

Sustainable Procurement in the European Union

Proposals and Recommendations to the European Commission
and the European Parliament

→ SUMMARY

Public authorities in the European Union yearly spend around € 1,500 billion on public procurement – approximately 16 percent of the total Gross Domestic Product (GDP) of the European Union. In March 2004, the European Parliament and Council adopted a revision of EU procurement legislation: Directive 2004/17/EC (the so-called Utilities Directive) and Directive 2004/18/EC (the Public Sector Directive).

Historically, public procurement has been used by governments for social policy purposes on a national level. Public procurement can also be an outstanding tool to promote Corporate Social Responsibility (CSR) globally, as governments operate as both regulators of and participants in the market.

This briefing makes the following recommendations:

- 1. The EU should take a leading role in linking CSR to public procurement,** by including social and environmental criteria in public purchasing procedures, and providing guidance to national

governments on how to include social and environmental concerns in public procurement policies.

- 2. The ECCJ calls on all member states to transpose the revised EU Directives on public procurement into national law** as soon as possible and to set defined goals on linking CSR with sustainable procurement.
- 3. As criteria in their procurement procedures, local and national authorities in EU member states should at least include the following:**
 - Compliance with the core conventions of the ILO;
 - Payment of a living wage that covers basic needs;
 - Adherence to the Basel Ban;
 - Adherence to the Rio Principles of preventive action, precaution and polluter pays;
 - Accept Extended Producer Responsibility as an essential principle.
- 4. National and local authorities in EU member states need to ensure and verify that companies actually follow the social and environmental criteria included in public procurement procedures.**

→ INTRODUCTION

The European Coalition for Corporate Justice (ECCJ) represents a diverse range of civil society organisations from across Europe. The ECCJ has a vision of a sustainable world in which corporations' drive for profit is balanced by the interest of society at large and respects, social, human and environmental rights.

There are many ways in which public sector bodies can play a role in stimulating CSR and corporate accountability. Governments in the European Union can promote CSR by assuming one or a combination of various roles. These roles can be categorized as follows:

- **Regulating** - Governments define minimum standards for business performance embedded within the legal framework;
- **Facilitating** - Public sector agencies enable or stimulate companies to engage with the CSR agenda or to drive social and environmental improvements;
- **Partnering** - Public sector bodies can act as participants, convenors or facilitators (public private partnerships, for instance);
- **Endorsing** – This role can take various forms, including through the mention of CSR in policy documents, the government as market player and consumer in public procurement and public sector management practices, or direct recognition of the efforts of individual enterprises through award schemes.¹

This paper will specifically address the ways in which governments can promote CSR and corporate accountability by using their enormous purchasing power and the ability to improve legislative frameworks.

Members of the ECCJ have been calling for the inclusion of social and environmental criteria in procurement policies at a local, national and European level for many years. In 2001, for example, a manifesto drafted by the India Committee of the Netherlands (ICN) and signed by more than 80 Dutch organizations and individuals called for the Dutch government to "give preference to socially and ecologically sound products and services" in public procurement procedures.²

In 2002, the Coalition for Green and Social Procurement, a broad coalition of European NGOs and trade unions, issued a recommendation to EU ministers regarding the incorporation of environmental and social provisions in the EU guidelines for public procurement. It was the belief of these organisations that public authorities have the obligation to take the greater good of society in mind when awarding public contracts.

The size of the public procurement market is considerable: in total, public authorities in the European Union yearly spend around € 1,500 billion on buying supplies, services and works – approximately 16 percent of the total Gross Domestic Product (GDP) of the European Union. As a consequence of decentralisation processes, responsibilities and budgets have been shifted to regional and local public authorities, including utilities, that currently account for around 65 percent of public procurement expenses.³

Many products, services and utilities in the EU are purchased by public authorities through public procurement procedures. In most of these cases, the Procurement Directives of the European Union apply. European and other international procurement regulations are built on three basic principles:

- **Transparency:** Procedures to award public contracts must be organised transparently and must use objective, accountable criteria.
- **Equal treatment or non-discrimination:** All interested parties must have a fair and equal chance to compete for the contract: calls for tender must be widely advertised; the location of a bidding company may not be used as evaluation criterion.
- **Best value for money:** Purchasing decisions can be based on an assessment of the price of bids alone, but could also take quality criteria such as environmental impact or community benefits into account.⁴



Public authorities should purchase certified wood (FSC) to guarantee environmental protection, and compliance with internationally recognized standards and recognition of indigenous groups in wood logging worldwide

In the European Union, companies from all member states have to be able to tender for public contracts, regardless of their country of origin. Their bids have to be evaluated in an objective and transparent procedure.

