

Key considerations for sustainable public procurement

Adverse human rights and environmental impacts are present in public sector supply chains. Contracting authorities across the EU have a key role to play by enforcing requirements in their procurement processes to prevent and mitigate cases of corporate abuse affecting workers and communities along global supply chains. However, implementation efforts remain flawed. This position paper outlines the current challenges surrounding Socially Responsible Public Procurement (SRPP) and provides recommendations to decision-makers on how to utilise public procurers' full potential as actors for change.

Background

Goods and services are procured by 250,000 public authorities across the EU. Public procurement in the EU amounts to 2 trillion EUR or 14 percent of total GDP¹. With no doubt, public authorities possess significant purchasing power. A substantial share of all goods purchased is produced in countries with weak enforcement of labour and civil law. When public purchasers implement SRPP by demanding that suppliers perform Human Rights and Environmental Due Diligence (HREDD²), monitor compliance and actively engage with suppliers, public procurement can contribute to positive change³.

Public procurement has been recognised as a lever to meet the Sustainable Development Goals and should, according to the UN Guiding Principles on Business and Human Rights (UNGPs)⁴, be used to promote respect for human rights. However, contracting authorities are not utilising the full potential of SRPP. While some Swedish contracting authorities stand out as international frontrunners along with authorities in Norway and a few other countries⁵, 55 per cent of procurement procedures in the EU use lowest price as the only award criterion for public contracts⁶. A recent study in Sweden shows that many contracting authorities do not regularly identify human rights and environmental risks⁷. The OECD has concluded that the inclusion of objectives of responsible business conduct (including human rights and labour rights) is incomplete and uneven among its member states, and challenges remain concerning monitoring of compliance⁸. From this perspective, public procurement can rightfully be called “the missing multiplier” for sustainable development as described by the Nordic Council of Ministers⁹.



Key challenges to Socially Responsible Public Procurement

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Limitations of the EU Public Procurement Directive

The EU Public Procurement Directive (2014/24/EU)¹⁰ places expectations on contracting authorities to take environmental, social and labour law¹¹ considerations into account in procurement processes. Under the Principles of Procurement, Article 18.2 promotes compliance with social and labour requirements in the performance of public contracts and stipulates that member states should take measures to ensure that the contract per-

formance complies with applicable obligations in the fields of environmental, social and labour law. The article specifically references the eight ILO Core Conventions. Further, the directive enables (e.g. when violations of the ILO Core Conventions occur), and sometimes requires (e.g. engagement in human trafficking), the exclusion of suppliers proven to have violated social- and labour-related obligations¹².

Socially Responsible Public Procurement (SRPP) is a process by which public sector entities take into account the impact of their procurements on society at large, at the local, national and global levels. The concept covers human rights and labour rights aspects related to the production of goods and services along global supply chains, as well as business ethics and social considerations that aim to improve access to the labour market and promote gender equality. This position paper focuses specifically on the enforcement of requirements in public purchasing that aims to safeguard human rights and the environment in the production of procured goods and services.

Despite expectations and quite far-reaching possibilities to enforce requirements that aim to safeguard human rights and the environment in global supply chains, the Public Procurement Directive makes the enforcement of effective and comprehensive socially sustainable procurement very much voluntary. This weakness is facilitated by the directive's lack of alignment with the UNGPs, the internationally endorsed framework on responsible business conduct, as the directive only focuses on the ILO Core Conventions, instead of the full spectrum of human rights. In practice, this means that contracting authorities may overlook fundamental human rights

such as the freedom of movement, freedom from (gender based) violence, and access to clean water and a healthy environment, even though there might be a high risk that they are violated in the production of procured goods.

Crucially, the directive fails to incorporate the concept of HREDD¹³ or how this should be implemented in procurement procedures. The European Commission missed the opportunity to further clarify this in its proposals on a Corporate Sustainability Due Diligence Directive (CSDDD)¹⁴ and regulation on prohibiting products made with forced labour¹⁵. Neither of these proposals explicitly mentions public procurement. The CSDDD proposal leaves out the European Parliament's recommendation from 2021 that would have enabled public purchasers to exclude suppliers that fail to perform HREDD¹⁶. The EC proposal on CSDDD does not apply to small and medium-sized companies (SMEs)¹⁷, which means that at least half of the directly contracted suppliers to the public sector in the EU would be exempt from its obligations¹⁸.

