

Hybrid Cars, Green Electricity and Organic Tomatoes



The situation and legal background of 'Green Procurement' in the EU

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For environmentally-minded people, it is always nice to be reminded of Article 6 of the EC Treaty: environmental aspects must be integrated into all different policy areas in the EU. However, at the moment, it seems that 'greening' of different policies is not very high on the political agenda. Given the various problems concerning employment, growth and national budgets, environmental standards are being questioned with respect to their impact on other policies, rather than the other way round. Interestingly, this refers to some extent more to the superficialities of political marketing than to real developments in the EU. It is also true that many initiatives on environmental policy integration that were started during the 90s are now reaching the point where they become relevant for many administrations. 'Green public procurement' is a case in point. Today, the idea of stimulating eco-innovation by sound purchasing practises is a well established concept. This article will describe the origins of green public procurement, the way it has been established and its present status at EU level and in the Member States.

Introduction

It is very unusual that an environmental association promotes a car. In a recent press release, the Dutch NGO Stichting Natuur en Milieu asked the national government to follow the example of eight Ministers of the British Government who apparently changed their Jaguars for environmentally friendly hybrid cars.¹ What seems to be in the first place a rather smart NGO press campaign is in line with official governmental objectives in many Member States of the EU. It is a well accepted approach to stimulate eco-innovation by sound purchasing practises. This is also known by the label 'green public procurement'. So, green purchasing is about setting examples and influencing the market place. According to figures given by the European Commission, public authorities are major consumers in Europe, spending some 16% of the EU's Gross Domestic Product. The assumption is that their procurement practices matter. By using their purchasing power to opt for goods and services that respect the environment, they could make an important contribution towards sustainable development.² This included in 2001, for example, 2.8 million computers and monitors purchased by public authorities in the European Union.

In Scandinavian countries, local authorities started decades ago to use public procurement as an active tool to

stimulate the production of 'environmentally friendly' products. It started with an environmental standard for paper that is still one of the most prominent examples. Today 'green' procurement is no longer limited to a few products, but refers to all kinds of goods and services ranging from the procurement of tomatoes for canteens to the timber for new windows in office buildings. New products such as 'green electricity' and the stimulation of sustainable public transport are also included. According to the international organisation ICLEI (Local Governments for Sustainability) switching public demand away from the conventional EU mix of electricity to green electricity would save some 60 million tonnes of greenhouse gases (CO²-equivalents) alone, equating to 18% of the EU's Kyoto commitments.³

This article will firstly describe the history of green procurement at the international level, related to initiatives on sustainable development. Then the political and legal framework at EU level will be described. In section two, recent figures will be presented on the practise of public procurement at the Member State level. Obstacles and important positive aspects that hinder or stimulate green procurement practices at national level will be discussed. The third section will present the Commission's view on the possibilities for public purchasers described in the handbook on Green Procurement as a sort of interpretation of recent



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case law and the new Directives. In the fourth section, other recent EU policies will be described that have an impact on the development of green public procurement. Finally, the article will discuss whether the new legal and political situation in the EU and developments at national level might lead to a new momentum for green procurement initiatives.

1. History at the international and EU level

Agenda 21, a 600-page document adopted in the framework of the Rio Conference on Environment and Development in 1992, has led to many local initiatives on sustainable development. It also makes suggestions on the application of policies in various areas of resource management. Section I, Chapter 4 is concerned with production and consumption and sets the objective of promoting more sustainable patterns of consumption and production.⁴ Thus, Rio also put 'green public procurement' as a new instrument on the international environmental policy agenda. Public procurement was especially mentioned in the follow-up Plan of Implementation of the World Summit on Sustainable Development, which stated that procurement policies should encourage development and diffusion of environmentally sound goods and services.⁵ Until today, many initiatives have been developed at the UN and OECD level.