In March 2004, the European Parliament and Council adopted a revision of EU procurement legislation: Directive 2004/17/EC (the so-called Utilities Directive) regulates contracting of works, supplies and services by utilities in the water, energy, transport and postal services sector. Directive 2004/18/EC (the Public Sector Directive) regulates contracting of works, supplies and services by all other public authorities. Both Directives are currently transposed into national law. While the deadline for implementation passed on January 31st, 2006, less than half of the 15 original EU members had such national laws in place in September 2006.⁵

The Directives regulate large public purchases and define detailed procedures and guidelines for specific requirements, selecting and rejecting tenders and awarding contracts. They also prescribe appropriate advertising of calls for tenders and contract notices across all EU Member States and define clear timeframes for procedures. All contracts with a total contract value above the thresholds are regulated by the European Directives. (See table below for current thresholds).

These thresholds are equal to those of the Government Procurement Agreement (GPA), a plurilateral agreement of the World Trade Organisation (WTO) which countries can choose to sign. Companies from countries outside the European Union that have signed the GPA can also participate in calls for tender in the European Union. This concerns Canada, Hong Kong China, Iceland, Israel, Japan, South Korea, Liechtenstein, Aruba (the Netherlands), Norway, Singapore, Switzerland and the United States.⁶

→ PUBLIC PROCUREMENT AND CORPORATE SOCIAL RESPONSIBILITY

Historically, public procurement has been used by governments for social policy purposes. According to Christopher McCrudden, public procurement has been “an extraordinarily adaptable tool, which has often been used to meet a regulatory need when other methods of regulation are not considered acceptable, available or effective.”⁷

Considering the immense popularity of CSR in the past fifteen years, it is hardly surprising that CSR has become linked to public procurement. Many of the issues that we now tend to relate to CSR have been linked to public procurement in the past, without being under the CSR banner.⁸ Some “traditional” issues connected to public procurement one could think of are the improvement of labour conditions, employment of disabled workers, and equal rights for men and women, with a focus on the national labour market. The development of CSR, in terms of the international impact of corporate activities and the supply chains of companies, has expanded the scope and normative issues that are now increasingly linked to public procurement. In some countries, notably in the European Union, the debate on CSR has increased the role of public procurement in addressing environmental issues and social conditions in developing countries.

Governments operate as regulators of the market, but are also participants in the market. When governments do not comply with the business principles they advocate as regulators, they may be perceived as hypocritical or lacking coordination. Therefore, an important driver for CSR standards in public procurement is the need to be leading by example.⁹ Some EU governments seek

Public contracts

| | Supplies | Services | Works |
|----------------------------|-----------|-----------|-------------|
| Central government | € 137,000 | € 137,000 | € 5,278,000 |
| Other levels of government | € 211,000 | € 211,000 | € 5,278,000 |

Utilities contracts

| | Supplies | Services | Works |
|-------------|-----------|-----------|-------------|
| All sectors | € 422,000 | € 422,000 | € 5,278,000 |



Natural stones used in public paving projects or public utility buildings (e.g. floors, windows) are often quarried and processed in India under extremely bad labour conditions.

to fulfil their endorsing role by providing market-based incentives to companies to adopt and comply with CSR obligations, and by linking these obligations with access to government contracts. Other governments, such as the Belgian federal government, assume a mandating role by introducing social and environmental clauses for certain public procurement contracts.

