

# **Green Public Procurement- Opportunities and Challenges**

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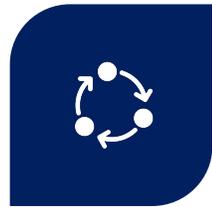
# What is GPP and why is it relevant?

- Green Public Procurement is a *“process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured.”*
- The economic importance of the public procurement market is significant: public authorities spend approximately 1.8 trillion euros annually (14% of the EU’s GDP).
- Public procurement regulation is a dynamic and flexible tool to achieve sustainability goals.
- GPP is a supply-side policy that aims to cultivate a market for sustainable products and services through government buying power.

# How can environmental criteria be applied in the current legal framework?



THE CURRENT LEGAL FRAMEWORK IS VERY VERSATILE IN TERMS OF POSSIBILITIES TO INCORPORATE GREEN CRITERIA.



OPTIONS TRANSCEND THE ENTIRE PROCUREMENT PROCEDURE.



DEFINITION OF THE SUBJECT MATTER, TECHNICAL SPECIFICATIONS AND AWARD CRITERIA ARE MOST RELEVANT.



THE COMMISSION'S GPP STRATEGY RELIES HEAVILY ON INSTRUMENTS SUCH AS LIFE-CYCLE COSTING, ENVIRONMENTAL FOOTPRINT CALCULATIONS, PRE-DRAFTED GPP CRITERIA, AND ENVIRONMENTAL LABELS.



COULD POTENTIALLY RECONCILE SOME OF THE MOST PRESSING ISSUES: COMPLEX REGULATION AND LACK OF PROCUREMENT KNOWLEDGE.



DESPITE THESE BENEFITS, WIDE USABILITY REQUIRES COVERAGE OF MORE PRODUCT GROUPS.

# What limitations does the link to the subject matter requirement pose on GPP?

- One of the most critical factors **limiting a contracting authority's discretion** is the requirement that the criteria in a procurement are linked to the subject matter of the contract (“LtSM requirement” or “LtSM test”).
- Applies to technical specifications, award criteria, and contract performance clauses, but is most often evaluated with respect to award criteria.
- Originates from the landmark *Concordia Bus Finland* (C-513-99) ruling , where the ECJ found that environmental considerations can be taken into account in so far as they relate to the subject matter of the contract.
- Seeks to exclude criteria and conditions relating to **general corporate policy**.
- Issues: what is the current interpretation and the optimal interpretation of the LtSM requirement?

# How should the link to the subject matter -requirement be interpreted?

- **A broad interpretation**
  - Counterintuitive, does not protect from arbitrary requirements, state aid, discrimination etc.
  - Makes verification difficult
  - + Serves the purpose of enabling and encouraging the use of green criteria
- **A narrow interpretation**
  - Hinders the use of green criteria
  - Restricts reference to general environmental policies
  - + Protects tenderers from arbitrary requirements, discrimination etc.
- ECJ and EU institutions endorse a loose interpretation.
- It is increasingly difficult to justify that broad requirements accepted in legal praxis do not constitute 'general corporate policies' that are explicitly excluded under the wording of the Directive.

# Can the use of environmental criteria amount to state aid?

- Under TFEU, any **aid that distorts or threatens to distort competition by favoring certain undertakings** that affects trade between Member States, is incompatible with the internal market.
- ECJ has confirmed **that state aid may arise from public procurement procedures.**
  - No material rules on the interface between procurement and state aid.
- State aid is present when terms of a contract **do not reflect regular market conditions.**
  - The presence of state aid is evaluated pursuant to the **market economy operator test**, under which it is generally assumed that private investors would not pursue horizontal policies.
  - Under this assumption, the award of a contract based on secondary considerations **does not reflect the actual market value of the object of the contract and thus can lead to state aid.**
- Horizontal considerations, such as **green criteria can be problematic in terms of state aid regulation.**