In the EC/EU, the 5th Environmental Action Programme described in detail the potential of consumer power to promote ecologically sound manufacturing and processing.⁶ The 6th Environmental Action Programme made the management of natural resources a key area, which was politically

addressed in the follow up through different instruments. In particular, the 2003 Communication on Integrated Product Policy underlined the importance of green public procurement.⁷ However, the former legal framework (Directives 93/36/EEC, 93/37/EEC, 92/50/EEC and 93/38/EEC) did not contain any reference to the possibility of integrating environmental considerations into a public procurement procedure. Barth and Fischer described the basic dilemma: the two principles of modern public procurement are that all bidders are granted equal opportunities and that public money is spent with regard to budgetary restraints. Therefore the integration of environmental or other aspects (e.g. social) would not necessarily reflect the guiding principles of procurement law.⁸ In practice, administrations at all levels have to some extent been reluctant with respect to green procurement, in order not to violate the already 'complex' EU regulations. In Sweden for instance, the unclear EU framework was until recently seen as one of the biggest obstacles to green procurement.⁹ This of course was not supporting the official policy objectives laid down in the 5th and 6th Action Programmes. Official EU environmental policy especially emphasised the need to operate beyond the traditional 'command and control' instruments with supplementary instruments in environmental policy, such as taxes, labeling, emission trading and eco audit. In this context, green procurement has been seen as an important environmental tool in order to stimulate environmentally friendly consumption and production patterns.¹⁰

However, until 2004 the Commission as a whole was rather reluctant to promote the idea of green procurement.¹¹ In its proposal for a new Directive on public procurement¹² the Commission did not elaborate and support green

procurement in the text.¹³ Given the obvious uncertainties concerning the legal background, the Commission published in 2001 an interpretative communication¹⁴ with the intention of clarifying the potential for purchasers to integrate environmental considerations. This did not, however, immediately change the complex legal situation and was a rather weak signal that the Commission supported the concept in general. A stronger push for green procurement was given by the Court of Justice in 2002 with the judgment in the 'Helsinki bus case'.¹⁵ The Court of Justice stated that a purchasing decision could also include value for public health and the environment. It was the European Parliament that followed this line and fought for green procurement in the negotiation of the new Directive on public procurement. The Commission modified its proposal in response to amendments proposed by the Parliament that clarified how environmental and social concerns can be taken into consideration when assessing tenders at the contract award stage. The Council accepted the main changes in its Common Position.¹⁶ In the final conciliation, it was stated that the Directive is based

on the principle of awarding contracts to the most economically advantageous tender. However, the contracting authorities may apply environmental and social criteria in a transparent manner in line with the case-law of the Court of Justice.¹⁷ So, consideration of environmental criteria is mentioned in the Directives and the jurisprudence that was positive regarding the practices of some pioneer authorities has been consolidated in the text.¹⁸ Also different from the Commission's initial proposal was the mention that eco-labels and environmental management schemes could play an important role for the purchasing authorities.

The old legislative framework was to some extent a legal, but also probably a psychological and political, problem for many local and regional purchasers. The uncertainty *vis-à-vis* Brussels had also to do with the lack of visible political support. This was changed with the new Directives adopted on 31 March 2004. The European Commission signalled political support in 2004, with the presentation of a handbook on environmental public procurement (Buying Green!) that describes in detail the possibilities for purchasers against the new legislative background. Some of the main statements of the handbook will be presented below in section 3.¹⁹

2. Green public procurement in the Member States

In parallel to international developments, front-runner governments started to develop coherent policies in the field at the national and regional level. Denmark can be seen as an example of early action. In 1992, green procurement was integrated in the national environmental act; in 1994 the government developed an action plan;

