

EU: The legal framework does encourage sustainable public procurement

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Is there a legal problem? Yes!

A survey revealed 103 sustainable public procurement initiatives launched by 26 EU Member States. A significant part of them is legal (35 percent).

(Final Report to the EU High-Level Group on CSR, Vienna, October 2007)

Article 2 EC (original version)

[The] Community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote ... a harmonious development of economic activities, ... and closer relations between the states belonging to it.

Article 2 EC (consolidated version)

The Community shall have as its task, by establishing a common market and an economic and monetary union ... , to promote throughout the Community a harmonious, balanced and **sustainable** development of economic activities, ...

Article 3 EC (1)

1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

(c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;

Article 3 EC (2)

1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:
 - (l) a policy in the sphere of the environment;

Article 6 EC

Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.

Conflicting Treaty Goals ? (1)

Art. 2 and 3 EC Treaty have to be taken into account when interpreting other provisions of the Treaty. They are also an important starting point for a teleological interpretation of the regulation on public procurement. It is generally acknowledged that the goals described in Article 2 EC Treaty may conflict with one another.

Conflicting Treaty Goals ? (2)

The same approach does also apply in the context of conflicting interests when defining the legal framework of competition policy-making (Hanns Ullrich [Ed.], *The Evolution of European Competition Law*, Cheltenham 2006, p. 40)

Article 3 EU

- The Union shall be served by a single institutional framework which shall ensure the **consistency** and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*.

Article 28 EC

- Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Secondary policies / purity principle

- According to the purity principle one purpose of public procurement regulation would be to establish a system that reduces as far as possible the insertion of non-economic criteria into the procurement process (definition by Sue Arrowsmith / Christopher McCrudden).

ECJ Case C-19/00 SIAC Construction

- The purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the free movement of services and goods (para 32).

ECJ Case C-513/99 Concordia Bus Finland

- Concordia contends that in a public tender procedure the criteria for the decision must always be of economic nature. If the objective is to satisfy ecological considerations, recourse should not be had to a public tender procedure (para 44).

ECJ Case C-513/99 Concordia Bus Finland

- Article 6 EC lays down that environmental protection requirements must be integrated into the definition and implementation of Community policies ...
(para 57)

ECJ Case C-448/01 Wienstrom (1)

- As regards the award criterion at issue in the main proceedings, the Court has already held that the use of renewable energy sources for producing electricity is useful for protecting the environment ... (para 40)

ECJ Case C-448/01 Wienstrom (2)

- Having regard, therefore, to the importance of the objective pursued by the criterion at issue in the main proceedings, its weighting of 45 % does not appear to present an obstacle ... to identify the most economically advantageous tender (para 42).

New Directives 2004/17 und 2004/18 EC

- For the first time in the history of the Community's procurement regime the new procurement Directives ... expressly include provisions specifically intended to deal with aspects of "green procurement."
(Peter Kunzlik)

New procurement Directives: What does consistency mean?

- The balance between free movement of goods and national environmental protection has been struck by providing that a national derogation is only permitted "provided that it does not constitute a means of arbitrary discrimination between Member States" (Article 30 EC; Peter Kunzlik)

Environmental technical specifications

- Art. 23 Directive 2004/18 Public Sector:
3. ... the technical specifications shall be formulated:
(b) ... in terms of performance or functional requirements; the latter may include environmental characteristics.

The tendency towards cheapest textile prices is not due to legal arguments

- Art. 53 Directive 2004/18 Public Sector:
 1. ... the criteria .. shall be either
 - (a) various criteria linked to the subject-matter of the public contract, for example, quality, price, technical merit, ...
 - (b) the lowest price only

Art. 26 Directive 2004/18 EC

- Contracting authorities may lay down special conditions relating to the performance of a contract, ... The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

Buying green! A handbook on environmental public procurement

- This handbook (issued by the European Commission in 2004) is designed to help public authorities successfully launch a green purchasing policy. ... It also gives many practical examples of green purchasing by public authorities across the EU.

Public Procurement Awarding Guide for the Clothing-Textile Sector, 2005

- The public contracting authorities often tend to appoint bidders according to purely financial considerations, by not sufficiently favouring/valueing the quality and the follow-up of the products in offer. With eco-labels it can easily be proved that bidders comply with the technical specifications.

Renewed EU Sustainable Development Strategy 2006

- Policy objective for 2010 of bringing the average level of EU green public procurement up to the standard achieved by the best performing Member States in 2006.

Communication COM(2008)400 final

- Public procurement for a better environment: Common criteria have the advantage of avoiding market distortions and reduce competition which could arise as a result of differing national GPP criteria.
- Priority sectors: 6. Clothing, uniforms and other textiles

Communication COM(2009)215 final

- The role of Fair Trade and non-governmental trade-related sustainability assurance schemes:
- The Commission is currently working on publishing a ... guide on social public procurement.

Conclusions

- The balance between sustainability goals and EU economic law rules has been struck.
- Environmental criteria are easier to implement than social criteria.
- Nice documents are one thing, implementation is another.

Implementation Tools

- - green procurement strategy documents
- - guideline documents for practitioners
- - education (planning of a procedure / legal framework / market knowledge)
- - sharing best practice examples
- - green public procurement statistics
- - green public procurement controlling
- - label/awards for model public entities or communities

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