2 Insufficient monitoring of sustainability requirements

Despite available guidelines and tools¹⁹, monitoring of sustainability requirements is generally weak. Data on monitoring is scarce, but a recent study found that only 15 per cent of the responding authorities in Sweden reported to “always or most often” engage in systematic monitoring of sustainability requirements²⁰. Long-term engagement in follow-up activities is crucial for effective SRPP. There is no legal obligation to follow up on sustainability requirements in Sweden (it is only mandatory to ensure that the possibility to follow up exists, based on legal praxis). This creates a loophole that allows contracting authorities to include sustainability demands in their contracts without enforcing them. It also opens the door for political decision-makers and suppliers to only commit to sustainability objectives on paper. Rightsholders’ potential exposure to environmental degradation and human rights violations as such remains unaddressed.

3 Lack of knowledge and resources

Contracting authorities in Sweden and other EU member states often lack the fundamental capacity, including resources and knowledge, to implement sustainability requirements²¹. According to the OECD, human rights considerations in public procurement is one of the areas with the greatest lack of understanding²². In Sweden, the National Agency for Public Procurement contains a library of sustainability requirements and risk-assessments covering human and labour rights for a wide range of products as well as step-by-step guidance on

the implementation process²³. The European Commission provides an SRPP guide with examples covering the full spectra of social aspects, including the scope of human rights considerations in global supply chains²⁴. These libraries of requirements and best practice examples are commendable, but without the necessary political will and the allocation of additional financial resources to build capacity among public purchasers, effective implementation of SRPP is likely to remain the exception to the norm.

Example from the Swedish context:

The implementation system used by the Swedish regions and some other individual front-running contracting authorities entails contractual terms that place responsibility on the supplier to perform HREDD throughout its supply chain. The contract must be fulfilled in accordance with the International Bill of Human Rights, ILO Core Conventions, environmental considerations and business ethics. Suppliers’ policies, processes and actual and potential impacts are monitored through a collaborative system, which includes social auditing at suppliers’ headquarters and at the production level in the supply chain. Market dialogue is also conducted to support improved HREDD efforts among suppliers.

4 Lack of transparency

Information is key to assessing risks and monitoring suppliers’ compliance with human rights and environmental requirements in their global supply chains. Companies are generally protective of information concerning their supply chain or lack insight, which makes it more difficult for contracting authorities to retrieve supply chain data on producing countries, factories and sources of raw materials and to monitor and verify HREDD measures. Legislative measures are thus needed that require companies operating in the EU market to map and disclose the suppliers in their value chains. Such provisions could be incorporated into the future CSDDD. Another hurdle is the lack of information-sharing between public authorities on suppliers’ compliance with set contractual requirements and legal obligations. This undermines the possibility to exclude suppliers, as contracting authorities need to provide evidence that proves that the tenderer has violated environmental, social or labour law obligations.

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10 key considerations

Swedwatch has identified 10 key considerations to strengthen public procurement as a tool to prevent and mitigate human rights and environmental impacts in public sector supply chains.

To the EU Commission:

Revise the Public Procurement Directive and make sustainability considerations mandatory

1. The EU Public Procurement Directive must be revised, to make it mandatory for contracting authorities across the EU to enforce and monitor human rights and environmental requirements throughout the procurement lifecycle. This would strongly enhance and clarify expectations on contracting authorities and suppliers.

Ensure alignment between the Public Procurement Directive and human rights standards

2. The EU Public Procurement Directive needs to be aligned with the UNGPs, recognising the full concept of HREDD and including all internationally recognised human rights. This would support the harmonisation of sustainability requirements among contracting authorities and increase the understanding between different stakeholders.

In relation to CSDDD

3. The CSDDD's scope must be widened to include SMEs, which constitute at least half of the suppliers to public authorities.

4. The CSDDD should require contracting authorities to ensure that suppliers comply with its obligations and allow public purchasers to exclude suppliers who are neglecting their HREDD obligations.

Increase transparency around suppliers' compliance

5. Adopt legislation requiring companies operating in the EU market to map and disclose their suppliers and other business partners present in their value chain, for example by incorporating such provisions into the CSDDD.

6. Provide contracting authorities with an information-sharing platform on suppliers' compliance with human rights and environmental requirements and legal obligations. This would increase transparency, enable effective monitoring and exclusion of non-compliant suppliers.

Build capacity among contracting authorities in EU member states

7. Support contracting authorities with practical tools and pedagogical resources on how to implement effective SRPP, in for example, a centralised knowledge hub. This will further support the alignment of methods and terminology and help consolidate practices.

8. Member states' authorities should allocate resources to build skills and capacity among staff to enable best-practice procurement procedures.

To the Swedish government and political parties:

9. As individual Swedish contracting authorities are considered front-runners regarding SRPP in a global context, the Swedish government should embrace the opportunity to take the lead by aligning its national procurement legislation with the UNGPs and incorporating human rights considerations as mandatory requirements for contracting authorities.