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and in 1998 voluntary agreements were signed by counties and municipalities.²⁰ In the Netherlands, a national campaign starting in 1999 has led – according to government figures – to 23% of green public procurement at all levels of government. The government has set an objective of 50% green purchasing by the year 2010.²¹ In many progressive countries, the first steps were not taken by national administrations but at the local and regional level. This is primarily because of the importance of local purchasing practices. According to estimates, local authorities account for 60%-70% of all procurement of goods and services in the EU.²² Thus, local authorities are

major stakeholders in the process. In Sweden, for instance, a number of environmentally-concerned municipalities and counties have been at the forefront. In the context of local initiatives, the most progressive supporter of green procurement has probably been the previously mentioned organisation ICLEI.²³ Under its umbrella a network of professionals in the field has been established (Big Net, The buy it Green Network), in order to exchange know-how and broaden expertise. The

last big international conference of the network was hosted in November 2005 inter alia by the British Presidency of the Council of the EU (Department of Environment, Food and Rural Affairs) in Cambridge. ICLEI has also started the Procura+ Campaign that has set clear objectives and sophisticated criteria for participating administrations for a small number of products and services.²⁴

So, there are many front-runners and a very busy international network of purchasers. But to what extent is green procurement today really practiced in all the Member States of the EU? DG Environment has commissioned the development of a measurement tool in order to measure the current level of green procurement. In October 2005, a first status report on the project was published. According to the study, there is a group of seven countries that already have a significant amount of green public procurement: Austria, Denmark, Finland, Germany, the Netherlands, Sweden and the UK. There, 40%-70 % of all tenders published on TED (Tender Electronic Daily²⁵) during the past year included environmental criteria. In the other 18 countries this figure was below 30%.²⁶ What are the most important factors for the application of green procurement? According to the findings the following aspects play an important role.

- There are strong political drivers and/or national guidelines.
- Green procurement has been approached from a national programme and has been addressed for a number of years.
- All successful Member States have information resources and websites (often containing product related information) available for sector staff.
- Most of the successful Member States (60%) use

innovative tools such as life-cycle thinking, functional specifications or contract variants, compared with 45% from other countries.

- 33% of the successful countries have management systems in operation compared with 13% in other countries.²⁷

These latest results show that green procurement is both a question of political commitment and administrative capacities. Strong political initiatives and national programmes have led to administrative structures and procurement routines that incorporate green public procurement aspects.

What have been on the other hand the problems and obstacles for the greening of public procurement? In all Member States the main problem is the fact that environmentally friendly products are perceived as more expensive. Another important obstacle is a lack of knowledge about the environment and how to develop environmental criteria for products and services. The lack of management support and administrative resources were also found to be a major problem, as well as the lack of practical tools and information and training for procurement officers.²⁸

In the course of the study, the quality of environmental criteria used in the tenders was also analysed. It was found that many environmental criteria were not well defined, which was felt to be connected to insufficient training in this area. If well-defined criteria were found, they were related to certain product groups where clear environmental criteria are already available on the market. The average of all Member States shows that most of the solid green criteria are found within the product group of paper, printed matter and printing services (recycled content, not bleached). The second most important group is the construction sector (timber, energy use, harmful matter, water efficiency) and the third office machinery (energy use, recycling).²⁹ It is not surprising that the authors recommend following the example of the seven 'green' front-runners. Their examples show that aspirational targets are feasible. In particular, products where solid environmental standards are already developed would be appropriate to be integrated into national programmes on green public procurement. As a second point of departure, the study emphasises the role of information, communication and practical training. These basic needs are, for instance, already reflected in the European Commission's handbook on green procurement.

3. The Commission's view on what is possible

It has been said in the previous sections that progressive administrations were already operating in the field of green procurement under the old legal framework. The latest study on the situation in the Member States has also shown that green procurement is very much about awareness and training, with respect to the market for environmental goods and services and the definition of selection criteria. Today, local, regional or national authorities can no longer hide behind the 'difficult' EU legislative procurement framework. The meaning and scope given by the Directives is no longer unclear. The European Commission has described its point of view in detail in the handbook on Green Procurement.³⁰ The following is a brief summary of the most important recommendations given by the Commission:

- Authorities have greater freedom when defining the



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subject matter of the contract, allowing ample scope for including environmental considerations (p.10).

