should see the whole picture.

3.2 Sustainable city of Barcelona

The City Council of Barcelona has increasingly included sustainability considerations in its purchasing practices since 2001. These practices have been driven by and form part of the City’s Local Agenda 21 policy and goals (Barcelona+Sostenible) defined in the Citizen Commitment to Sustainability (2012–2022), the document that defined broadly agreed principles, objectives and lines of action to move towards a better city²⁹, and the Sustainable City’s Roadmap, which in 2016 formed of a network of over 800 organisations.

²⁸ See the impact analysis in details: CITY OF VIENNA. *Ökokauf Wien - Green Public Procurement in the City of Vienna, Impact Analysis*. 30 April 2014.

²⁹ AJUNTAMENT DE BARCELONA (City of Barcelona). *Compromís Ciutadà per la Sostenibilitat* (Citizen Commitment to Sustainability 2012–2022). 2. ed. October 2015 [cit. 28. 12. 2017]. Available at: http://lameva.barcelona.cat/barcelonasostenible/sites/default/files/compromis_22_redicio.pdf

In 2013 the enactment of the Municipal Decree for Responsible Public Procurement was a next big step, where integrating sustainability requirements became compulsory for all contracting bodies in the city. Furthermore, in 2015 the adoption of the 12 Technical Instructions for the Application of Sustainability Criteria established procurement requirements for 12 high priority procurement categories.³⁰ These criteria can be easily applied in many Member States, even in middle or large cities, so they are forming a great “best practice”. In the followings I detail the Criteria with some comments on the international practice.

- The purchase of work uniforms respecting the conventions of the International Labour Organisation (ILO) and with restricted presence of chemicals, according to OekoTex; [see also: Article 18. 2. of 2014/24/EU Directive]
- The acquisition of certified sustainable wood; [see: upper mentioned on eco-labels]
- 100% of electricity supplies stemming from renewable energy sources or high-efficient cogeneration;
- All school catering services including food from ecological agriculture; [see also the Innovative Public Organic food Procurement for Youth program with significant research details³¹]
- All computers complying with at least the Energy Star standard, and respecting the conventions of the ILO; [see also the IT program of Stockholm County³²]
- 100% of recycled paper;
- Priority for acquiring electric vehicles;
- Public events organised following a greening plan;
- Communication products include eco-publishing criteria and more sustainable materials and practices;

³⁰ AJUNTAMENT DE BARCELONA. *Technical Instructions for the Application of Sustainability Criteria* [cit. 28. 12. 2017]. Available at: http://www.ajsosteniblebcn.cat/file-68251_68251.pdf

³¹ LØES, Anne-Kristin et al. *Final report for 1881 Innovative Public Organic food Procurement for Youth (iPOPY)*. CORE Organic, 2010 [cit. 28. 12. 2017]. The whole report is available at: <http://orgprints.org/31199/>

³² In Sweedish language: <http://www.sankterik.se/pagefiles/1514/miljosteg5.pdf> [cit. 28. 12. 2017].

- Public buildings and public spaces with the highest energy, water and environmental self-sufficiency; [probably this is the most documented area in the EU, as the Commission has several materia for supporting this kind of procurement³³, and the international literature is quite in favour of this area³⁴]
- Eco-designed or eco-labelled office furniture: Produced using recycled or sustainable raw materials, free of toxic substances, durable, etc;
- Selective waste collection and the use of green cleaning products and other materials.

4 Concluding remarks

Organizing and regulating public spending is always a current topic as it is a role model for private companies. When it comes to the point of innovation and spending in an environmentally and socially responsible way, money and financial issues are not the first ones to consider. The EU has made several efforts for motivating the public authorities to change their ways of thinking on public procurement. Not only with the Directives, but also with the judgements of the European Court of Justice the Member States are getting closer to a more responsible spending. Examining the international best practices has several advantages, here I would like to highlight only two: (1) the fear of being the first one in a changing paradigm is always an issue. But we can see from the collections of the European Commission and the OECD that there are many counties who gained an advantage on the long run (!) by applying new award or contractual criteria in favour of sustainable procurement. For this, Vienna is a great example. (2) there are many products and services which are similar in every country: constructing, vehicles, recycling, IT-services, this way if a new procurement method is working in one country, almost for sure it would work in another. This “spillover” effect makes it possible to use the tools and criteria of another country

³³ See: EU GPP Criteria Toolkits and guidance documents at: http://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm [cit. 28. 12. 2017].

