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Strategic Public Procurement: An Overview

Policy Paper no 28

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November 2015



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Strategic Public Procurement: An Overview

Heinz Handler

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Abstract:

The paper provides an overview of the development of public procurement (PP) rules in the EU and in selected international organisations. The EU rules were originally designed to foster competition and efficiency, and the dominant award criterion was the price. Over time, and in particular in the context of the "EU 2020" strategy, PP rules have been extended to address not only economic objectives, but also social and environmental goals as well as innovation aspects. As a result, such "strategic" elements of PP have in 2014 been legalised by the new EU Procurement Directives. However, as long as strategic PP remains an isolated policy, it will have only limited ramifications on Community-wide sustainability. Strategic PP should rather complement sustainability policies in their respective areas and should thus become an integral part of overall EU policies.

Key words:

Public procurement, EU internal market, Europe 2020 strategy, sustainability, innovation

JEL Classification: H57, O38

1. Introduction

Public procurement (PP) is the process by which governments and other bodies under public law purchase products, services and public works. The purpose of such purchases varies from purely replenishing office supplies or refurbishing office buildings to matching national policy objectives like stimulating economic activity, protecting domestic industries or alleviating regional disparities. Over many decades, efforts have been undertaken, nationally as well as internationally, to establish legal frameworks for these purchases which secure that markets

are not disrupted and taxpayers' money is efficiently spent. More recently, a number of horizontal public goals have come into play, among them environmental and social targets as well as the promotion of R&D and innovation.

In the EU, PP is legally founded on the Treaty, on secondary legislation in form of directives and regulations, and finally on case-law resulting from decisions of the European Court of Justice (ECJ). The relevant rules have been related to the evolving internal market of the EU. A second strand derives from the multilateral trade system around the World Trade Organization (WTO) with its Government Procurement Agreement (GPA). Over time, these sources have gradually been adapted to the evolving needs of societies and, accordingly, the focus of PP rules has been widened and PP procedures have been rendered more precisely (Handler, 2005).

In the EU the rules governing PP were originally designed to foster competition and efficiency by promoting the widest possible expression of interest among contractors in the EU Member States (MS). Regulation efforts were designed to allow for an open and transparent competition between potential suppliers and thereby to arrive at the technically and financially optimal solution. In particular on regional and local level, this procedure also intended to frustrate subjective decisions depending on the personal connections and interests of decision makers.

In the course of many years, and in particular as an outgrowth of the "EU 2020" strategy, PP rules in the EU have been adapted to address not only economic objectives, but also social and environmental goals as well as innovation aspects. It has been recognised that PP "can shape production and consumption trends and a significant demand from public authorities for 'greener' goods will create or enlarge markets for environmentally friendly products and services. By doing so, it will also provide incentives for companies to develop environmental technologies" (European Commission, 2008b).

Traditionally, and in line with the original focus on efficiency, the most important award criterion has been the price. In many cases the price can easily be communicated and compared between tenderers. It also helps to meet one of the chief objectives of contracting authorities: to provide the required goods, works and services at minimum cost. However, non-price criteria may be applied in cases where the contracting authority has advertised in advance to select – from its own point of view – the "most economically advantageous tender" (MEAT). Non-price criteria may include quality, running costs and the delivery period. This has resulted in an ever increasing number of criteria to specify the quality of a project.

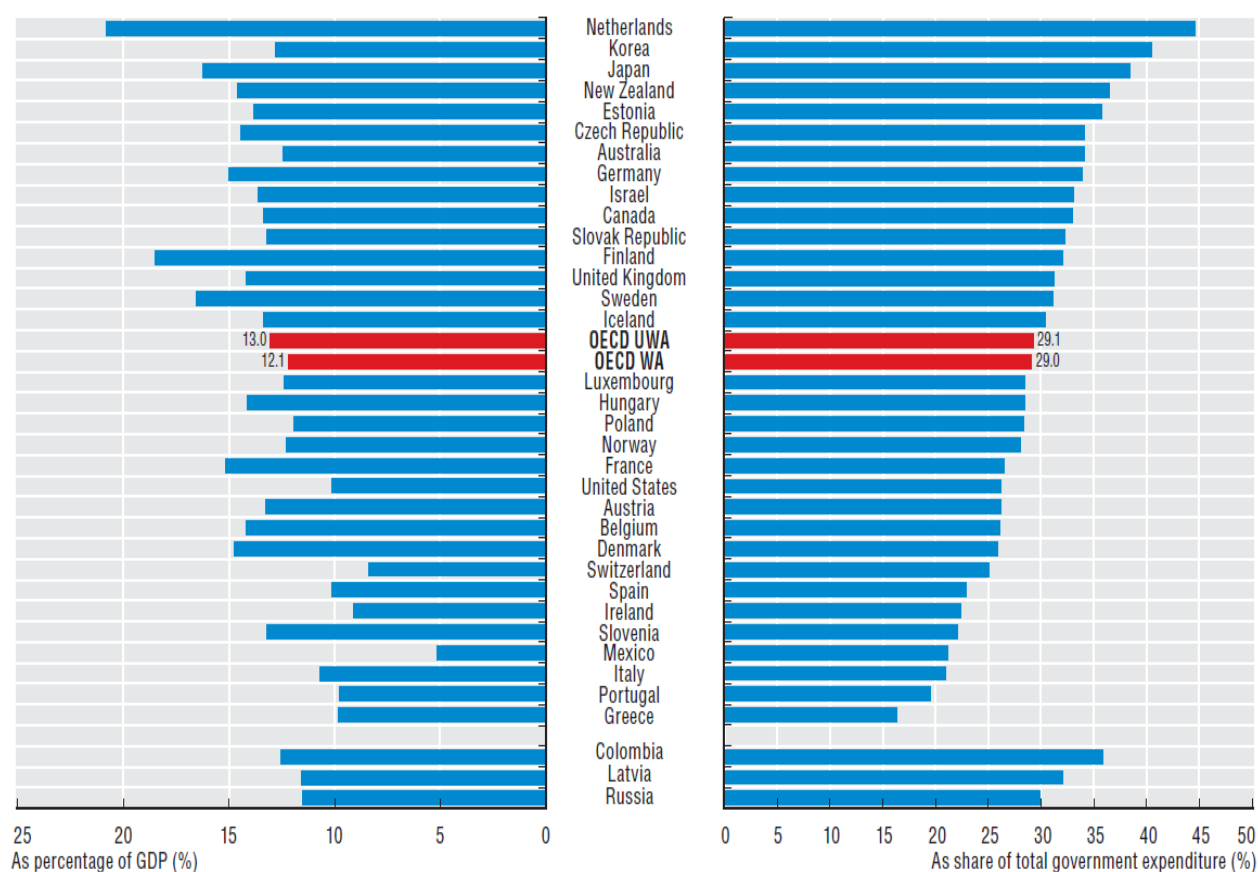
The current paper provides an overview of the development of the rules governing PP in the EU. It starts with selected data to impart an impression on the importance of PP activities in the EU and the MS (Chapter 2). Chapter 3 reviews the legal foundations of PP in the EU and sketches the evolving PP system through directives and case law. Chapter 4 focuses on the specifics of green, sustainable and strategic PP. The latter refers to the broadest concept of PP which, in the context of the "Europe 2020" strategy, comprises not only economic, social and environmental goals, but also innovation and a number of other possible objectives of public policy, such as education and public health. Chapter 5 recognises that this development has not been confined to the EU, but has had precursors and parallels on an international level, carried, among others, by the International Labour Organization (ILO), the World Trade Organization (WTO), The United Nations (UN) and the Organisation for Economic Co-operation and Development (OECD). They have all had an impact on the development

in Europe. Finally, Chapter 6 provides a number of concrete examples of implementing strategic PP elements, and concludes with summarising remarks.

2. Some data on public procurement

PP purchases are an important part of economic activities encompassing in general public expenditures on goods, services and works. However, procurement statistics may differ significantly due to the data source and the range of coverage. According to National Accounts data of the OECD, which do not include public corporations, state-owned enterprises and social security funds, PP in 2013 on (weighted) average amounted to 29.0% of total government expenditures and to 12.1% of GDP (OECD WA in Figure 1).