- The underlying technical specifications of eco-labels may be useful for the drafting of specifications. The relevance of the different label schemes is described in detail. Importantly, tenderers do not necessarily have to be registered under any eco-scheme to fulfil the specifications (p.19)
- It is also possible to specify specific materials or environmental production methods if relevant. According to the Commission, the two new Directives (2004/17/EC and 2004/18/EC) explicitly allow choosing between specifications based on technical standards and performance based requirements. An example: if office buildings should be kept at a certain temperature, this can be achieved by detailed specifications for the heating system. Alternatively, it could be stated that the temperature should be 20 degrees, leaving the question of the heating system to the supplier (p.18)
- The Commission also emphasises the possibility of working with 'green variants'. This means establishing a minimal set of technical specifications for a product which will apply to both a neutral offer and a green variant. This allows the authority to compare offers on

the basis of the same standard requirements (p.19).

- The new Directives also explicitly recognise that environmental management certificates can serve as a possible means of proof for companies to demonstrate their technical capacity to perform environmental management measures that are important for the performance of a contract. However, the authority should also accept all other evidence of this technical capacity (p.31).

4. Other important factors for green procurement

One important result of the latest study has concerned the obstacle that many officials associate with green products – higher prices. To some extent this has proved to be a misconception. Research under the RELIEF project has shown that, in reality, while some green products indeed would cost more, many others would cost the same as non-green products, but generate savings in other areas, such as energy and water consumption, waste disposal costs and reduction of unnecessary purchasing.³¹ It is also a question of whether or not the potential savings are taken into account and can play a relevant role in the procurement decisions. On the other hand, there is of course a dilemma of lower prices of non-environmentally friendly products that cannot be solved at the level of single authorities. The European Commission has only recently in its State Aid Action Plan again emphasised the aim of ensuring a full internalisation of environmental costs.³² This also touches upon very sensitive national issues, such as state aid for different sources of energy, where very progressive steps are not likely in the near future. Related to the present lack of internalisation of environmental costs, the European Commission also recognises the need for environmentally friendly products and technologies to be financially supported. Consequently, the Commission is – according



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to the State Aid Action Plan – also ready to encourage eco-innovation and improvements in productivity through eco-efficiency where certain measures might also be exempted under the general block exemption from the obligation to notify the aid. That means that the new environmental aid guidelines that will be ready in the course of 2006 can be regarded as an important element in the framework of

green procurement.

A sustainable increase in green procurement will depend both on the reduction of subsidies for non-environmentally friendly production, and on active financial support for environmentally smart technologies.

Another important result of the latest study has been the relevance of solid green criteria. It was shown that the prominence and credibility of national eco-labels plays an important role in the pioneer countries. This indicates also that, at the EU level, future support for the promotion and development of eco-label schemes is a valid tool for green procurement. Today, there is a mix of public national, EU and private labels. There is still a lot to improve: for instance the number of categories under the EC eco-label (European flower) and under national labels have to be increased, since many new relevant green procurement products are not covered. Therefore, the complementary and supportive elements of both instruments, eco-label and green procurement, have to be streamlined.³³

The work at EU level in the area of integrated product policy (where the Commission released a Communication in 2003) will also be very important.³⁴ Integrated Product Policy seeks to minimise the harmful effects of production, use or disposal by looking at all phases of a product's life-cycle and taking action where it is most effective. In pilot projects, this is at the moment being tested for several products. The idea is also to provide in this framework better website information on environmental criteria in order to provide corporate and public purchasers with background information on what criteria are relevant for a particular product.³⁵

Finally, it is a political reality that any environmental instrument will be assessed today in order to know more about its impact on competitiveness. DG Environment of the European Commission and the Environment Council have frequently in the Lisbon framework supported the idea that public procurement procedures could indeed be a demand-driven stimulator for innovation, and there is also a strong link to research and development.³⁶ Green public procurement is therefore regarded as a key aspect of the EU's Environmental Technologies Action Plan. The Action Plan seeks not only to promote the development of environmentally sound technologies, but also to increase the EU's competitiveness.³⁷ The first review of the Plan in January 2005 identified the importance of action in the field, when it was stated that national action plans for green public procurement should be set up.³⁸

