

GPP Helpdesk Webinar 'Social and environmental considerations and the link with the subject matter', 12 December 2023

Questions from the audience & Answers from the European Commission and the speakers

Questions addressed to the European Commission

1. *How do you define social procurement and what is the view of the EU Commission regarding the social enterprise?*

The European Commission's '[Buying social guide](#)', provides:

'Socially responsible public procurement (SRPP) is about achieving positive social outcomes in public procurement contracts. Procurement affects a large number of people: users of public services, those involved in production and delivery, or staff of the buying organisation. Beyond those directly affected, SRPP has the potential to influence the broader market on both the demand and supply sides.

By purchasing wisely, public buyers can promote employment opportunities, up and reskilling of the workforce, decent work, social inclusion, gender equality and non-discrimination, accessibility, design for all, ethical trade, and seek to achieve wider compliance with social standards. For some products, works and services, the impact can be particularly significant, as public purchasers command a large share of the market in sectors such as civil engineering, healthcare and transport.

To address societal challenges, public authorities need to step up efforts to deliver on all aspects of sustainability (social/ ethical, environmental and economic). Public buyers are major investors in Europe, spending currently over 14 % of the EU's gross domestic product. By using their purchasing power to opt for goods and services that deliver positive social outcomes, they can make a major contribution to sustainable development.'

Directive 2014/24/EU does not provide a legal definition of social enterprise or social economy enterprise. Social economy enterprises/social enterprises come into play twice in the implementation of the Directive.

Article 20 on reserved contracts aims to foster participation of procurement contracts for sheltered workshops, sheltered employment programmes and 'economic operators active in social and professional integration of disabled or disadvantaged persons'. The latter is usually understood as to refer to 'work integration social enterprises' or social economy enterprises whose mission is the social and professional integration of persons with disabilities and disadvantaged workers. Legal scopes of sheltered workshops, sheltered employment programmes and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons, are close to the definitions provided in the General Block Exemption Regulation in Regulation (latest version available [here](#), whose duration has been extended until 2026), but not defined per se.

Article 77 on reserved contracts for certain services gives Member States the possibility to reserve the right to participate in public procurements for

organisations under certain strict conditions enumerated in the Art. 77. Recital 118 stresses that such organisations are based on employee ownership, active employee participation in their governance or is organised in the legal form of a cooperative. Communication from the Commission about 'Social Business Initiative Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation' COM(2011) 682 provided a description of the concept of 'social enterprise', which is reflected in Directive 2014/24/EU.

In recent years, there have been some definitions of social economy enterprises and social enterprises. The most recent one is provided for in the [Council Recommendation of 27 November 2023 on developing social economy framework conditions](#) (C/2023/1344)

- (a) '**social economy**' means a set of private law entities providing goods and services to their members or to society, encompassing organisational forms such as cooperatives, mutual societies, associations (including charities), foundations or social enterprises, as well as other legal forms, that operate in accordance with the following key principles and features:
- (i) the primacy of people as well as social or environmental purpose over profit;
 - (ii) the reinvestment of all or most of the profits and surpluses to further pursue their social or environmental purposes and carry out activities in the interest of their members/users ('collective interest') or society at large ('general interest'); and
 - (iii) democratic or participatory governance.
- (b) '**social enterprise**' means a private law entity that provides goods and services for the market in an entrepreneurial way and in accordance with the principles and features of the social economy, having social or environmental objectives as the reason for its commercial activity. Social enterprises can be set up in a variety of legal forms.

The application and implementation of Articles 20 and 77 of Directive 2014/24/EU have as a pre-condition the existence of a national legal framework on social economy and social enterprises, which is currently not in place in all EU Member States, although progress has been made in most countries.

2. *Is the legislator aware that it is difficult to control sustainability only in what's connected to the subject matter and not the whole business? For example, if you go and check if a farm produces organic rice, and it has chemicals in the farm, it is difficult to understand if it uses them on the field connected to the subject matter or not... Also when there are no global accounting systems to check there is no overlapping.*

We understand the question as in which ways can a contracting authority guarantee that a certain product is delivered in compliance with the requirements set out in the procurement.

It can be challenging to ensure that businesses adhere to sustainable practices throughout their entire operations during the execution of the contract, especially when verifying compliance with specific criteria such as, for e.g., organic farming. The effectiveness of socially responsible public procurement depends on the clarity and specificity of the criteria set out in the procurement process and the way of formulation in the contract that is tendered out.

In this specific case, this is not an issue related to the subject matter per se, but a matter of contract management. Ensuring that a certain product, such as organic products free from chemicals, is delivered in compliance with the obligation of the awarded contract requires that the contracting authority has put in place a contract management function that is able to ensure this compliance (or at least to verify it).

However, in this regard, it should be noted that, even in breach of contract, the contracting authority has limited tools (for e.g., contract penalties, contract remedies) to enforce contract conditions in relation, in this case in specific, organic products.