Figure 1: General government procurement in 2013, excluding social security funds and utilities
(Source: OECD, 2015c)



For EU countries, the total value of public expenditures on goods, services and works (excluding utilities) in 2013 is estimated at €1.8 trillion or 13.7% of GDP. For individual MS, this figure varied from 6.6% for Cyprus to 22.6% for the Netherlands (Table 1). These expenditures constitute PP of any kind, direct and indirect, cross-border and national, regional or local, but exclude expenditure by utilities due to the questionable reliability of the available figures. As a share of this total, the value of cross-border calls for tender published in the Official Journal of the European Union amounted to 19.1% or the equivalent of 2.6% of GDP (Table 2).

Table 1: Estimate of total public expenditure on works, goods and services (excluding utilities) as % of GDP (Source: European Commission, 2015)

	2010	2011	2012	2013
Belgium	13.19	13.43	13.75	13.59
Bulgaria	12.18	11.06	10.85	12.03
Czech Republic	16.29	15.40	14.73	14.37
Denmark	13.72	13.47	14.06	13.58
Germany	14.68	14.46	14.45	14.67
Estonia	13.03	12.85	14.30	13.14
Ireland	11.92	10.36	9.67	9.47
Greece	11.59	9.85	9.77	8.91
Spain	12.94	11.83	10.18	9.74
France	14.87	14.52	14.74	14.90
Croatia	11.97	11.88	11.67	12.29
Italy	10.90	10.61	10.33	10.08
Cyprus	9.53	8.91	7.42	6.63
Latvia	11.71	12.22	11.68	11.38
Lithuania	12.85	11.58	10.51	9.87
Luxembourg	12.78	12.18	12.34	12.02
Hungary	13.83	13.18	13.28	14.02
Malta	8.53	9.38	10.29	9.63
Netherlands	22.93	22.30	22.76	22.62
Austria	11.32	10.99	11.10	11.24
Poland	14.05	13.55	12.50	12.05
Portugal	13.79	11.89	10.68	10.43
Romania	12.64	12.98	12.00	11.24
Slovenia	13.48	12.64	12.40	12.60
Slovakia	12.74	12.43	11.81	11.76
Finland	16.66	16.66	17.20	17.81
Sweden	16.25	16.14	16.23	16.32
United Kingdom	15.43	14.34	14.46	14.46
EU average	14.33	13.81	13.69	13.67

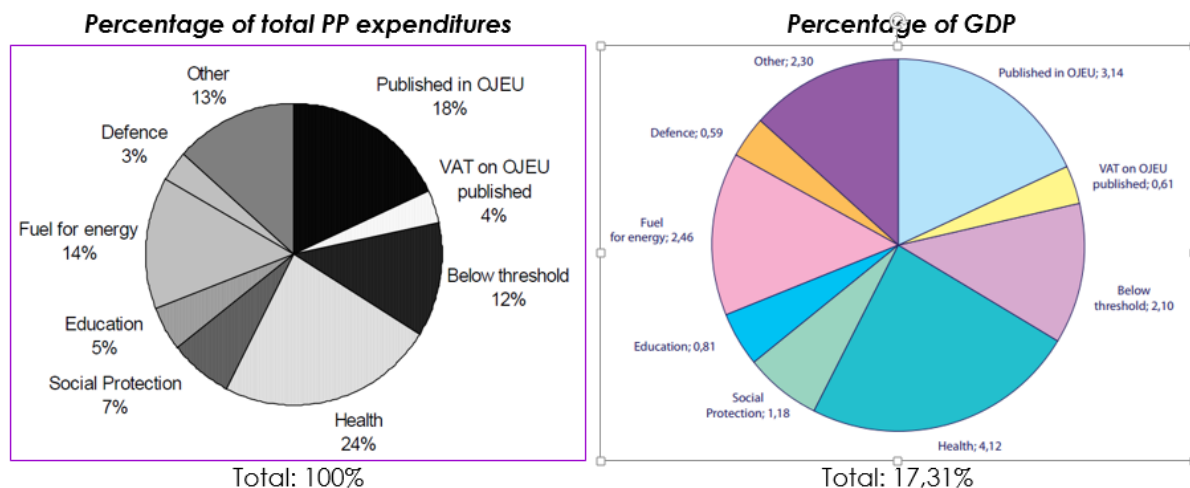
Table 2: Value of tenders published in the Official Journal as % of total expenditures (excluding utilities) and GDP (Source: European Commission, 2015)

	% Tot. Exp.	% GDP	% Tot. Exp.	% GDP
Belgium	16.60	2.28	19.06	2.59
Bulgaria	54.93	5.96	64.61	7.77
Czech Republic	31.88	4.70	28.33	4.07
Denmark	39.89	5.61	37.28	5.06
Germany	5.97	0.86	6.40	0.94
Estonia	39.35	5.63	31.48	4.14
Ireland	12.51	1.21	15.67	1.48
Greece	18.03	1.76	20.94	1.87
Spain	15.99	1.63	13.40	1.31
France	18.88	2.78	18.48	2.75
Croatia	n.a.	n.a.	25.08	3.08
Italy	15.50	1.60	19.54	1.97
Cyprus	29.77	2.21	29.29	1.94
Latvia	57.72	6.74	51.90	5.90
Lithuania	33.43	3.51	37.95	3.75
Luxembourg	10.44	1.29	10.37	1.25
Hungary	48.07	6.38	51.93	7.28
Malta	33.78	3.48	35.75	3.44
Netherlands	8.11	1.85	7.60	1.72
Austria	9.65	1.07	11.82	1.33
Poland	35.31	4.42	47.52	5.73
Portugal	14.32	1.53	15.73	1.64
Romania	34.26	4.11	28.86	3.24
Slovenia	26.07	3.23	48.18	6.07
Slovakia	36.22	4.28	57.03	6.71
Finland	19.24	3.31	18.87	3.36
Sweden	22.40	3.64	22.79	3.72
United Kingdom	34.02	4.92	32.90	4.76
EU average	18.53	2.54	19.07	2.61

For 2011, total EU government and utility expenditures on works, goods and services amounted to 17.3% of GDP. The overwhelming part of these outlays are not subject to the specifics of the PP Directives, although the basic principles of the Treaties have of course to be observed anyway. Exempted from the Directives are supply contracts in the areas health, social protection, fuel for energy, defence, and contracts below the EU thresholds. In all these cases, national procurement rules may fill the gap. Using a breakdown for 2008, only for 18% of the expenditures mentioned (excluding value-added tax), or for 3.1% of GDP, the EU PP

Directives are applicable. Contract offers in this segment have to be published in the Official Journal (OJ) of the EU (Figure 2).

Figure 2: Breakdown of total government and utility expenditure on works, goods and services (Source: European Commission, 2011, Part 1)



3. The EU approach to public procurement

This section of the paper deals with the legal background of PP in the EU, in particular with primary law provisions of the Treaties, with EU directives and with ECJ case law.

3.1 Internal market connection

The rules governing PP were originally targeted to further the opening of procurement markets to competition, to eliminate “buy national” policies and to promote free trade. They were (and are) based on the Treaty provisions concerning the internal market. Article 3 TEU¹ states: “The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.”

Further, Article 18 TFEU prohibits any discrimination on grounds of nationality, while Article 26 TFEU establishes the basic principle of the freedom of movement of goods, persons, services and capital. This is complemented by Article 34 TFEU which prohibits quantitative restrictions on imports and all measures having equivalent effect on trade between MS.² Most important for breathing life into the internal market, Article 114(1) TFEU empowers EU authorities to

¹ For the EU Treaties the following abbreviations are used: TFEU = Treaty on the Functioning of the European Union. It is an amended and renamed version of the Treaty establishing the European Community (TEC, “Treaty of Rome”, 1958) and constitutes, together with the Treaty on European Union (TEU, “Maastricht Treaty”, 1993), the “Lisbon Treaty” which has been in force since 1 December 2009.

² For comparable provisions concerning the freedom to provide services within the EU, see Article 56 TFEU.

coordinate national procedures which aim at the approximation of provisions concerning the internal market.

General exceptions from the principle of free movement of goods are specified in Article 36 TFEU. Trade restrictions may be justified on grounds of public morality or security, the protection of health and life, the protection of national treasures, or the protection of industrial and commercial property. Such restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between MS.

