

Proposals for a European Commission strategy on Socially Responsible Public Procurement

Implementing human rights and decent working conditions along global supply chains in public contracts

“State should promote respect for human rights by business enterprises with which they conduct commercial transactions”

Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (Human Rights Council of the United Nations)

“Examples of non-legal “complicity” could be situations where a business enterprise is seen to benefit from abuses committed by others, such as when it reduces costs because of slave-like practices in its supply chain [...]”

The Corporate Responsibility to Respect Human Rights. An interpretative guide (United Nations)

“Of course the taste of sugar dose not vary depending on whether it was traded fairly or unfairly. A product places on the market on unfair conditions does however leave a bitter taste in the mouth of a socially responsible customer”

Juliane Kokott, Advocate Generale at the Court of Justice of the European Union on C-368/10 (European Commission v. the Netherlands)

Background

The **“Buying social”** guide published by the European Commission in 2011 made reference to nine different meanings of the term “Socially Responsible Public Procurement”(SRPP). They comprise social issues (eg. social inclusion of people with disabilities) and four issues regarding working conditions and human rights, which could be defined as “ethical” issues, such as decent work, compliance with social and labour rights, ethical trade and respect for human rights.

In 2011, the Human Rights Council of the United Nations has endorsed the **“Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework”**, known as “UN Guiding Principles” (UNGPs). The UNGPs are the main authoritative international reference in the field of business and human rights. The Principles are based on three pillars. The first pillar refers to: *“State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation and adjudication.”*

Principle n. 6 provides that **“State should promote respect for human rights by business enterprises with which they conduct commercial transactions”**. The commentary to the Principles states: *“States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States – individually and collectively – with unique opportunities to promote awareness and respect for human rights by those enterprises, including through the terms of contract, with due regards to States' relevant obligations under national and international law”*.

At the EU level the **EU strategy 2011-14 for Corporate Social Responsibility, COM(2011) 681, foresees the following:**

- Invites Member States (MS) and public authorities at all levels to make a full use of all the possibilities of the SRPP guide (4.4.2);
- Recognises that a *“better implementation of the UN Guiding Principles will contribute to EU objectives regarding specific human rights issues and core labour standards, including child labour, forced prison labour, human trafficking, gender equality, non-discrimination, freedom of association and the right to collective bargaining”* (4.8.2);
- Invites EU MS to develop national plans for the implementation of the UNGPs (4.8.2, grey box, letter E).

Despite the publication of the European Commission’s (EC) “Buying social” guide and the EC solicitation to implement at the national level the UNGPs in general and ethical/social criteria in public procurement, empirical evidence shows that the majority of contracting authorities in Europe has not yet integrated ethical/social criteria in their procurement procedures.

Therefore, there is ground for developing a EU strategy aiming at the integration in public contracts of human rights and decent working conditions along the global supply chains, aiming at “ethical public procurement” being part of the SRPP concept.

The European Commission should facilitate the implementation, across the EU, of the international principles and its own commitment to human rights and decent working conditions through a strategy on ethical public procurement with the close involvement of Member States and the European contracting authorities (CAs).

One additional, however important reason for developing this strategy is to strengthen the principles of equal treatment and fair competition among suppliers. Through the abuse of human rights and the practice of indecent working conditions suppliers can achieve unfair competitive advantage, which allows them to offer a lower price than suppliers’ operating in compliance with national and international labour legislation. Therefore, implementing in reality such strategy for ethical criteria and socially responsible supply chain management in public procurement will strengthen the principle of equal treatment of suppliers and contribute to their fair competition.

Windows of opportunity for ethical criteria in public procurement

The new Directive on public procurement seeks to achieve two complementary objectives: first, increase the efficiency of public spending to ensure the best value for money and, second, allow procurers **to make better use of public procurement in support of common societal goals**.

The new Directive contains a “horizontal clause”: Member States shall take appropriate measures to ensure the compliance of economic operators to applicable obligations in the field of environmental, social and labour law established by EU law, national law, collective agreements or by international environmental, social and labour law provisions.

The Directive makes also a distinction between the terms “social” and “labour” (article 15.2) it draws special attention to international conventions on labour (Annex XI) and it allows the integration of “social criteria” in the different phases of the procurement procedures (article 66.2). Therefore, the Directive provides room for integrating ethical criteria along the global supply chains also by allowing to taking into consideration the production process of the object of the contract.

Furthermore, the Directive has integrated the Court reasoning in the North Holland case and is much more explicit than the current one on the possibility of taking social criteria into consideration.

In the landmark ruling “Commission v Kingdom of the Netherlands” of 2012, the The EU Court of Justice (CJEU) decided on the introduction of social criteria in the procurement process. Already in the Wienstroem judgement it had confirmed that award criteria could be considered to be linked to the subject matter when related to production processes rather than physical characteristics (such as ‘green electricity’ in the case in question). It was not until the North Holland case that the Court had

the chance to decide on whether the same reasoning applies to social aspects, and if the ‘link to the subject matter’ test was applicable to them.

In that case the Court went further in its reasoning and confirmed the trend of the Wienstroem case law regarding characteristics that do not alter the end-product by stating that ‘there is no requirement that an award criterion relates to an **intrinsic characteristic of a product**, that is to say something **which forms part of the material substance thereof**’.