5. A strong push for green procurement?

Given the political support for 'green procurement' at the EU level and the changes made by the Directives, will there be a major push in the Member States in the near future? The expectations of stakeholders from SMEs are for instance that green procurement will have a new momentum in the EU.³⁹ Also environmental NGOs have been rather satisfied with the new Directives, recognising that they have strengthened the scope for considering not only environmental, but also social and ethical considerations.⁴⁰ The situation as shown in this article is definitely much better than in the past. However, today it is vital that these achievements are fully embraced by implementing authorities in the Member States. In fact, it will be very important how the Member States use the political and legal support coming from Brussels for their national and regional policies. By 31 January 2006, the Member States have to transpose the

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two new Directives on public procurement into national legislation.⁴¹ The present situation offers a good opportunity to fully incorporate the options described by the European Commission into the newly adopted national legislation.⁴² This would also mean for instance that the objective of environmental policy integration was mentioned in national legal texts, making the link to the objectives of national sustainable development strategies or environmental plans. This must be at the political level supported by ambitious national objectives formulated in national action plans on green procurement. For all non-pioneer countries, the debate on the national transposition of the procurement rules could be used for national and regional campaigns to

spread the understanding of green procurement. The Green Procurement handbook of the Commission could be the stimulus for similar information tools in those Member States where these tools have not yet been developed. It has to be said, however, that in most of the Member States, due to economic and budgetary problems, environmental policy is not very high on the agenda. Nevertheless, procurement is an interesting test case of modern environmental policy: if we succeed in integrating the environmental dimension into purchasing decisions, we make a little move away from the 'end of the pipe' to the source of the environmental problems. ::

NOTES

- ¹ See press release Stichting Natuur en Milieu, 1.7. 2005: "Ministers lopen niet warm voor schone auto's".
- ² See European Commission (2004): "Buying Green". A handbook on environmental public procurement, p5.
- ³ This figure is mentioned by ICLEI, Local Governments for Sustainability, at <http://www.iclei.org>.
- ⁴ United Nations Conference on Environment and Development, Brazil, 3-14 June 1992: Agenda 21 (<http://www.un.org>).
- ⁵ See European Commission, Green Public Procurement. Background. Short summary at <http://europa.eu.int/comm/environment/gpp/background.htm>.
- ⁶ See European Commission: "Towards Sustainability", *OJ*, 17.5.1993, p 138.
- ⁷ Other related initiatives are the Thematic Strategies on Natural Resources, on the Prevention and Recycling of Waste, and the Environmental Technology Action Plan. See Green Public Procurement. Background. At <http://europa.eu.int/comm/environment/gpp/background.htm#6eap>.
- ⁸ See Barth, Regine and Almut Fischer, "The European Regime on Green Public Procurement", in: Christoph Erdmenger, *Buying into the Environment*, 2003, p. 51.
- ⁹ See Ochoa et al, "Green purchases in practice: experiences and new approaches from the Pioneer Countries", in: Christoph Erdmenger, *Buying into the Environment*, 2003, p. 20-29.
- ¹⁰ Ibid.
- ¹¹ See also Barth and Fischer, "The European Regime", p. 67.
- ¹² See European Parliament Database Oeil. Fiche de Procédure. Commission Proposal COM(2000)275. Summary of the Common Position of the Council. (<http://www.europarl.eu.int/oeil/FindByProcnum.do?lang=2&procnum=COD/2000/0115>).
- ¹³ Barth and Fischer. "The European Regime", p. 67.
- ¹⁴ Commission, DG Internal Market, Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement COM(2001)274.
- ¹⁵ In the Commission's initial proposal, COM(2001)275, environment characteristics are inter alia mentioned as award criteria in article 53.b but the meaning and value is not further clarified.
- ¹⁶ See European Parliament: "EP/Council: Conciliation committee, results", database Oeil. Fiche de procédure. Commission Proposal COM(2000)275.
- ¹⁷ Case C-513/99, ECJ 17 September 2002, *Concordia Bus Finland Oy Ab*. Under strict conditions the contracting authority is allowed to award a contract to the tenderer who submits the economically most advantageous tender taking into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses.
- ¹⁸ See European Parliament: "EP/Council: Conciliation committee, results", database Oeil. Fiche de procédure. Commission Proposal COM(2000)275.
- ¹⁹ Recitals refer to Article 6 ECT that stipulates the integration of environmental aspects into all policies.
- ²⁰ European Commission, "Buying Green", A handbook on environmental public procurement (2004).
- ²¹ See Rikke Traberg: Greener Public Procurement in Denmark, Presentation of the Danish Environmental Protection Agency, at <http://www.un.org/esa/sustdev/sdissues/consumption/denmark021127.pdf>.
- ²² See Green Public Procurement in the Netherlands. Presentation given by Christel Ankersmit, Dutch Ministry of the Environ-