Derived from the Treaty provisions, several general principles have entered the PP scene, such as equal treatment, transparency, proportionality and mutual recognition. However, such principles have turned out insufficient to prevent preferential treatment in PP contracts. To overcome this deficiency, secondary legislation and case law decisions of the ECJ have at various occasions emphasised the internal market connection of PP.

3.2 Public procurement in early directives and case law

The first **directives** dealing with PP were oriented at French legislation and dealt predominantly with procedural aspects. This holds in particular for Directive 66/683 of 6 November 1966 and for Directive 70/32 of 17 December 1969 which prohibit contracts requiring the exclusive use of national products. Directive 71/304 of 26 July 1971 bans restrictive and discriminatory practice of awards for public works contract. Directive 77/62 introduces the principles of Union-wide advertising and transparent award procedures.

Following the Commission's White Paper on the internal market, the Remedies Directives, 89/665 for the public sector and 92/13 for the utilities sector, set the stage for tendering and appeals against awards. The 1993 Directives (93/36, 93/37 and 93/38) consolidated the rules of previous directives.

Parallel to the advances via directives, a number of **case law** decisions elaborated in more detail the conditions to be met by contracting authorities when they were about to restrict the four freedoms. An example is the ECJ ruling on the *Case University of Cambridge* (C-380/98 of 3 October 2000) which stipulates "that the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State" (Paragraph 16). The ECJ judgment in the *Case Contse* on health services (C-234/03 of 27 October 2005) requires that restrictions must (i) be applied in a non-discriminatory manner, (ii) be justified by imperative requirements in the general interest, (iii) be suitable for securing the attainment of the objective which they pursue; and (iv) not go beyond what is necessary in order to attain it (paragraph 25).

In conjunction with the *Dassonville* (Case 8/74 of 11 July 1974) and *Cassis de Dijon* (Case 8/74 of 20 February 1979) rulings of the ECJ, the principle of mutual recognition evolved: Products that are lawfully produced and marketed in one MS must be mutually recognised by all other MS. Exemptions were seen justifiable to secure the effectiveness of fiscal supervision, the fairness of commercial transactions and consumer protection.

In its *PreussenElektra* decision (Case 379/98 of 13 March 2001), the ECJ established that under certain conditions trade-related aspects of PP could be overruled by other policy objectives. In the decision it was recognised that legal requirements for German electricity suppliers to

purchase renewable electricity from local sources could hamper cross-border trade. However, in view of the environmental objectives of the Union (according to the Treaty of Amsterdam, in force since 1 May 1999), the ECJ considered this as no violation of Article 34 TFEU.

More recently, the ECJ has added a number of other possible mandatory requirements, e.g. "the protection of the environment, the improvement of working conditions, the promotion of culture, the prevention of the risk of seriously undermining the financial balance of the social security system, the maintenance of press diversity, the protection of road safety, the fight against crime, the protection of animal welfare and the protection of national or regional socio-cultural characteristics" (Hettne, 2013).

Back in 2001, two Interpretive Communications by the European Commission – i.e. COM (2001) 274 for environmental concerns and COM (2001) 566 for social concerns – paved the way for an extension of the award criteria towards sustainability. The ideas formulated in these Communications were later absorbed, jointly with the earlier ECJ decisions, into the 2004 Directives³. They explicitly recognise environmental and other sustainability factors in PP contracts. Quoting Directive 2004/18, such factors may be implemented at various stages of a standard PP procedure (see also Bell – Usher, 2007):

- **Targets:** Defining the goal of a procurement project is the task of the policymaker. Union law does not regulate the subject matter of a contract which can thus freely be set at the national level. "Public procurement legislation is not much concerned with what contracting authorities buy, but mainly with how they buy it" (European Commission, 2004:14). Therefore, public authorities planning a procurement contract may promote support for environmental and/or labour standards, but they have to indicate this already in the call for tenders.
- **Technical specifications:** There are eligibility criteria or minimum quality criteria which may contain environmental and social elements as long as they are compatible with Community law and are announced in the contract notice or in the contract documents. They shall not create unjustified obstacles to the opening up of PP to competition (Article 23(2) of Directive 2004/18). According to Article 23(3)b, technical specifications may be expressed as performance or functional requirements which include environmental characteristics. The Directive's Preamble (Recital 29) provides that contracting authorities may define characteristics such as a given production method and/or specific environmental effects of goods or services. Public purchasers may exclude contractors in case of major labour standard violations. However, as mentioned in Bell – Usher (2007), the adherence to labour standards as part of the specification is seen as problematic on the grounds that the conditions of production are not intrinsic to the quality of the finished product.
- **Award criteria** are used to establish a ranking among the eligible projects. The Preamble (Recital 46) stipulates that the award criteria can be quality (and not just economic) factors. Accordingly, Article 53(1) prescribes that award criteria shall either be the lowest price only or, when the award is made to the "tender most economically advantageous" (MEAT), various criteria linked to the subject-matter of the contract in question. Examples for the latter are technical merit, aesthetic and functional characteristics, environmental characteristics, running costs,

³ Directive 2004/17 "coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors", and Directive 2004/18 "on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts", both of 31 March 2004.

cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion. The Preamble adds that contracting authorities may use criteria to meet social requirements, in particular to respond to the needs of disadvantaged persons.

- **Performance conditions:** According to Article 26, contracting authorities may lay down environmental and social 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 contract documents. Procuring authorities may require ongoing compliance with environmental and labour standards within contracts, and can monitor such compliance which seems essential to secure the effectiveness of performance conditions.

As an outgrowth of these Directives, European and national legislation have opened up public contracts to a bundle of policy goals while securing fair competition, thereby giving citizens gradually better quality at the best price.

3.3 New Directives of 2014

Following the financial and economic crisis of 2008/09, the European Commission has launched a new ten-year growth strategy, carrying forward the preceding Lisbon Strategy of 2000 which had never been completed. The new **Europe 2020** strategy of March 2010 (European Commission, 2010a) sets priorities on knowledge and innovation ("smart growth"), on more resource efficient, greener and more competitive economies ("sustainable growth") and on high-employment economies delivering social and territorial cohesion ("inclusive growth"). Seven "flagship initiatives" support the implementation of reforms, tackle bottlenecks and contribute to delivering the headline targets until 2020.

Public sector procurement is supposed to foster long-term growth strategies, although in the short run fiscal consolidation has clearly been dominating. The flagship initiative "Resource-efficient Europe" encourages a wider deployment of green PP, the utilisation of procurement to adapt production and consumption methods as well as to reduce energy and resource use. In the flagship initiative "An industrial policy for the globalisation era", the Commission has worked on modernising PP as part of a horizontal approach to industrial policy; to improve the business environment especially for innovative small and medium-sized enterprises (SMEs), and MS are supposed to support innovation incentives also via PP contracts.

An important contribution to the European growth agenda, as defined in the Europe 2020 strategy, was the initiative by the Commission to **re-launch the Single Market**. A first Single Market Act with twelve fields of specific actions was adopted in April 2011 (IP/11/469). One of the priority actions concerned a revision and rounding up the EU's PP rules. A modernised set of directives should (i) aim at a balanced policy supporting the demand for environmentally friendly, socially responsible and innovative goods and services, (ii) provide contracting authorities with simpler and more flexible procedures, in particular through implementing electronic invoicing as the standard procedure, and (iii) give SMEs easier access to procurement markets. A more concrete list of proposals was issued in the Commission Communication "Together for new growth" (Single Market Act II, COM(2012) 573 final of 3 October 2012).

Already in January 2011, the Commission had issued a Green Paper on the modernisation of the Union's PP policy with the main aim (i) of facilitating the procurement procedures and (ii) of complementing the award criteria with a view of promoting environmental, social and innovation goals of public policy. As result of the following discussion process, the Council on 26 February 2014 adopted the **new Procurement Directives** which replaced the 2004 Directives. They have retained, however, "the basic requirements of competition, transparency, equal treatment and compliance with EU state aid rules" (Semple, 2014a). The legislative package consists of:

- Directive 2014/24 on public procurement ("Public Sector Directive"),⁴ replacing Directive 2004/18;
- Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors ("Utilities Directive"),⁵ replacing Directive 2004/17; and
- a new Directive 2014/23 on the award of concession contracts ("Concessions Directive")⁶ which provides an orientation previously given only by ECJ case law.