3. *Can we have more information on the "Strategic Procurement Dialogues" project of the European Commission, implemented by PricewaterhouseCoopers and ICLEI?*

In 2023, the European Commission launched a [project](#) on **strategic public procurement dialogues** whose aim is to develop a dialogue between stakeholders on the use of strategic public procurement (green, social and innovation) as a lever for innovative and sustainable public policy development. During the workshops that are being organised in the Member States, public buyers and stakeholders identify the barriers faced and the solutions to be developed to help overcome those barriers. Then, together, they elaborate a road map to foster the development of strategic public procurement in their country. In the strategic procurement dialogues, the Commission mainly addresses the central administration (ministries and agencies, although some Member States allow the participation of regional bodies), to encourage the take up of strategic procurement, which can be only on social or green or innovation aspects or on all three aspects.

Questions addressed to prof. Roberto Caranta

Before going into individual questions, it is necessary (a) to remind that corporate social responsibility (CSR) is today understood in a wide sense covering the different aspects of sustainability (Article 2(b)(17) of Directive 2013/34/EU, as amended by Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting. Moreover, (b) Due Diligence (DD) is a methodology to assess, improve and communicate the CSR of companies. Finally, (c) to recall the legal framework, distinguishing between the present situation and what will happen once the Corporate Sustainability Due Diligence

Directive (CSDDD) becomes applicable.

PRESENT

It is first necessary to distinguish between international, EU or national law mandatory environmental, social and labour obligations and sustainability requirements discretionarily chosen by contracting authorities.

Concerning the former, Article 18(2) of Directive 2014/24/EU provides that “Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X”. Under the last phrase of Article 56(1) “Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable obligations referred to in Article 18(2)”, but exclusion is mandatory in case of abnormally low tender (Article 69(2)(d)). Finally, a tenderer may be excluded under Article 57(4)(a) “where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2)”. In sum, a tender not complying with the applicable obligation may – and more rarely must – be excluded, and an economic operator having breached the same obligations in the past may also be excluded. Implementing national measures may turn the ‘may’ into ‘must’.

Concerning instead sustainability requirements discretionarily chosen by contracting authorities, the case law has understood the link to the subject matter requirement for sustainable consideration as demanding focus on *what is bought*, not on *whom you buy from*. In Case C-448/01, *EVN*, the contracting authority wanted BOTH to buy energy from renewable sources AND award points to tenderers based on the volume of their overall supply of energy from renewable sources. The CJEU held that “An award criterion that relates solely to the amount of electricity produced from renewable energy sources in excess of the expected annual consumption [of the contracting authority], as laid down in the invitation to tender, cannot be regarded as linked to the subject-matter of the contract.” (paragraph 68). This approach was reiterated with reference to a sectoral CSR policy – fair trade coffee – in *Max Havelaar* (C-368/10, *Commission/Netherlands*). The CJEU accepted that contracting authorities are “authorised to choose the award criteria based on considerations of a social nature, which may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons” (paragraph 85) such as the producers (paragraph 89). The Court further held that the “award criterion at issue [...] covered only the ingredients to be supplied in the framework of that contract, without any bearing on the general purchasing policy of the tenderers. Therefore, those criteria related to products the supply of which constituted part of the subject-matter of that contract” (paragraph 90).

The case law was consolidated in the last phrase of Recital 97 of Directive 2014/24/EU:

“the condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services. Contracting authorities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place” (emphasis added).

WITH CSDDD

Based on the information available, Article 24 of the future CSDDD will require compliance with CSDD by economic operators covered under the directive to be added as a contract performance condition in public procurement and concession contracts. Moreover, contracting authorities will be empowered to award points to economic operators not bound under the CSDDD that voluntarily decide to adhere to its rules. Remarkably, under the CSDDD, what is assessed is the general corporate policy of a company.

4. *Where can we find the list of mandatory CSR you have mentioned ?*

There is no official list and the number is growing. Check Annex X of Directive 2014/24/EU; Regulation (EU) 2023/1115 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation; the CSDDD will also have to be considered.

5. *Is it possible to ask for evidence of how suppliers are taking active measures to meet certain laws e.g. equal pay (beyond only looking back at legal breaches)?*

If the question refers to the award stage, under the relevant parts of Article 60(1), “Contracting authorities may require the certificates, statements and other means of proof referred to in paragraphs 2, 3 and 4 of this Article and Annex XII as evidence for the absence of grounds for exclusion as referred to in Article 57 and for the fulfilment of the selection criteria in accordance with Article 58. Contracting authorities shall not require means of proof other than those referred to in this Article and in Article 62”. Article 62 refers to quality assurance standards and environmental management systems. Basically, besides the latter documents mentioned, only certifications and self-declarations may be required.

The situation is different concerning the contract performance phase. Beside any requirement in national law (e.g. Icelandic Standard **ÍST 85**), contract clauses may provide for documentary evidence (e.g. pay slips), inspections, audit. Contracts can also provide sanctions (e.g. penalty clauses) in case of breach. The only limit would be compliance with the general principle of proportionality.