- ment, June 2005, available at <http://www.un.org/esa/sustdev/sdissues/consumption/procurement/christell.pdf>. Some critics say that the objective is not ambitious and the government should aim at 100%, see news from October 2005 on DG Environment Eco-label page (http://europa.eu.int/comm/environment/ecolabel/news/index_en.htm).
- ²³ See "Green purchasing gaining ground", *EnviroReport*, No. 2 January 2000.
- ²⁴ According to its own presentation, www.iclei.org is an international association of local governments and national and regional local government organisations that have made a commitment to sustainable development. More than 475 cities, towns, counties, and their associations worldwide comprise ICLEI's growing membership. ICLEI works with these and hundreds of other local governments through international performance-based, results-oriented campaigns and programmes.
- ²⁵ The Procura+ campaign concentrates on electricity from renewable resources, energy-efficient computers and IT devices for offices, organic food for canteens, hospitals and catering, buildings meeting highest heating and cooling efficiency standards, health-oriented cleaning services, quality-oriented public transport services with low-emission buses. See www.iclei.org.
- ²⁶ Tenders Electronic Daily publishes all tenders above certain thresholds defined by EU public procurement rules.
- ²⁷ See also: European Commission: Buying green! New facts and figures on green public procurement in the EU. press communication 27 October 2005.
- ²⁸ Bouwer, *et al*, *Green Public Procurement in Europe. Status Overview*, Interim Report October 2005, p.7.
- ²⁹ *Ibid.* p. 8.
- ³⁰ *Ibid.* p. 9.
- ³¹ European Commission, "Buying Green", A handbook on environmental public procurement.
- ³² See "Helping Public Authorities provide environmental relief". Information about the RELIEF project given by DG Research at <http://europa.eu.int/comm/research/environment>.
- ³³ See European Commission, State Aid Action Plan. Consultation Document, July 2005, p 11. Available at http://europa.eu.int/comm/competition/state_aid/others/action_plan/saap_en.pdf.
- ³⁴ See Allison, Charles and Anthea Carter, Study on different types of Environmental Labelling (ISO Type II and III labels), Study prepared for DG Environment, 2000.
- ³⁵ See European Commission Communication: Integrated Product Policy Building on Environmental Life-Cycle Thinking, COM(2003)302.
- ³⁶ See European Council, Integrated Product Policy, Council Conclusions, 12 November 2003.
- ³⁷ See Catherine Day: "Buying Green: The Crucial role of Public Authorities", in: *Local Environment* Vol. 10, No. 2, pp. 201-209, April 2005, 208.
- ³⁸ The Action Plan was adopted in 2004. European Commission: Stimulation Technologies for Sustainable Development: An Environmental Action Plan for the European Union, COM(2004)38.
- ³⁹ See press release of DG Environment: "Environmental technologies: Reinforcing Action Plan to maximise contribution to Lisbon goals", 27 January 2005.
- ⁴⁰ See "Introduction to environmental requirements in public procurement." Fact Sheet on Green Public Procurement provided by the Euro Info Centre for SMEs in Ireland. Available at www.eic.ie.
- ⁴¹ See "Making the most of public money", published by a platform of environmental and social NGOs in Europe. Also available on www.eeb.org.
- ⁴² Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts, (OJ L 134, 30.4.2004) and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134 30.4.2004).

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