The new Directives do not change the thresholds which are subject to obligations of the EU under the World Trade Organisation's Government Procurement Agreement (recently renegotiated as Revised GPA, in force since April 2014). MS must transpose the new PP Directives into national law by April 2016, for e-procurement the deadline is September 2018.

Directive 2014/24, Article 67(2) takes up the idea of Directive 2004/18, Article 53(1): The most economically advantageous tender (MEAT) from the point of view of the contracting authority "shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question." This means that price or cost considerations have to be part of the award criteria and that "lowest-price awards" are possible as ever. Only in addition may quality criteria serve to identify the MEAT.

The new Directives also introduce a number of simplified rules and procedures and broaden the possibilities for negotiation: the "competitive procedure with negotiation" may be used when justified by the specific nature of a given project or by the fact that the needs of the contracting authority cannot be met by a standard type of solution. Semple (2014b) finds that in some instances the 2014 Directives are narrower than previous laws, e.g. with respect to eco-labels and the use of life-cycle costing.

4. Strategic procurement as all-embracing concept

In this section, the economic elements of strategic PP are discussed, comprising in particular sustainability aspects (green PP and socially responsible PP) and innovation issues and reaching out to a broad set of other policy objectives (such as health and education).

⁴ See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0024>.

⁵ See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0025>.

⁶ See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0023>.

4.1 What is “strategic procurement”?

The significant economic role of PP provides the public sector with notable market power which can strategically be used not only for economic but also for wider social and political purposes (Schulten et al., 2012). As the European Commission (2011, Part I: ix) noticed in the evaluation report on the “Impact and Effectiveness of EU Public Procurement Legislation”, there has been “growing policy interest in re-orienting public expenditure towards solutions that are more compatible with environmental sustainability, promote social policy considerations, or support innovation”. Among others, the consideration of social criteria in public contracts has more and more become acknowledged as a core principle of a modern procurement policy. In practice the development of “socially responsible public procurement” (SRPP) may include a wide range of policy issues such as employment opportunities, decent work, compliance with social and labour rights, social inclusion, and equal opportunities etc.

Box 1: Strategic public procurement

A major goal of the 2014 reform of the PP Directives was „to facilitate strategic procurement taking account of environmental, social and innovation factors” (Semple, 2014b). Towards this end, the Preamble to Directive 2014/24 states: “In order to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 strategy for smart, sustainable and inclusive 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 level in that area” (Recital 123). And further: “Public authorities should make the best strategic use of public procurement to spur innovation” (Recital 46).

Other terms sometimes used in the literature to describe the all-embracing concept of PP is “preferential procurement” or just “linkage”. The latter term is used by McCrudden (2004) for PP when used to achieve social outcomes, other authors (e.g. Chen, 2013) employ it synonymously to what is denoted here as strategic PP.

As remarked above, the original (limited) intention of PP rules in the EU was to secure competition and efficiency in public sector contracts. However, in the course of developing the EU internal market, other strategic procurement elements (as stated in Article 3 TEU) have entered the scene. The term “Strategic Public Procurement” is at times used as a synonym for sustainable PP, but in the context of the Europe 2020 strategy it indicates an even broader view (see Box 1). Besides economic, social and environmental goals, it also focuses on horizontal issues such as innovation and a number of other objectives of public policy. They may include, e.g., education, public health and non-discrimination on the basis of sex, ethnic or religious background.⁷ A convenient structure of strategic PP objectives would, apart from competition and efficiency, incorporate the following “other policy considerations”:

- promotion of environmental aspects (green public procurement – GPP);
- adherence to certain social and ethical standards (socially responsible public procurement – SRPP); and
- promotion of innovative goods, services or works (public procurement promoting innovation – PPPI).

⁷ In a much narrower sense, Garcia-Alonso – Levine (2008) employ the term „strategic procurement“ to denote protectionist practices promoting strategic domestic industries such as defence or the pharmaceutical industry.

The dominant achievement of the new Directives is the integration of the various strands concerning strategic PP which continue to be based on open and transparent procurement markets and the most efficient use of public funds. These strands comprise incentives for improving the conditions for business to innovate; for encouraging the wider use of green procurement through support of a shift towards a resource efficient and low-carbon economy. More concretely, the following aspects of the revised PP rules will contribute to implementing the Europe 2020 strategy (Hettne, 2013):

- The concept of "life-cycle costing" will encourage public authorities to consider the complete existence of a product in their purchasing decisions. "[C]ontracting authorities can determine the most economically advantageous tender and the lowest cost using a life-cycle costing approach. The notion of life-cycle costing includes all costs over the life cycle of works, supplies or services" (Recital 96 of Directive 2014/24).
- Contracting authorities may take into account criteria linked to the production process of the works, services or supplies to be purchased, such as the inclusion of disadvantaged people or the use of non-toxic substances.
- Contracting authorities may also require that works, supplies or services bear specific labels certifying environmental, social or other characteristics, as long as only the criteria and characteristics of the label which are linked to the subject-matter of the contract are required and that equivalent labels are accepted.
- To favour social inclusion, the reservation in favour of sheltered workshops has been extended to economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers.
- Innovation will be fostered by the new partnership procedure where the contracting authority shall cooperate with a company – selected in a regular competitive tender procedure – to develop an innovative product, work or service, which does not yet exist on the market.

To tap the full potential of implementing strategic considerations in PP contracts, the following points should be observed:

- i. Defining the subject matter of the contract is the task of the contracting authorities: There are no EU rules as to what governments and other public authorities should buy. However, the "subject matter of a public contract may not be defined with the objective or the result that access to the contract is limited to domestic companies to the detriment of tenderers from other Member States" (COM (2001) 274 final:12).
- ii. If the EU itself requires contracting authorities to promote environmental and social considerations, they will not only promote their own national interests but will also contribute to the realisation of the common objectives of the EU. Examples are the Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources, or the Directive 2009/33/EC on the promotion of clean and energy-efficient road transport.
- iii. If it is ultimately not possible to justify the preferences of the contracting authority through the definition of the object of the contract, and the EU has not adopted measures that support the objectives set by the authority, the impact of social and/or environmental requirements on the free movement of goods must be assessed.

Towards this end, Monti (2011: 77-78) maintains that "there is probably room for a greater use of public procurement as a tool to achieve policy objectives set out at EU level. Public purchase can be a boost for innovative products and technologies in the area of climate change and energy. It may give a push to research and innovation, promote social cohesion and help meet the poverty reduction and employment objectives...." To achieve these goals, the contracting authorities may resort to award criteria relating to the subject matter of the contract or to mandatory requirements, such as technical specifications. The decision must be taken case by case. Hettne (2013) argues in favour of award criteria because they are usually "a more proportionate and effective approach than other mechanisms. They are easier to justify than admission conditions, selection criteria and technical specifications etc., which are capable of totally excluding tenderers who cannot meet them." In contrast, Kahlenborn et al. (2011) assert that "(u)nder the financial constraints of tight budgets public authorities often follow a more short-term policy and tend to choose the cheapest bids. As a consequence, a more encompassing inclusion of social award criteria will require legally binding provisions to be incorporated into procurement law."

Although there is obviously a positive climate for environmental, social and innovation considerations which encompasses PP, there is, from a legal point of view, some risk attached for MS to an exuberant application of non-economic (strategic) elements in PP. This is related to the **degree of harmonisation** of national policies in the EU. In certain fields the EU may have opted for minimum harmonisation or no harmonisation at all. In case of total harmonisation the risks are limited that the application of strategic criteria may not comply with European law, while there is much less certainty when there is just minimum harmonisation, in which case MS may maintain or introduce more stringent protective measures.

4.2 Environmental and social aspects of sustainable procurement

A rather lengthy definition of **sustainable public procurement** (SPP) is used by the United Nations Environment Programme (UNEP, 2012a) which sees SPP as a "process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organisation, but also to society and the economy, whilst minimising damage to the environment." This definition was originally formulated by the U.K. Task Force for Sustainable Procurement (Simms, 2006).

In the EU, environmental protection was first recognised as a primary goal in the Treaty of Amsterdam. As a follow-up, social considerations and environmental requirements are now explicitly mentioned in the TFEU. Article 9 states: "In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health". And Article 11 adds: "Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development".