The European Commission, in its communication on CSR published in July 2002, stated that “making access to [...] public procurement conditional on adherence to and compliance with the OECD Guidelines for Multinational Enterprises, while respecting EC international commitments, could be considered by EU Member States and by other States adherent to the OECD Declaration on International Development.”¹⁰

This suggestion has not proven to be very effective as of yet. In 2005, the Dutch Minister for Foreign Trade declared that she was opposed to linking the OECD Guidelines for Multinational Enterprises directly to public procurement, because it would undermine the “voluntary nature” of the OECD Guidelines.¹¹ This decision is in contradiction with the Dutch government’s policy to link the OECD Guidelines to export credits. To a certain degree the minister’s position illustrates the ambiguity in the debate on public procurement in relation to CSR. On the one hand, if one defines public procurement as government regulation, it appears to be incompatible with the voluntary spirit of CSR as defined by the European Commission.¹² On the other hand, if one defines public procurement as a market operation

in which the government acts as a purchaser, it appears to be in line with a range of market-based incentives, such as export credits, marketable emissions permits and subsidies for abatement. From this viewpoint, using public procurement as a tool to foster CSR and linking procurement criteria to international standards (such as the OECD Guidelines) is in fact consistent with CSR voluntarism.¹³ However, the apparent divide between the voluntary approach and the regulatory approach to CSR is not all that relevant in the context of public procurement, as the revised Directives on public procurement have clarified some fundamental principles and offer some clear opportunities for the inclusion of social and environmental criteria in public procurement procedures. According to the new Directives, environmental and social criteria can be used effectively in public purchases:

- If an authority wants to award a contract to the bid offering best value for money rather than to the “lowest price tender”, it must state from the start that it will use the option of awarding the contract to the “most economically advantageous tender”. The criteria used to determine the most economically advantageous tender can include environmental and social factors, as long as they allow for a fair, transparent, and objective evaluation.
- Any environmental or social criteria that will be used to evaluate a bidder or a bid have to be published together with the contract notice or call for tender.
- Specifications regarding product performance or performance conditions should make reference to

recognised (international) standards such as eco-labels and standards of working conditions, but equivalent standards must also be accepted.

- Contracting authorities can specify conditions for the execution of a contract that embrace its environmental or social policy goals.¹⁴

While the revised Directives offer an opportunity for public sector bodies to purchase socially and environmentally “responsible” products and services, authorities have the responsibility to spend money wisely and must therefore secure best value for money. The concept of best value requires that purchasing decisions are not based solely on the price of offers, but also on their quality and ability to deliver additional benefits.

In the European Union context, an approach to the issue of linking CSR to public procurement appears to have developed in the form of an enabling model of law. The EU has created legal regulation, in the form of the revised Directives, which enables national and local authorities to establish a relationship between CSR and public procurement, although the EU does not prescribe that this relationship be established. In the 2006 Commission Communication on CSR, mention of public procurement was entirely absent, much to the disappointment of trade unions and NGOs.¹⁵ The diversity of national and local initiatives in relation to sustainable procurement is symptomatic of the reluctance of the EU to regulate in this particular policy area. Many governments have taken up the challenge of sustainable public purchasing and have found creative solutions. In spite of the enthusiasm and willingness to invest in sustainable procurement, public sector bodies seem to feel a lack of guidance and leadership from the European Commission. Let us highlight some examples of linking CSR to public procurement:

→ Belgium

The Belgian federal government has created a guide for sustainable procurement, which is mandatory for government bodies to use when they procure office supplies.¹⁶ The guide rates a large number of products based on both environmental and social criteria and creates minimum standards for these products. The standards are set up in such a way that there are adequate options for all product groups. For the social criteria, Belgium has created a social label on the basis of the eight core ILO conventions. The label is voluntary, in that companies have to request certification for their products, and aim to reduce inhumane working conditions during the production of goods used by the government.

→ Denmark

In 2003, guidelines were published for purchasers based on legislation from 2001 that states that the central government needs to change its procurement policies of tropical timber in such a way that it would only purchase legal and sustainable timber.¹⁸ Timber needs to be grown and processed according to standards, such as the Forest Stewardship Council (FSC), that incorporate both environmental and social standards, and are set up in consultation with all the stakeholders. Due to the limited use of these guidelines, they were revised in 2006 in an attempt to make them more binding and to include all types of timber.¹⁹ Similar policies can be found in the Netherlands and the UK.