Another important finding of the Court in the above mentioned case was the breadth of understanding of ‘considerations of social nature’. Specifically, the Court said that such considerations ‘may concern the persons using or receiving the works, supplies or services which are the object of the contract ‘but also **other persons**’.

These two legal developments set a precedent for a stronger focus on SRPP in the future.

DEMAND 1 - ENCOURAGING UPTAKE OF SOCIAL PROCUREMENT IN EU MS

One of main challenges of the new Directive will be the implementation of social and ethical criteria by Member States into national law and by contracting authorities into their procurement activities.

It will be fundamental that the EC expressly integrates the feasibility and legitimacy of ethical criteria in its “Guidance notes” for the implementation of the Directive by Member States.

The application of the “horizontal clause” will need ready-to-use information on environmental, social and labour issues in national, European and international laws, as well as on collective agreements.

Despite the good examples already existing in Europe, many public authorities are still reluctant to take into account other criteria than the compulsory environmental ones in their “sustainable” purchasing decisions, in the false belief that it would be costly and not legally possible.

The Commission should encourage the three pillars of sustainability in public procurement as well as in other sustainable consumption and production areas. As the new Directive offers a clear framework for the introduction of social criteria, the EC guidelines should clearly indicate the legitimacy of this practice and give guidance on how to better promote it under the new legislative framework. An important tool to encourage SRPP is to look at the whole life cycle of the subject matter of the contract.

What would this imply?

- Integrate the feasibility and legitimacy of ethical criteria into the new Directive “Guidance notes” for MS
- Provide support on SRPP within the European Commission, similarly to the support provided on GPP
- Develop a “SRPP Training Toolkit” for purchasing practices, that comprises ethical criteria
- The SRPP training toolkit should include the different steps of the procurement process: identifying risks, defining criteria for SRPP, guidance on monitoring, and follow up
- Develop tools (database, web portal, etc.) for the correct implementation of the “horizontal” clause (e.g.: working conditions established by collective agreements at international level).

How could this be further encouraged?

- Organize training and awareness-raising activities to pro-actively encourage the enforcement of SRPP

- Establish a SRPP advisory group
- Develop SRPP criteria at EU-level
- Set up a help desk for SRPP
- Provide a list or map of “ethical” initiatives and ethical suppliers in every country (e.g. Fair Wear Foundation, Electronics Watch)
- Foster “knowledge transfer” among practitioners, including also academia and research institutions
- Link a future EU ethical procurement strategy with the UNGPs and other CSR initiatives.

DEMAND 2 - SHARING OF BEST PRACTICES

An increasing number of contracting authorities are already successfully integrating social and ethical criteria in their calls for tenders. In some countries, such as Sweden, Norway, Italy and Germany public authorities have engaged in a close dialogue with their suppliers in order to prevent human rights abuses and take remedial actions when human rights are violated in their supply chains (the Swedish County Councils and the Norwegian Healthcare Authorities are front runners in this practice).

It would therefore be most useful if the European Commission could facilitate the exchange of best practices as it currently does in the context of Green Public Procurement.

What would this imply?

- Map policy and practice on SRPP across European countries
- National legal framework and national policy documents
- National/regional and local approaches and practices to SRPP
- Existing tools on SRPP: data base of labels, follow-up portals, self-assessment questionnaires, risk assessment tools for “social hotspots”, social audits, capacity building expert network (ask me), etc.

How could this be disseminated?

Through a platform/website accessible to procurers in Europe and translated into all the EU official languages.

DEMAND 3 - MONITORING & EVALUATION OF SRPP IN EUROPE

It is well known that monitoring the implementing sustainability criteria in supply chains is a real challenge. The access to information, evaluation of data and evidence is limited. Therefore, contracting authorities in the EU member states need support on how the monitoring shall be carried out. In a report from the Scottish Government’s Public Procurement Reform review it is pointed out: “the European Commission recognizes that this is an area for development.”

Furthermore, recital 51a) of the new Directive reads “In order to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 Strategy for sustainable growth, **environmental, social and innovation procurement will also have to play its part.** It is therefore important to obtain **an overview of the developments in the field of strategic procurement so as to take an informed view on the general trends at the overall (macro) level in this area**”.

In line with its objective of achieving “best value for money” in public procurement, the Commission needs to **gather data** of the actual public spending on sustainability. This includes not only environmental aspects, but also social, ethical and economic criteria. This would help to get a clear picture of the actual uptake of sustainability criteria by public authorities, as well as identify the areas for improvement.

What would this imply?

- Develop a database for monitoring criteria for sustainable procurement
- Develop a collaboration between EC and MS competent bodies for monitoring the sustainable procurement practices
- Include sustainable procurement section in the Annual Public Procurement Implementation Review published by the Commission every year.

How could this be done?

- The Commission should consult with experts in all fields of sustainable procurement, and especially take into account the experience of public authorities that have already adopted a coherent approach to sustainable procurement.

The undersigned organisations therefore call on the European Commission to take into consideration their demands outlined above in order to effectively implement social and ethical criteria in public procurement in Europe.

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