These rules are further elaborated in other Articles of the TFEU, forming the basis for secondary legislation and case-law. Articles 191, 192 and 193 TFEU are specifically devoted to the "Environment" in a broader (strategic) sense, with the following objectives mentioned in Article 191(1) TFEU: (i) preserving, protecting and improving the quality of the environment, (ii) protecting human health, (iii) prudent and rational utilisation of natural resources,

(iv) promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

Today, the European Commission distinguishes between **Green Public Procurement** (GPP) and **Sustainable Public Procurement** (SPP). The narrower concept of GPP means that “public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life-cycle compared to goods, services and works with the same primary function that would otherwise be procured.” The broader concept of SPP implicates that “public authorities seek to achieve the appropriate balance between the three pillars of sustainable development - economic, social and environmental - when procuring goods, services or works at all stages of the project”.⁸

In 2003 the Commission issued a “Communication on Integrated Product Policy”, COM(2003) 302 final,⁹ urging MS to draw up publicly available **National Action Plans** (NAPs) with regard to greening their PP. The NAPs should assess the existing situation and the targets for the coming years, specifying what measures will be taken to achieve them. The legally non-binding NAPs are supposed to provide political impetus to the process of implementing and raising awareness of greener PP. As of September 2015, 22 MS (all except Croatia, Estonia, Greece, Hungary, Luxembourg and Romania) had adopted NAPs or equivalent documents.¹⁰

In 2006 the European Council adopted a “Renewed EU Sustainable Development Strategy” which, among others, aimed “to achieve by 2010 an EU average level of Green Public Procurement (GPP) equal to that currently achieved by the best performing Member States”.¹¹ And in 2008, the Commission issued a “Communication on Public Procurement for a Better Environment” (European Commission, 2008b). In an attempt to avoid a distortion of the single market and to secure among MS a high degree of similarity of environmental requirements for products and services, the Commission proposed two types of criteria, based on a life-cycle approach and scientific evidence:

- The “core criteria” address the key environmental impacts and are suitable for use by any contracting authority across MS. They are designed to be used with minimum additional verification effort or cost increases.
- The “comprehensive criteria” aim at the best environmental products available on the market. They may require additional verification effort or a slight increase in cost compared to other products with the same functionality.

Based on the use of such common environmental criteria, many MS follow the EU's approach to GPP for specific priority product groups (Kahlenborn et al., 2011). The Commission proposed that, by 2010, 50% of all tendering procedures should be “green”, i.e. compliant with endorsed common core GPP criteria. Although the uptake of core criteria has increased, the overall goal has been missed in many MS. Moreover, uptake of core criteria has varied not only across countries, but also across product groups. Just a few criteria are used frequently, while e.g. life-cycle costing is rather neglected (Renda et al., 2012).

In a parallel **case law** strain, the ECJ has developed a number of criteria which were not already enshrined in directives. The following cases may serve as illustrations:

⁸ See http://ec.europa.eu/environment/gpp/versus_en.htm

⁹ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0302:FIN:EN:PDF>.

¹⁰ See http://ec.europa.eu/environment/gpp/action_plan_en.htm

¹¹ See <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010917%202006%20INIT>.

- In the decision on the *Beentjes Case* (C-31/87 of 20 September 1988), the ECJ indirectly accepted social policy considerations as part of the award criteria, at least when the “most economically advantageous offer” is awarded. As this term is not exactly defined by the relevant directives, procurers may include policies of fighting long-term unemployment as long as it is compatible with the general principles of the Treaty (e.g. non-discrimination) and is made public in the tender notice.
- In the Cases *Telaustria and Telefonadress* (C-324/98 of 7 December 2000), *Concordia Buses Finland* (C-513/99 of 17 December 2002) and *EVN-Wienstrom* (C-448/01) of 4 December 2003), the ECJ ruled more generally that, as an element of the MEAT criteria, environmental considerations could be used to justify a PP award.

As far as **social policy** is concerned, government contracting was quite popular in the 19th century in Europe and North America, particularly in dealing with issues of labour standards and unemployment (McCrudden (2004). The use of PP expanded during the 20th century, initially to include the provision of employment opportunities to disabled workers. During and after World War II, the use of PP became important in the United States in addressing racial equality, in the requirements for non-discrimination in contracts, and in affirmative action and set-asides for minority businesses. Subsequently, the role of PP spread both in its geographical coverage and in the subject areas of social policy. More recently, procurement has been used as an instrument to promote human rights transnationally, also by international organisations such as the International Labour Organisation (ILO). De Schutter (2014), as the United Nations Special Rapporteur on the Right to Food, has strongly emphasised the right of all humans to adequate food, and has listed a number of recommendations to policymakers to fulfil this duty through PP contracts. Inter alia, food procurement schemes should source preferentially from small-scale food producers, guarantee living wages and fair prices, set specific requirements for adequate food diets, and demand from their suppliers to produce food according to sustainable methods.

In the EU, the Commission has formulated the concept of “Socially Responsible Public Procurement” (SRPP) which comprises the promotion of employment opportunities, decent work, social inclusion, equal opportunities, accessibility, ethical trade, and seeks in general to achieve wider compliance with social standards. Social considerations may enter the PP procedure at various stages, but not all stages may be suitable for all such considerations. As an example, labour conditions are generally more appropriate to be included in performance clauses rather than in technical specifications or selection criteria. With respect to corporate social responsibility (CSR), wider voluntary commitment is sought going beyond legal requirements to pursue environmental and social objectives (European Commission, 2010b).

As another aspect of SRPP, there have been attempts to stimulate the interest of **small and medium-sized enterprises** (SMEs)¹² to become engaged in procurement activities. According to Thomassen et al. (2014), between 2009 and 2011, an estimated 56 percent of all public contracts above the EU thresholds (measured by the number of contracts) were awarded to SMEs in the EU-27. Unfortunately, SMEs are much less successful when they bid for large contracts. Measured by the average contract value, SMEs only won 29 percent of the above-threshold contracts. Due to their small size, SMEs face a number of impediments which make it difficult for them to participate in the PP market. Problems arise in particular with

¹² In the EU, SMEs are defined as independent enterprises or groups of enterprises with less than 250 employees and with (a) total annual turnover not exceeding 50 million euros, or (b) a balance sheet not exceeding 43 million.

respect to collecting relevant information, the size of contracts, overcoming administrative burden, providing sufficient financial guarantees, complying with quality and time requirements (for details, see European Commission, 2008a, 2010b). A major effort was undertaken through creating the European Single Procurement Document (ESPD). It provides a standard electronic form for self-declaration of the financial position, technical competencies and tax clearance. The move to make e-procurement obligatory may also help to achieve this goal. However, the gradual shift from price or cost to MEAT as dominant contract criteria impairs the chances for SMEs to engage in PP projects.

4.3 Innovation as goal of public procurement

"Innovation means the implementation of a new or significantly improved good, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, with the purpose of helping to solve societal challenges". Following Semple (2014a), **public procurement of innovation** (PPI) is thus "driven by the demand of public customers, and targets the development of concrete solutions to meet these needs." Obviously, there is a potential for PPI "to trigger the purchase of innovative solutions on a larger scale. When procurers represent a critical mass they can help to shift both public and private sector demand towards new technologies and processes. In certain sectors, the demand-pull from the public sector is the most important instrument to develop new markets for innovative products and services. Healthcare and civic infrastructure are two examples of this."

The European Commission, in the Communication COM(2003) 226 final of 4 June 2003, emphasised that the public sector could act as a launching customer in a number of sectors, such as health care, education, transport, environmental protection and defence. PP rules demand that public buyers obtain the best value for money, including innovative products and services that best fit their needs. The Directives of 2004 permit technical specifications in terms of functional or performance criteria which may also include aspects of innovation (see Directive 2004/18, Recital 29 and Article 23.3).