→ France

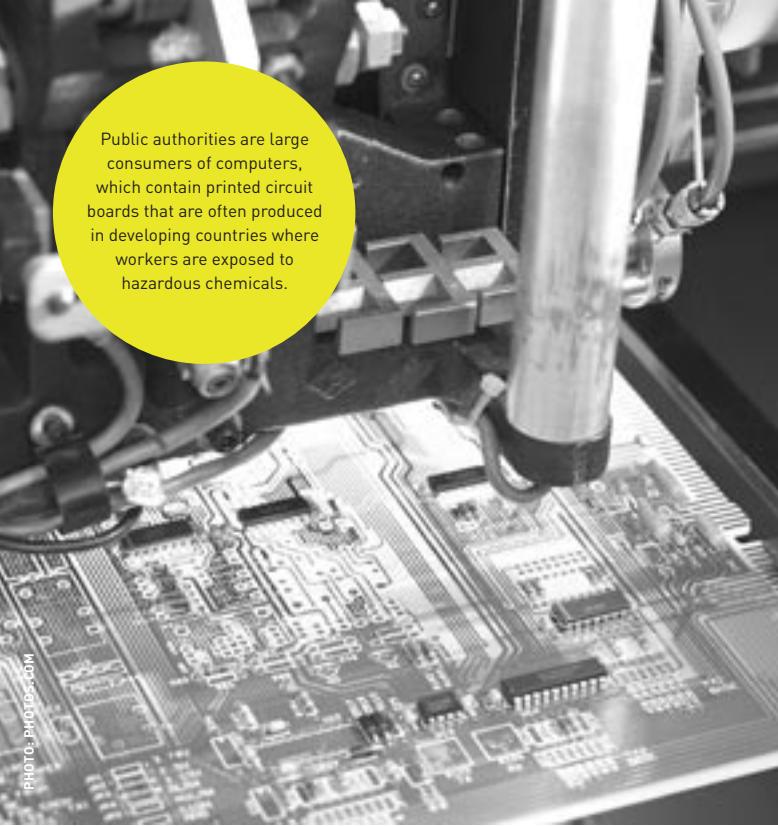
In its national procurement policy, France has included that its performance in terms of occupational integration of “populations in difficulty” can serve as a criterion in procurement procedures.²⁰ The municipal government of Nantes has passed a local law that determines that companies interested in procurement projects in the fields of construction and cleaning have to commit themselves to hiring unemployed for a set amount of hours. In a similar case in Calais, the European Court of Justice decided that such social criteria as the reduction of unemployment can be used in awarding a procurement contract.

→ Netherlands

In 2005, the Dutch parliament adopted a motion which stated that sustainability shall be used as a paramount criterion in all public procurement procedures by 2010. SenterNovem, an agency of the Dutch Ministry of Economy, has developed an information pack with specifications for environmental and social criteria for 32 products and services, which are updated annually. All government procurement officers and environmental staff in the Netherlands receive a bimonthly digital newsletter containing practical news concerning sustainable procurement. SenterNovem ensures continual publicity regarding sustainable procurement in trade publications for purchasing and environmental coordinators. A Sustainable Procurement helpdesk replies to specific questions from procurement officers and environmental coordinators.

→ Spain

In December 2003, the city council of Barcelona approved an institutional declaration which contemplates environmental and social criteria with regard to purchasing practises of wood. The city council committed to promoting the purchase of certified wood (FSC) and to guaranteeing environmental protection, compliance



Public authorities are large consumers of computers, which contain printed circuit boards that are often produced in developing countries where workers are exposed to hazardous chemicals.

with internationally recognized standards and recognition of indigenous groups. Moreover, in 2005 the city council of Barcelona purchased 700 uniforms for use in parks and gardens in a socially responsible manner, with the assistance of the Spanish Clean Clothes Campaign.

Public authorities from outside the European Union have also found creative ways of including social and environmental criteria in public procurement and some of them are clearly at the forefront of sustainable policymaking in relation to public procurement:

→ Japan

In 2001, Japan passed the Law on Green Purchasing, forcing all government bodies to formulate and follow a green purchasing policy. This entails formulating annual goals, making purchasing based on these goals and reporting their performance.²¹ Sendai city has formulated a green purchasing policy in which it tries to be an example for the greater community and thereby increase the market share of green products. As a measurable goal, the city aimed to have 90 percent of all purchases in the city to be sustainable for ten product groups. Through its Sendai Green Stationery Promotion Program, the city stimulated the sale of sustainable office stationary in 114 shops by offering free promotion and advertisement materials.

