



Public procurement and EU legislation

By MEP Heide Rühle

The annual turnover of the public procurement of goods and services in the European Union¹ accounts for 16% of the gross domestic product or more than 1,500 billion euros². Provided that the public authorities are unable to make or render these goods and services themselves, they must rely on purchasing them externally.

No question about it, public authorities need these goods to be able to fulfil their duties. However, they are not – apart from their outstanding buying power – participants in the market like all others, they are unable to rely on private autonomy, but should, because they manage public funds, not lose sight of the central political challenges which we face in the award of contracts: Overcoming the global economic and financial crisis, climate change and the growing poverty crisis in the southern countries.

Meeting the international standards of the International Labour Organization ILO, such as the prohibition of child work, or the energy saving and energy efficiency objectives, does not contradict the European rules for public procurement, as unfortunately often claimed all over Europe. On the contrary the European framework directives from the beginning permitted the consideration of ecological and social standards in public procurement, if these respect the rules of the internal market.

The European rules for the internal market

The objective of European legislation is the formation of a common internal market³. Within this framework, the member states are not permitted to indirectly or directly discriminate against members of other member states on grounds of nationality. They must further guarantee the four freedoms (principle of the internal market), i.e. observe the freedom of goods, services, capital and labour as well as the transparency order.

¹ Information according to the International Monetary Fund for the year 2006, nominal GDP in million US\$ on the basis of the exchange rate for the EU of October 2007: US\$ 14,609,840 million.

² Even though a considerable share of this is spent on defence goods, which so far are not subject to the public procurement directives. Yet a proposal for a European procurement directive for this area was presented recently.

³ The realisation of the European market/internal market pursuant to the currently applicable European agreements is the top provision, because it is expected to yield the greatest benefit in terms of the progress of European integration – in particular with regard to permanent peacekeeping.

In order to implement these primary laws, the EU, i.e. the European Commission, the European Parliament and the representatives of the European member states, passed, amongst other things, the so-called public procurement directives⁴, which determine the conditions for the award of public contracts above clearly defined threshold values⁵. Below these threshold values, the award of contracts is primarily subject to national regulations, if these do not contradict the general rules for the internal market – this corresponds to the principle of subsidiarity and the principle of proportionality in the European agreements, i.e. the EU should only regulate issues relevant to the creation of the internal market⁶.

Sustainable procurement – Ecological, social and ethical criteria

The European Union expressly does NOT require the member states to hold a competition for the cheapest offer when awarding contracts! Although it is possible to select the lowest priced offer, this is equal to the option of applying a transparent procedure to determine the economically most advantageous tender.

Even the old body of rules⁷ made it possible to consider social and ecological criteria in tender procedures for public supply and service contracts – though it did not expressly explain this option, neither did it rule it out. Two announcements published by the Commission in the Official Journal of the European Union in 2001, for example, explain the inclusion of social and ecological criteria⁸.

The preamble to the new, revised directives of 2004 now highlights European Court of Justice case-law:

"This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting entities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked

⁴ Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and directive 2004/17/EC of 31 April 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

⁵ Current threshold values: 412,000 euros for supply and service contracts in the utilities sector, 206,000 euros for other supply and service contracts, and 5,150,000 euros for works contracts and works concessions.

⁶ Article 5 para. 2 EC. These principles primarily aim to serve the conservation of the identities of member states and a greater degree of closeness to citizens (principle of principle of conferral of competences and principle of minimum intervention).

⁷ Directive 92/50/EEC on the coordination of procedures for the award of public service contracts, directive 93/36/EEC coordinating procedures for the award of public supply contracts and directive 93/37/EEC on the coordination of procedures for the award of public works contracts.

⁸ Although the objectives of environmental protection, social protection, and the objective of sustainable development in Art. 177 of the EC agreements are so-called subordinate objectives in the agreements which are still applicable at present, even these are protected by primary legislation. The new Reform Treaty of Lisbon further reinforces their significance.

*to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting entity, are expressly mentioned and comply with the fundamental principles mentioned in recital 9."*⁹.

And in Art. 38 and 26 the new procurement directives of the EU (2004/17/EC and 2004/18/EC) explicitly stipulate that contracting authorities can lay down conditions for the performance of a contract. Here it says:

"The conditions governing the performance of a contract may, in particular, concern social and environmental considerations" (Article 38).

And:

"Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations" (Article 26 directive 2004/18/EC).

However, non-economic criteria must fulfil the following conditions:

- they must be linked to the subject matter of the contract,
- they must not give the purchaser unlimited decision-making authority,
- they must expressly be mentioned in the contract specifications or in the contract notice,
- they must observe all applicable principles of Common Law, in particular the prohibition of discrimination.