The Aho-Report to the Commission (Aho et al., 2006) advocated the establishment of "**lead markets**" in selected areas. In a follow-up, the European Commission (2007b) presented the Lead Market Initiative to identify "areas where concerted action through key policy instruments and framework conditions, coherent and coordinated policy making by relevant public authorities, as well as enhanced cooperation between key stakeholders can speed up market development, without interfering with competitive forces." Lead markets were designed to cover broad market segments with strategic societal and economic interest; they were supposed be demand (and not technology) driven and should avoid a "picking the winner" outcome. The Commission proposed six areas where specific impediments hampered innovative solutions:

- (i) *eHealth*, aiming at better care for less money, in particular by reducing the fragmentation of the market;
- (ii) *sustainable construction*, for better coordination of regulations within and between countries;
- (iii) *protective textiles*, which shield the users from all kinds of hazards, could gain from unified European standards and an improved protection of property rights;
- (iv) increasing the knowledge and transparency of *bio-based products* should help to replace fossil-based products;

- (v) *recycling of waste* could be spurred by more effective processes and technologies; and
- (vi) the production of *renewable energy* would gain from energy prices which better reflect external costs and from removing administrative and market barriers.

In its "Guide on dealing with innovative solutions in public procurement", the European Commission (2007a) regarded PP as an effective instrument to encourage innovation in these areas. However, PP is only seen as an element of a broader innovation strategy. "What is needed is a system providing for education, for research, for finance, for knowledge transfer and support for small business, for intellectual property management and for a high quality regulatory environment."

Edler – Georghiou (2007) specifically deal with **pre-commercial procurement** in the form of public technology procurement (PTP), which occurs when a government agency places an order for goods or services that do not yet exist. The contracting authority specifies the functions required, but not the product which is elaborated by the supplier. Therefore, R&D and innovation have to take place before delivery. A procurement contract could remove part of the financial risk for the supplier and encourage R&D investment. The danger associated with PTP is that ailing "national champions" are sponsored at the expense of competition. To get around this problem, multiple sources of supply should be addressed, in particular via European cooperation.

Tsipouri (2012) and Semple (2014a) ask why PPI is still quite limited in scale across Europe and provide the following answers:

- Contracting authorities tend to rely on traditional procurement processes which rest on competition and price, and they are to some extent reluctant to exhaust the possibilities provided by EU law.
- Off-the-shelf PP is a relatively straight-forward process as compared with PPI which may demand advanced technical skills and insights in rather complex solutions.
- Risk-aversion retards the buying of innovative solutions from a new company.
- New technologies and market developments are loaded with the problems of awareness, knowledge and experience.
- Procurement is often treated as a purely financial and administrative task which is hard to align with broader policy objectives (e.g. health, environment, transport).

Semple emphasises that the new PP Directives of 2014 "open up a number of opportunities for PPI, while maintaining the basic requirements of competition, transparency, equal treatment and compliance with EU state aid rules." She emphasises the **two new PP procedures** which seem particularly relevant for authorities who intend to invest in innovative goods, services or works: the *Innovation Partnership* and the *competitive procedure with negotiation*. In addition, the *competitive dialogue* will become more freely available with clearer rules on the end stages and the refinement of bids. "All three procedures will be available for contracts which include an element of design or innovation, or if technical specifications cannot be sufficiently defined. Procurers will thus have greater flexibility in the choice of procedure to meet their needs and to evaluate a range of solutions."

Tsipouri (2012) suggests a number of policy measures which would help establish PP as a vehicle spurring R&D and innovation. Foremost it would be necessary to create a positive climate for PPI through rewarding innovative procurers and building up the necessary skills to

successfully implement PPIs. This should be complemented by a strategy to reduce the risks involved for procurers and suppliers via additional budgets or insurance systems. Furthermore, PPI raises issues of governance and coherence between the primary PP goals and the innovation goal. A number of ideas attempt to tackle this problem, such as (i) providing the market with advance information on future needs, (ii) creating special agencies to manage PPI, or (iii) making a single Minister responsible for both procurement and innovation across government.

In an empirical investigation for Germany, Aschhoff – Sofka (2008) conclude that PP has significant positive effects on the innovation success, comparable to providing an efficient infrastructure to foster knowledge spill-overs from universities to firms. However, while the benefits of university knowledge apply uniformly to all firms, PP is especially effective for smaller firms. They in particular benefit from the planning reliability and from immediate sales opportunities.

5. Sustainability in PP rules outside the EU

International agreements on PP have at various points in time adopted “secondary policy objectives” in addition to competition and efficiency. This chapter reviews the respective developments at the International Labour Organization (ILO), the World Trade Organization (WTO), the Organisation for Economic Co-operation and Development (OECD) and several United Nations organisations.

5.1 Early ILO activities on fair working conditions

Already in 1948 the International Labour Office in Geneva undertook a comprehensive report on “Fair Wage Clauses in Public Contracts” (ILO, 1948). The report provided an overview of national pay clauses in public procurement contracts and presented the results of a survey according to which a majority of the ILO member had expressed their support for an ILO Convention on that issue (Schulten, 2012). On 29 June 1949, the 32nd International Labour Conference of the ILO finally adopted the Convention No. 94 and the Recommendation No. 84 on “Labour Clauses in Public Contracts” which came into force on 20 September 1952 (see ILO, 2008b: 135ff).

The *ILO Convention 94* is seen to have two principle objectives (ILO, 2008a: xiii):

- (i) Requiring that all bidders respect locally established minimum standards concerning labour costs, thereby taking out labour costs from the competition among bidders for public contracts.
- (ii) Placing standard clauses in public contracts to the effect that workers receive wages and enjoy working conditions (including hours of work) that are not less favourable than those established for the same work in the area where the work is being done by collective agreement, arbitration award or national laws and regulations (Article 2, Paragraph 1). This should ensure that public contracts would not exert a downward pressure on wages and working conditions.

Reflecting different interpretations of these provisions, the ILO Committee of Experts made clear that they were met only if labour clauses in public contracts guaranteed the most favourable working conditions provided by one of the three instruments (collective

agreements, arbitration awards or national law). As collective agreements usually determine more favourable conditions than those laid down in national law, labour clauses in public contracts should refer to the prevailing collective agreements regardless whether they are universally applicable or not.

The ILO Convention 94 shall be applied to all contracts awarded by public authorities both at central as well as at regional and local level, and shall also apply to work carried out by subcontractors. Moreover, the *ILO Recommendation No. 84* adds that labour clauses might be used also "in cases where private employers are granted subsidies or are licensed to operate a public utility." Therefore, ILO Convention No 94 is also relevant for concession contracts.

Only a few years later, the ILO adopted several conventions to further protect the rights of employees. The *Equal Remuneration Convention* (Convention 100, 1951) stipulates that, for work of equal value, equal pay for men and women should be the rule. The *Discrimination Convention* (Convention 111, 1958) requires that no discrimination in employment should occur on grounds of race, colour, sex, religion, political opinion, national extraction or social origin. Subsequently, the ILO Committee of Experts recommended the use of government contracts for implementing these goals. In 1977, the ILO Governing Body adopted the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (MNE Declaration) which is now in its 4th Edition. It offers guidelines to multinational enterprises, industrial organisations and governments concerning the conditions of work and life. Such guidelines have become particularly important in the wake of rising foreign direct investment across many parts of the world. In 1998, the *ILO Declaration of Fundamental Principles and Rights at Work* was adopted which commits Member States to promote fundamental rights at work, such as (i) the freedom of association and the effective recognition of the right to collective bargaining, (ii) the elimination of forced or compulsory labour, (iii) the abolition of child labour and (iv) the elimination of discrimination in respect of employment and occupation. These principles also provide guidance to governments on what social criteria to include in sustainable public procurement.

5.2 WTO relies on traditional evaluation criteria

When the General Agreement on Tariffs and Trade (GATT) was concluded in 1947, PP was explicitly not covered by the new rules. As a consequence, PP contracts preferring domestic suppliers were not penalised on an international level. It was not before April 1979 when, as an outgrowth of the Tokyo Round of trade negotiations, the *GATT Code on Government Procurement* was signed. The main aim of the Code, becoming effective in January 1981, was to secure greater international competition in government procurement markets. In Article II it was stated that "(w)ith respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, the Parties shall provide ... treatment no less favourable than: (a) that accorded to domestic products and suppliers; and (b) that accorded to products and suppliers of any other Party." However, special and differential treatment was assured for developing countries in their needs to safeguard their balance-of-payments position and to promote the establishment or development of domestic industries.