³⁴ See eg: VARNAS, Annika, Berit BALFORS and Charlotta FAITH-ELL. Environmental consideration in procurement of construction contracts: current practice, problems and opportunities in green procurement in the Swedish construction industry. *Journal of Cleaner Production*, 2009, no. 17, pp. 1214–1222.

without the need to spend many working hours on figuring out the maths: somebody else (or the European Commission) has already did it. The public authorities should just do not be afraid (or not be too lazy) to use it!

Literature

AJUNTAMENT DE BARCELONA. *Compromís Ciutadà per la Sostenibilitat*. 2nd Edition. October 2015.

CITY OF VIENNA. *Ökokauf Wien - Green Public Procurement in the City of Vienna, Impact Analysis*. 30 April 2014.

DRAGOS, Dacian and Bogdana NEAMTU. Sustainable Public Procurement: Life Cycle Costing (LCC) in the New EU Directive Proposal. *European Public Procurement and PPP Law Review*, 2013, no. 1, pp. 19–30.

EUROPEAN COMMISSION. Impact and Effectiveness of EU Public Procurement Legislation – Evaluation Report. *Commission Staff Working Paper*, SEC, 2011, 853 final, Brussels.

EUROPEAN COMMISSION. *Green Public Procurement – A collection of good practices*. Brussels, 2012.

HORNE, Ralph E. Limits to labels: The role of eco-labels in the assessment of product sustainability and routes to sustainable consumption. *International Journal of Consumer Studies*, 2009, no. 33, pp. 175–182.

MATTHIEWS, Darin. Strategic procurement in the public sector: A mask for financial and administrative policy. *Journal of Public Procurement*, 2005, no. 3, pp. 388–399.

OECD. *Going Green: Best Practices for Sustainable Procurement*. Paris: OECD, 2015.

ORUEZABALA, Gwenaëlle and Jean-Charles RICO. The impact of sustainable public procurement on supplier management — The case of French public hospitals. *Industrial Marketing Management*, 2012, no. 41, pp. 573–580.

SEMPLÉ, Abby. *Guidance for Public Authorities on Public Procurement of Innovation, Procurement of Innovation Platform, ICLEI – Local Governments for Sustainability*. Druckerei Kesselring GmbH, Emmendingen. s.a.

- SCHULTEN, Thorsten, Kristin ALSOS, Pete Burgess and Klaus PEDERSEN. Pay and other social clauses in European public procurement – An overview on regulation and practices with a focus on Denmark, Germany, Norway, Switzerland and the United Kingdom. *Study on behalf of the European Federation of Public Service Unions (EPSU)* Düsseldorf: December 2012.
- TESTA, Francesco, Fabio IRALDO, Marco FREY and Tiberio DADDI. What factors influence the uptake of GPP (Green Public Procurement) practices? New evidence from an Italian survey. *Working Paper*, Istituto di Management, Scuola Superiore Sant’Anna di Pisa, 2011, no. 6.
- VARNAS, Annika, Berit BALFORS and Charlotta FAITH-ELL. Environmental consideration in procurement of construction contracts: current practice, problems and opportunities in green procurement in the Swedish construction industry. *Journal of Cleaner Production*, 2009, no. 17, pp. 1214–1222.
- WALKER, Helen and Stephen BRAMMER. The relationship between sustainable procurement and e-procurement in the public sector. *International Journal of Production Economics*, 2012, Vol. 140, pp. 256–268.

Contact – e-mail

gjudit@sze.hu