6. *Can you please clarify if including CSR in procurement (beyond mandatory criteria) is compliant with EU law provided that equivalent means to prove them are allowed?*

Presently, non-mandatory CSR criteria may be required only concerning the specific good or services acquired (e.g. fair trade coffee supplied to the contracting authority, but cannot require that the tenderer only supplies fair trade coffee). According to the *Max Havelaar* caselaw as reformulated in Article 43 of Directive 2014/24/EU, alternative means of proof must often be accepted. Under the CSDDD it will be possible to award points to economic operators voluntarily adhering to company-wide CSR policies.

7. *Is the existence of adopted ethical policy of the tenderer a legitimate criterion for evaluation or qualification? If yes, which should be preferred?*
8. *Could you please elaborate on the existence of adopted ethical policy of a tenderer as a selection criteria in the context of article 58 of Directive 2014/24/EU?*

Presently, reference to the general ethical policy is not allowed. But it is possible to refer to aspects related to the specific contracts to be awarded. In Case T-578/19 *Sophia Group*, the General Court considered to be linked to the subject matter several social aspects included in award criteria for the procurement of management services for the buildings of the European Parliament. Specifically, points were attributed for equal treatment (*Diversité/égalité des chances*); combating harassment (*Lutte contre le harcèlement*); inclusion of persons with disabilities (*Inclusion de personnes en situation de handicap*); quality of working environment (*Bien-être au travail*); training and certification schemes, including ISO 9001 or equivalent. Obviously, an economic operator might refer to its general policy to prove it meets the criteria.

It is also possible to use to such criteria in qualification as long as they are related to the technical and professional qualification, e.g. for services to be provided to/in vulnerable communities a qualification requirement might be added that employees have been trained to work by high ethical standards. Under Article 58(4) of Directive 2014/24/EU, "With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard".

See above for the forthcoming CSDDD. This directive is not expected to explicitly require contracting authorities to penalise with exclusions breaches to its standards, but this might happen as it will introduce obligations relevant under Article 18(2) of Directive 2014/24/EU, potentially leading to exclusion under Article 57(4)(a).

Questions to Wolter van der Vlist, Procurement Policy & Strategy Team, Judicial Institutions Department, Ministry of Justice and Security (NL)

9. *What was the biggest challenge that suppliers had to overcome in the tender?*

We asked suppliers to listen to prisoners in order to prevent food waste. They rather have a tender that is straightforward and simple. Requiring the supplier to listen to prisoners is a complex matter and required flexibility from the supplier.

10. *Regarding food in prison, would it be possible to know more about how the criterion of Regional Connection is applied?*

We asked the suppliers to tell us how they incorporate regional suppliers in their own supply chain. We rewarded them with 15% of the points.

11. *In this procurement, was your social/environmental policy translated in award criteria or in contract performance conditions?*

It was only translated in award criteria.

12. *What are the lessons learned from this project?*

We have learned many lessons, but the most important one is: tell the market your dreams and vision are. And let them know that if they help to fulfill that dream in their tender, they will win.

Questions addressed to Karsten Skjellerup, CSR Consultant, Socially responsible procurement team, City of Copenhagen (DK)

13. *Is it allowed to ask contractors and their subcontractors to submit workers payslips? Is it a mandatory or voluntary requirement?*

It is a compulsory requirement for the primary contractor to ensure fair compensation for the employees of their subcontractors (throughout the entire supply chain). If the primary contractor is unable to provide documentation for the employees of their subcontractors, it is considered a breach by the primary contractor, resulting in sanctions against them. Consequently, we advise that the primary contractor implements a labor clause with their subcontractors, granting them legal authority to impose sanctions on their subcontractors. Whenever we require documentation concerning or from a subcontractor, we always request it from the primary contractor. The primary contractor then relays our request down the supply chain to the relevant subcontractor, who in turn sends the documentation back up the chain.

14. *How do you set up your sanctions?*

There are two categories of violations: formal and material. Formal violations occur when a contractor is unable to provide the required documentation following a request from the contracting authority, which may include pay slips, proof of income tax payment, and work hours records. If there is a breach of the labor clause, a material sanction can be applied. This action is taken in cases of significant underpayment, excessive work hours, or unsafe working conditions. Typically, the remedy involves ensuring that underpaid employees receive proper compensation and that contractors rectify their breach of the labor clause by reimbursing the employees the amount they are entitled to under the labor clause.

15. *How should we consider site visits in this context?*

Site visits are essential for focusing efforts on scenarios where there is a genuine risk. The purpose of site visits is to prevent unnecessary bureaucracy and to identify serious cases that require intervention. Often, a site visit provides invaluable insights into the practices of sectors and contractors, aiding in our risk-based approach. Therefore, site visits are crucial for achieving a high success rate in our enforcement efforts.