10. The Swedish government and Members of the European Parliament should actively support the revision of the EU Public Procurement Directive in order to level the playing field for all suppliers operating in the European market.

Endnotes

- 1 European Commission, Internal Market, Industry, Entrepreneurship and SMEs.
- 2 As of 2017. European Commission, Public procurement, retrieved 28th April 2022
- 3 Swedwatch, Agents for Change, 2016.
- 4 UN Guiding Principles of Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework. https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.
- 5 See, for example, European Commission, Buying Social – A Guide to Taking Account of Social Considerations in Public Procurement (2nd edition), 2021. One initiative that contracting authorities use to implement SRPP in ICT procurement is Electronics Watch, a non-profit organisation that supports over 400 mainly European contracting authorities with contract clauses and a worker-driven monitoring system that aims to protect labour rights and workers in the production of electronics. www.electronicswatch.org.
- 6 European Commission, Public Procurement, retrieved 28 April 2022.
- 7 Fairtrade, ST, Vision, Så kan den offentliga upphandlingen bli mer hållbar, 2022. 422 responding contracting authorities out of 740.
- 8 OECD, Integrating Responsible Business Conduct in Public Procurement, OECD Publishing, Paris, 2020. <https://doi.org/10.1787/02682b01-en>.
- 9 Nordic Councils of Ministers, Sustainable Public Procurement and the Sustainable Development Goals, 2021.
- 10 There are three directives regulating procurement – Directive 2014/24/EU on public procurement; Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors; and Directive 2014/23/EU on the award of concession contracts. This report focuses on 2014/24/EU, which regulates the purchase of goods and services, but the considerations of this paper apply to all directives.
- 11 ILO Core Conventions; Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol on Substances that Deplete the Ozone Layer; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention); Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention); Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10 September 1998, and its three regional protocols.
- 12 Article 57.4 (a) refers to Article 18.2 and Annex X. It outlines that if a contracting authority can demonstrate “by any appropriate means” that a tenderer is in violation of any of the obligations referred to in Article 18.2, the tenderer may be excluded. In cases where the contracting authority can show that the violations are the cause of an abnormally low bid, it is mandatory to exclude the supplier. Purchasing authorities also have the mandatory obligation to exclude suppliers who have, among other things, been convicted of criminal offences related to corruption and human trafficking.
- 13 HREDD is the process when a company assess the risk of potential and actual human rights impacts, take action to prevent and mitigate impacts, track and communicate performance, and provide remedy to affected rights holders through legitimate processes if the company has caused or contributed to salient impacts. The environmental aspect can be included as human rights and environmental impacts are linked.

- 14 The EU Commission's proposal of a Corporate Sustainability Due Diligence Directive would require EU companies with more than 500 employees and a turnover of €150 million to prevent human rights and environmental abuses throughout their supply chains by carrying out HREDD. https://ec.europa.eu/info/sites/default/files/1_2_183888_annex_dir_susta_en.pdf
- 15 COM(2022) 453 – Proposal for a regulation on prohibiting products made with forced labour on the Union market
- 16 European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability
- 17 EU companies with over 500 employees and over €150m turnover. EU companies with over 250 employees and €40m turnover in high risk sectors: (a) textile; (b) agriculture, forestry, fisheries, food and drinks; (c) extractive sector (mining, oil, gas) and mineral products. Non-EU companies with over €150m EU turnover or over €40m EU turnover in high-risk sectors.
- 18 Statistik om offentlig upphandling, 2020 Upphandlingsmyndighetens rapport och 2020:4 Konkurrensverkets rapport 2020:5, European Commission, Key Findings – Analysis of SMEs' Participation in Public Procurement and the Measures to Support It, 2019.
- 19 See, for example, the National Agency for Public Procurement's guidance, <https://www.upphandlingsmyndigheten.se/om-hallbar-upphandling/socialt-hallbar-upphandling/arbetsrattsliga-villkor/ansvarsfulla-leveranskedjor/forvalta/>.
- 20 Fairtrade, 2022.
- 21 Undersökning om hur offentlig sektor ställer arbetsrättsliga villkor | Upphandlingsmyndigheten; OECD, 2020.
- 22 OECD, 2020.
- 23 Upphandlingsmyndigheten, Kriterietjänster, retrieved 24 May 2022.
- 24 European Commission, Executive Agency for Small and Medium-sized Enterprises, Tepper, P., McLennan, A., Hirt, R., et al., Making Socially Responsible Public Procurement Work: 71 Good Practice Cases, Publications Office, 2020, <https://data.europa.eu/doi/10.2826/844552>.