As regards the tendering procedures, a contract should be awarded to the tenderer who appears to be "fully capable of undertaking the contract and whose tender, whether for

domestic or foreign products, is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous" (Article V 14 f). Although not only the price, but also non-price criteria could be used to evaluate a tender, at this stage there was no explicit reference to environmental or social issues. A revised version of the Code entered into force in February 1988, providing for increased transparency through enhanced exchange of information, for the inclusion of leasing contracts under the coverage of the Agreement, and for lowering the threshold from SDR 150,000 to SDR 130,000.

In the course of the Uruguay Round, the World Trade Organisation (WTO) negotiated another revision which in 1994 resulted in the "plurilateral" **Government Procurement Agreement** (GPA), in force since January 1996. It binds only those WTO Member States ("the Parties") which have committed themselves to its rules in a separate ratification procedure. The GPA is also a contract with "variable geometry", which means that the rights and obligations of a given signatory country in relation to another signatory depend on reciprocity. As an outgrowth of that system, the coverage offered by the EU externally in the utilities sector is different from the scope of the Utilities Directive 2004/17.

Currently, the Agreement has 17 Parties comprising 45 WTO members. Another 29 WTO members participate in the GPA Committee as observers. Out of these, 10 members are in the process of acceding to the Agreement.¹³

The GPA is oriented towards an "effective multilateral framework for government procurement, with a view to achieving greater liberalization and expansion of, and improving the framework for, the conduct of international trade". The measures regarding PP "should not be prepared, adopted or applied so as to afford protection to domestic suppliers, goods or services, or to discriminate among foreign suppliers, goods or services" (Garcia-Alonso – Levine, 2008). However, Article III specifies exceptions to the Agreement, which include procurement indispensable for national security or for national defence purposes.

On 30 March 2012 the GPA Parties adopted a Protocol amending the 1994 GPA. In November 2013 the European Parliament approved the amendment which entered into force on 6 April 2014. The revised GPA streamlines and modernises the text. Businesses in party countries will gain better market access because numerous government entities (ministries and agencies) and new services and other areas of the public procurement activities have been added to the GPA's scope of application. The WTO estimates that the revision will bring extra procurement opportunities worth around € 80 billion. Moreover, the revised GPA should make it easier for new members to join (WTO, 2014).

According to the revised GPA, a contract may be awarded to the supplier that "has submitted (a) the most advantageous tender; or (b) where price is the sole criterion, the lowest price" (Art. XV). Similar to the MEAT criterion in the EU Procurement Directives, the "most advantageous tender" must be "based solely on the evaluation criteria specified in the notices and tender documentation". The evaluation criteria may include, among others, price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery". A weighting scheme must secure transparency as to the relative importance of the criteria. Protecting the environment and promoting the conservation of natural resources are now explicitly recognised as elements in the technical specifications (Art. X), but there is no reference to social conditions.

¹³ See WTO homepage https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

5.3 OECD favours a balanced approach

As result of a PP dispute between Belgium and the USA, the OECD in 1979 concluded an agreement on rules to improve the transparency of procurement. The "Buy American Act" of 1933 had stipulated that, before comparing prices of a domestic and a foreign bid, the latter should be inflated by 6% (or more, depending on the contract type), thus clearly favouring US suppliers.

In 2002 the OECD recommended to member countries to "take greater account of environmental considerations in public procurement" and, towards this end, "[d]evelop greener public purchasing policies in ways which are consistent with Member countries' competition and other relevant national policies, and with their international obligations and commitments" (OECD, 2002).

The OECD suggests that "secondary policy objectives" should be balanced against primary procurement objectives (i.e. delivering goods and services necessary to accomplish government mission in a timely, economical and efficient manner). "Secondary policy objectives could include promoting sustainable green growth, the development of small and medium-sized enterprises, innovation, standards for responsible business conduct or broader industrial policy objectives" (OECD, 2015b). However, PP should be just one alley of attaining secondary objectives, "balancing the potential benefits against the need to achieve value for money". Appropriate strategies and impact assessment methods should be deployed "to measure the effectiveness of procurement to achieve secondary policy objectives" (OECD, 2015a).

In a survey conducted among OECD countries (OECD, 2015b), only Estonia and the Slovak Republic reported to never have addressed secondary policy objectives via PP at the central level. Most other Member countries have developed procurement strategies to support green PP, SMEs and/or innovative goods and services.

5.4 United Nations with comprehensive sustainability goals

Already in 1987, the *UN Environment and Development Commission* defined the goal of sustainable development as "meeting the needs of the present without compromising future generations' ability to meet their needs" (UN, 1987: 43). The *UN Global Marketplace* calls procurement as sustainable "when it integrates requirements, specifications and criteria that are compatible and in favour of the protection of the environment, of social progress and in support of economic development".

According to the **United Nations Environment Programme** (UNEP) sustainable procurement "integrates requirements, specifications and criteria that are compatible and in favour of the protection of the environment, of social progress and in support of economic development, namely by seeking resource efficiency, improving the quality of products and services and ultimately optimizing costs". The UN strives for an appropriate balance between these factors, given its aim of progressing towards a wide array of environmental, social, humanitarian and development goals, including the Millennium Development Goals.

In a parallel development, the **United Nations Commission on International Trade Law** (UNCITRAL) has adopted a "Model Law on Procurement of Goods, Construction and Services", originally in 1993 (for goods and construction only), revised in 1994 (to also include

services) and updated in 2011 (in particular to allow for electronic procurement). The purpose was to assist governments in designing PP systems which would reap the expected domestic benefits (value for money, efficiency, avoiding abuse etc.), but would also help improve trade relations between countries. The Model Law is not a code, but just a framework to demonstrate how national PP laws could look like. It has had its impact on the reforming Central and Eastern European countries, and is now increasingly being used in African and Asian countries. Already in its 1994 version, the Model Law in Article 34(4) provided for horizontal award criteria such as furthering employment or transferring technology (Arrowsmith, 2010). In its current version, Article 11 provides that the criteria for evaluating a tender may, apart from the price, include operating costs, characteristics of the subject matter and “[a]ny criteria that the procurement regulations or other provisions of law of this State authorize or require to be taken into account”.

The *United Nations Office for Project Services* (UNOPS) issues “Annual Statistical Reports on United Nations Procurement” for operational activities within the UN system. Supplementary information is regularly provided on SPP issues and on case studies (e.g. UNOPS, 2008, 2014).

6. Implementation examples and concluding remarks

The following **examples** may highlight the possibilities of policies on national and EU level to foster the ambitions of the EU 2020 growth strategy through PP contracts. The list rests, among others, on Edler – Georgiou (2007) and Tessema – Marsille (2009).

- PP in the broad field of housing and construction provides many opportunities to implement sustainability criteria, e.g. by striving for an optimal use of land, promoting high standards in the design of buildings, using environment-friendly building materials, making intelligent use of renewable energy, and creating a socially-inclusive community. PP can also be used to improve the energy management in households and office buildings.
- The new PP Directives provide ample opportunity for simplified procurement procedures which facilitate, e.g., contracting with SMEs or with shops employing handicapped people or generally for social services.
- Eco-labels are frequently used as standardised information tools which indicate environmentally and/or socially preferable products, services or companies. As long as eco-labels do not discriminate against bidders from other EU countries, they help communicate the intentions of the contracting authority. As of November 2015, the global database “Ecolabel Index” contained 463 eco-labels in 199 countries and 25 industries (see <http://www.ecolabelindex.com/>). There are, however, still many areas and products for which no credible eco-labels exist.
- Regional cooperation can decisively increase the success of SPP goals. Coordination and communication between the cities, towns and organisations of a region is a driver to carry out more efficient processes.
- An integrated approach, which includes green or social criteria at every stage of the procurement procedure, underscores the determination of the contracting authority to achieve sustainability goals. Applying such an integrated approach, the City of Lille, France, called for tenders to renew and manage the street lightning in the period 2004-2012. The strategic aim was to increase the use of renewable energies, to cut

energy consumption and to reduce light pollution. The integrated approach turned out to induce suppliers to achieve the best possible environmental solution in their bids. In a comparable effort, the City of Zurich in 2002 renovated the street lighting system. Discussions with suppliers before tendering resulted not only in the formulation of realistic tendering criteria, but also in technical advances compared with products already on the market.