→ Canada

The Canadian federal government founded the Office of Greening Government Operations (OGGO) in 2005, which developed the Policy on Green Procurement in 2006. Through this policy, all government bodies need to formulate green procurement targets and all personnel

responsible for procurement need to be trained in green procurement.²² The OGGO provides purchasers with a decision making toolkit and a checklist on their website to encourage them to consider sustainability. In the state of Manitoba the government decided that social issues such as opportunities for ethnic minorities also need to be considered in public procurement.

➔ RECOMMENDATIONS

1.

The EU should take a leading role in linking CSR to public procurement and provide guidance to national governments on how to include social and environmental concerns in public procurement policies. The European Commission should formally state that social and environmental criteria can and should be included in public procurement procedures.

For member states, the European Commission should develop guidelines and tools that must be used to include CSR related criteria in public procurement. Currently there are many but isolated initiatives to promote sustainable procurement throughout the European Union. On the basis of best practises in EU countries, the European Commission should endeavour to bring these initiatives together and give clear guidance to member states on how they can implement sustainable procurement.

2.

The ECCJ calls on all member states to transpose the revised EU Directives on public procurement into national law as soon as possible. All member states should have implemented this new legislation before January 31st, 2006. In September 2006, less than half of the 15 original EU members had such national laws in place.

Every member state should set concrete goals for linking CSR to sustainable procurement. In 2005, the Dutch parliament adopted a motion which stated that sustainability shall be used as a paramount criterion in all public procurement procedures by 2010.²³ The ECCJ urges other member states to adopt similar objectives. The deadline for integrating CSR concerns in the public procurement of all member states (including the

new member states) could be aligned with the target date for the Millennium Development Goals (2015), as sustainable public procurement can make a key contribution to the reduction of poverty.

3.

As criteria in their procurement procedures, regional, national and local authorities in EU member states should at least include the following standards:

- Companies that want to take part in public tenders should implement the core conventions of the International Labour Organisation (ILO) throughout the supply chain. Eight ILO Conventions have been identified by the ILO's Governing Body as being fundamental to the rights of human beings at work:
 - Freedom of Association and Protection of the Right to Organise (No. 87)
 - Right to Organise and Collective Bargaining (No. 98)
 - Forced Labour (No. 29)
 - Abolition of Forced Labour (No. 105)
 - Discrimination (Employment and Occupation) (No. 111)
 - Equal Remuneration (No. 100)
 - Minimum Age (No. 138)
 - Worst Forms of Child Labour (No. 182)
- Companies throughout the supply chain need to pay a living wage that covers basic needs.
- Companies should respect the right to safe and sound working conditions (ILO convention 155)
- Companies should adhere to the Basel Ban. The Basel Ban was incorporated as an amendment to the Basel Convention in 1995 and prohibits the export of hazardous waste from developed (OECD) countries to developing (non-OECD) countries. The Basel Ban applies to export for any reason, including recycling.
- Companies should adhere to the Rio Principles of Preventive Action, Precaution and Polluter pays.
- Extended Producer Responsibility (EPR) needs to be an essential principle for the company. Extended Producer Responsibility is a policy principle to promote total lifecycle environmental improvements of product systems by extending responsibilities of the manufacturer of the product to various parts of the product's life cycle, and especially to the take-back, recovery and final disposal of the product.

Companies that want to participate in public tenders should ensure that their suppliers also abide by the same standards.

4.

National and local authorities in EU member states should ensure and verify that companies follow the social and environmental criteria included in public procurement procedures.

National and local authorities in EU member states should ensure and verify that companies follow the social and environmental criteria included in public procurement procedures. Companies should demonstrate how they comply with these criteria, for example by the use of labelling, codes of conduct and certification. To this end, the European Commission should recognise and encourage credible and effective multi-stakeholder initiatives at sectoral and European wide level, based on internationally agreed CSR standards and principles. Codes, labelling and certification schemes should include mechanisms for independent monitoring and verification by relevant stakeholders. Companies need to show how they monitor the implementation of these criteria in their companies and in their supply chains. If they cannot comply with all criteria, they must explain how they have provided for equivalent ways to implement the criteria. In some cases, this may be necessary, for example when companies have production locations in China, where freedom of association is impossible simply because the State does not allow it. In this case, companies could show how they help to organise alternative forms of workers' representation.

➔ ENDNOTES

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European Coalition for Corporate Justice

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