To assist with the correct implementation, the Commission published guidelines for the ecological award of contracts (Green Procurement) on its homepage (see: <http://ec.europa.eu/environment/gpp>)¹⁰ and passed a communication about environment-oriented public procurement¹¹. It is in the process of developing similar guidelines for social and ethical criteria (Fair Procura) as well. For this purpose, it commissioned a study and organised a conference on this subject matter in Brussels on 19 April this year.

⁹ In particular the freedom of establishment and the freedom of services and the principles resulting from these, as well as the principles of equal treatment, of non-discrimination, of mutual recognition, the principle of proportionality and the principle of transparency (preamble 2).

¹⁰ Above all "green procurement" has high political priority for the EU Commission and other EU institutions. This is reflected by numerous political documents (e.g. "Kok Report"), guidelines and initiatives on "green procurement" in particular by the DG Environment (http://ec.europa.eu/environment/gpp/index_en.htm). Furthermore, the EU Commission recommended action plans for environment-friendly procurement to the member states – this was rejected by Germany with reference to the federal structure of the state and a conflict between quantitative objectives for environment-friendly procurement and economic purchasing by public authorities.

¹¹ Communication from the Commission on public procurement for a better environment, COM(2008) 400 of 16 July 2008.

On 5 May 2009 the EU Commission published a communication¹² which, besides acknowledging Fair Trade including the "Fair Trade Label" it is based on, for the first time also made clear that, within the scope of European procurement directives, public institutions can give preference to fair trade products:

"According to European public procurement rules, contracting authorities ... cannot require specific labels because this would limit ... the access to the contract of products which are not so certified ...

If a contracting authority intends to purchase Fair Trade goods, it can define in the technical specifications of the goods the relevant sustainable criteria, that must be linked to the subject matter of the contract and comply with the other relevant EU public procurement rules, including the basic principles of equal treatment and transparency. These criteria must relate to the characteristics or performance of the products (e.g. glasses made out of recycled material) or the production process of the products (e.g. organically grown)" ...

Environmental and social criteria may also be incorporated in the execution clauses, provided these criteria are linked to the execution of the contract in question (e.g. minimum salary for the workers involved in the performance of the contract)".

(Page 9 of the communication).

State of implementation in the member states

The procurement directives had to be put into national legislation by 31 January 2006. By 2007, only 20 out of 27 member states had done so. The European Parliament criticised this hesitant implementation in a report of 11 June 2007¹³ and demanded full and correct implementation. We were given all important reasons for the failure to transpose: lack of national legal expertise, lack of human resources and lack of political will. A report by the World Bank reveals persisting, even increasing, problems with corruption.

Responsible rapporteur Arlene McCarthy (British socialist, Chair of the Committee on Internal Market and Consumer Protection) in her report, which was accepted overwhelmingly in Parliament, demands:

- the increased use of pre-commercial procurement to drive innovation,
- the development of a handbook / guidelines for the application of social criteria analogous to the Commission's handbook on the application of environment-related criteria,
- the setup of a management system, the promotion of training of the people responsible and their coordination in European networks,
- and the conversion of the concept of procurement from a budget-related to a results-oriented concept, taking into consideration the costs of the total project cycle.

¹² Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee. Contributing to Sustainable Development: The role of Fair Trade and nongovernmental trade-related sustainability assurance schemes, COM(2009) 215 of 5 May 2009.

¹³ A6-0226/2007

Implementation in Germany

The German government likewise took a long time to put the European procurement directives into national legislation. The law on the modernisation of procurement legislation became effective only on 23 April this year. It for the first time explicitly enables (like the European framework directives) the consideration of "social, environment-related or innovative aspects, if they are in factual context with the subject matter of the contract and result from the contract specifications."¹⁴ The possibility of excluding bidders from the procedure, who in a final judgment received a sentence pursuant to the statutory provisions of the member state for crimes which question their professional reliability, was likewise addressed for the first time. The commitment to gender equality (gender mainstreaming), unfortunately, was not addressed. This likewise could have been embodied beyond the rules of the EU regulations. – Nevertheless, an important first step.

It is now imperative to make the corresponding procurement regulations of the federal states analogous and also keep an eye on the General Terms and Conditions of the procurement committees. The complicated German procurement law (cascade principle) makes keeping an overview over the correct implementation of European framework legislation more difficult and enormously contributes to legal uncertainty in Germany in the area of public procurement.

However, legal uncertainty is also created by the wrong interpretation of European framework legislation. This makes it even more important to set up a management system for public procurement analogous to the recommendations of the European Parliament¹⁵ of 11 June 2007, aiming to train the people responsible for procurement and provide correct information about European framework legislation. Other member states (e.g. Great Britain) are much more advanced in this respect.

¹⁴ Article 1 of the "Law on the modernisation of procurement legislation", published in the German Law Gazette, issue 20 of 23 April 2009, concerns: amendment of the old §97, section 4.

¹⁵ A6-0226/2007