- Big infrastructure projects may produce substantial negative environmental impacts which are often disregarded during their development. To minimise such impacts, life-cycle costing should be integrated into the procurement criteria, as done in 2005 by the Finnish Road Administration in the "Highway 9" project. As a result, bidders and contractors were motivated to adapt technologies and procedures to meet the eco-efficient requirements.
- As another example of life-cycle costing, the University of Edinburgh developed an SPP strategy for the years 2003-2006 which was designed to ensure sustainable values at all stages of the supply chain. To ensure effective centralised procurement decisions, the strategy comprised the training of staff as well as the identification of common purchasing interests among the different budget holders.
- Since municipal staff can have a key role in promoting GPP, a comprehensive training scheme was initiated in Gothenburg, Sweden, as early as 1990. Participation was open, on the one hand, to suppliers (in particular SMEs) to enhance their readiness for supplying green products and services. On the other hand, the training also raised the interest of local politicians for GPP and thereby fostered their commitment to it. Quite generally, to get stakeholders involved at an early stage of the procurement process greatly facilitates that sustainability goal will be reached.

Many additional case studies can be found in the various National Action Plans concerning GPP, in European Commission (2012), UNEP (2012b) and others.

From the overview in this paper some **concluding remarks** emerge. PP law and policies in the EU have been based on the principles laid down in the TFEU ensuring the four freedoms of the internal market (persons, goods, services and capital), as well as on the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. Over time, secondary legislation and case law decisions by the ECJ have attempted to reconcile the interests of free trade with new areas of public policy, such as the environment, social conditions and innovation. The gradual broadening of the spectrum of Community objectives eventually popped up in the Treaty of Amsterdam, being further enhanced by the Europe 2020 strategy. On this footing, the procurement Directives of 2014 incorporate all relevant developments in secondary legislation and case law.

The introduction to PP of "non-economic" objectives was originally met with great scepticism and fears that transparency and competition would be watered down. From the eclectic selection of examples just mentioned, it can safely be inferred that such fears were overdrawn and that the Directives on PP equally pursue the old and the new objectives.¹⁴ They can also be viewed as an effective means to foster innovation and to improve the environment, public health and social conditions. However, it must also be stressed that

¹⁴ However, as revealed, e.g., by the current discussion of an amendment to the Austrian PP law (the Bundesbeschaffungsgesetz), the Community intentions to foster non-economic contract criteria may be misunderstood as opening the door for discriminatory awards favouring local contractors (see Schramm, 2015).

strategic PP, as long as it remains an isolated policy, will have only limited ramifications on EU-wide sustainability. Strategic PP should rather complement policy measures in their respective areas and should thus become an integral part of overall Union policies.

Since PP law in the EU chiefly aims to strengthen the single market, contracting authorities are not provided with full leeway to set sustainability and innovation targets when awarding a public contract, be it just because the general principles of EU law have to be observed anyway. However, as Hettne (2013) concludes, the “possibility for the Member States to promote environmental or social interests in public procurement in support of existing EU legislation will ... increase.”

The legal framework for strategic PP contracts in the EU has centred on the activities of national authorities, while there have been only limited efforts of propagating best practices and channelling PP activities on an international level. Furthermore, since almost all PP provisions regarding environmental and social aspects are voluntary, their application in law and practice is relinquished to MS or contracting authorities. Only a few rules are mandatory, such as the prohibition of child labour and human trafficking, but also tax evasion.

The new PP Directives in many instances only set the stage without going too much into detail. Much of their eventual effect will thus depend on the way the Community rules are translated into national law, a process that is under way right now. Therefore, national legislators and contracting authorities should be alert to make best use of Community law for their own national and local purposes.

Annex: General public procurement rules¹⁵

Public procurement (PP) is defined as the purchase of works, services and supplies by public agencies. To ensure that procurement markets are transparent, efficient and effective, various aspects of the procurement process are regulated by EU Directives and their transposition into national law. This holds in particular for the rules on publishing calls for tender and the core principles of transparency, open competition and sound procedural management. To ensure a level playing field for all businesses in Europe, the EU Procurement Directives provide for **minimum harmonised rules** for PP tenders above certain thresholds (see Table 3). According to these rules public authorities

- may not discriminate against a business because it is registered in another EU country,
- may not refer to specific brands, trademarks or patents when describing the characteristics of products & services they wish to purchase,
- may not refuse to accept supporting documents (certificates, diplomas, etc.) issued by another EU country, as long as they provide the same level of guarantee,
- must make all information regarding tenders available to all interested companies, regardless of what EU country they are registered in.

A public authority has the right to **exclude a business** from a call for tenders if it:

- is bankrupt or being wound up,
- has suspended its activities or its activities are administered by a court,

¹⁵ The following information is taken from European Commission homepages such as http://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm and http://europa.eu/youreurope/business/public-tenders/rules-procedures/index_en.htm.

- has been found guilty of grave misconduct,
- has not paid taxes or social security contributions,
- has made false declarations to a public authority.

Only in specific cases may public authorities award contracts **without publishing a call for tenders**:

- in emergencies due to unforeseeable events,
- for contracts that - for technical reasons or because of exclusive rights - can be carried out by one particular company only, and
- for contracts which by law are excluded from public procurement (acquisition/rental of existing buildings, employment contracts, programme material for broadcasting, etc.).

Table 3: Thresholds triggering EU-wide rules (Source: http://europa.eu/youreurope/business/public-tenders/rules-procedures/index_en.htm)

Central government authorities:	
≥ EUR 134 000	Supplies contracts (for defence only those listed in Annex III of Directive 2014/24)
≥ EUR 207 000	Supplies contracts for defence products not listed in Annex III of Directive 2014/24
≥ EUR 5 186 000	All works contracts
Other public authorities:	
≥ EUR 414 000	Supplies and services contracts in the fields of water, energy, transport and postal services
≥ EUR 207 000	Other supplies and services contracts
≥ EUR 5 186 000	All works contracts

Note: Amounts do not include VAT and are valid from 1 January 2014.

The Procurement Directives define a variety of **procurement procedures**. The basic characteristics of the most common ones are:

- In an *open procedure* any business may submit a tender. No negotiations with the bidders are permitted.
- In a *restricted procedure* any business may ask to participate, but only those who are pre-selected will be invited to submit a tender. This saves time and money for both businesses and buyers. No negotiations with the bidders are permitted.
- In a *negotiated procedure* the public authority invites at least three businesses with whom it will negotiate the terms of the contract. Most contracting authorities can use this procedure only in a limited number of cases which are specified in the Directives. This procedure can take place with prior publication (e.g. in case of unsettled contract specification) or without such publication (e.g. to protect exclusive rights or in great urgency).

- The *competitive dialogue* is often used for complex contracts where the public authority cannot define the technical specifications at the outset.

For **contracts above thresholds**, contracting authorities must normally engage in an EU-wide tender and

- advertise the contract in the Official Journal of the EU,
- carry out procurement procedures in line with applicable law,
- select bidders according to selection criteria (non-discriminatory and transparent),
- award the contract according to award criteria (non-discriminatory and transparent), and
- stick to the time frames.

For tenders **below the thresholds**, national rules apply which may be simplified compared to an EU-wide tender. They nevertheless have to respect the general principles of EU law, in particular the principle of value for money, non-discrimination with respect to nationality (Art.18 TFEU), free movement of goods (Art.34 TFEU), the right of establishment (Art.49ff TFEU), the freedom to provide services (Art.56ff TFEU), as well as transparency, proportionality and mutual recognition.

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Project Information

Welfare, Wealth and Work for Europe

A European research consortium is working on the analytical foundations for a socio-ecological transition

Abstract

Europe needs change. The financial crisis has exposed long-neglected deficiencies in the present growth path, most visibly in the areas of unemployment and public debt. At the same time, Europe has to cope with new challenges, ranging from globalisation and demographic shifts to new technologies and ecological challenges. Under the title of Welfare, Wealth and Work for Europe – WWWforEurope – a European research consortium is laying the analytical foundation for a new development strategy that will enable a socio-ecological transition to high levels of employment, social inclusion, gender equity and environmental sustainability. The four-year research project within the 7th Framework Programme funded by the European Commission was launched in April 2012. The consortium brings together researchers from 34 scientific institutions in 12 European countries and is coordinated by the Austrian Institute of Economic Research (WIFO). The project coordinator is Karl Aiginger, director of WIFO.

For details on WWWforEurope see: www.foreurope.eu

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