# Can the use of environmental criteria amount to state aid?

- The issue of horizontal criteria and state aid remains unresolved in legal literature and case law.
  - In case *BAI* (T-14/96) the CFI found that horizontal considerations do not impact evaluation of state aid. The deciding factor was whether the consideration paid **adequately reflects normal market conditions**.
  - Was interpreted amongst scholars to **effectively preclude the use of horizontal criteria in public procurement**.
- LtSM test is also relevant in this regard: **general requirements lead to *de facto* subsidies granted for adherence with vague policies?**
- Application of the (arguably outdated) market economy operator test leads to the conclusion that private investors would not pursue horizontal policies.
  - Consequently, the **use of environmental criteria may theoretically lead to the presence of state aid**.
  - In the absence of case law that would provide a definitive conclusion, there is little evidence to the contrary.

Can environmental criteria constitute discrimination with the effect of hindering trade as stipulated in TFEU and the Public Procurement Directives?

- Public procurement is **subject to primary EU law** (in particular the rules on free movement of goods, non-discrimination). Applies also in cases where EU-threshold is not exceeded.
  - The impact of public procurement measures on the internal market is formidable.
- Significant **tension between EU economic and environmental policies**.
- Emerging trends of local food sourcing, negative impacts of pollution from transport have been recognized.
- Environmental criteria are **more likely to be connected to local realities**, and as such, could constitute hindrances to trade and nationality-based discrimination.
  - A loose interpretation of the LtSM test could lead to the use of criteria that favor economic operators in certain locations.

Can environmental criteria constitute discrimination with the effect of hindering trade as stipulated in TFEU and the Public Procurement Directives?

- Defining the subject matter of a contract in environmentally friendly terms **establishes a market rather than restricts access to it.**
  - Does not hinder trade but can be discriminatory if there is discriminatory intent.
- Contracting authorities should especially refrain from setting criteria that **directly place tenderers in different Member States in unequal positions**, such as those related to delivery distances.
- Risks can be mitigated by carefully incorporating secondary considerations into the subject matter of the contract or relying on established models such as life-cycle costing or the PEF-method.

# Concluding remarks

- **Basic problem:** perceiving public procurement as a manifestation of internal market regulation inevitably degrades pursuits of sustainability into ‘secondary’ objectives that require justification.
- Contracting authorities are faced with the difficult choice of balancing often contradictory objectives (price vs. quality?).
  - Budgetary restraints after COVID-19.
- **Complexity and uncertainty of the legal framework.**
  - Abundance of soft-law instruments adds confusion.
  - Compliance and functional goals outweigh objectives such as sustainability.
  - Fear of legal challenge.
- Contracting authorities lack basic procurement knowledge.
- **Procurement legislation should be reshaped and revised to provide a simpler and more effective framework for GPP.**

# HILMI-HANKE:

## Suosituksset

kestävyyšnäkökohtien huomioon ottamisen edistämiseksi hankintalaissa

1. Velvoite huomioida ympäristö- ja sosiaaliset näkökohdat nostetaan nimenomaisesti hankintalain tavoitteisiin, 2 §:n 1 momenttiin, lain muiden tavoitteiden rinnalle (tehokkuus, syrjimättömyys ja avoin kilpailu).
2. Ympäristörikoksia koskeva harkinnanvarainen poissulkemisperuste pakolliseksi.
3. Hankintalakiin sisällytetään ”best efforts” -tyyppinen vaatimus käyttää elinkaarikustannuslaskentaa. Tämä vaatimus tulisi kohdistaa ympäristövaikutuksiltaan merkittävimpiin tuoteryhmiin.
4. Hankintalaissa asetetaan hankintayksiköille selvitysvelvollisuus hankintaan soveltuvista ympäristökriteereistä ympäristövaikutuksiltaan merkittävimpiin tuoteryhmiin kuuluvien hankintojen osalta, sekä 124 §:n mukainen raportointivaatimus mikäli niitä ei käytettäisi.

Kiitos!