

STUDY

Requested by the EMPL Committee



# The social impact of public procurement

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Can the EU do more?



Policy Department for Economic, Scientific and Quality of Life Policies  
Directorate-General for Internal Policies  
Authors: Valentina CAIMI, Silvia SANSONETTI  
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# The social impact of public procurement

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Can the EU do more?

## **Abstract**

The aim of this study is to present the possibilities offered by Directive 2014/24/EU on public procurement for the achievement of social goals and to analyse how these possibilities have been transposed into national law and implemented by contracting authorities across the EU. Another aim is to identify obstacles to the use of existing provisions and make recommendations with regards to possible future EU action.

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This document was requested by the European Parliament's Committee on Employment and Social affairs.

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## LIST OF ABBREVIATIONS

<b>ACCP</b>	(Spanish) Asamblea de Cooperación por la Paz (Assembly of Cooperation for Peace)
<b>AEIDL</b>	European Association For Innovation in Local Development
<b>BBWT</b>	Big Buyers Working Together
<b>BPQR</b>	Best Price-Quality Ratio
<b>BSI</b>	Buying for social impact
<b>CJEU</b>	Court of Justice of the European Union
<b>CoP</b>	Community of Practice
<b>CPAS</b>	(Belgium) Centre Public d'Action Sociale
<b>CPV</b>	Common procurement vocabulary
<b>CSO(s)</b>	Civil society organisation(s)
<b>DG EMPL</b>	Directorate-General for Employment, Social Affairs and Inclusion
<b>DG GROW</b>	Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs
<b>DG REGIO</b>	Directorate-General for Regional and Urban Policy
<b>EASME</b>	European Executive Agency for Small and Medium-sized Enterprises
<b>EC</b>	European Commission
<b>ECA</b>	European Court of Auditors
<b>EESC</b>	European Economic and Social Committee
<b>EFTA</b>	European Free Trade Agreement
<b>EIGE</b>	European Institute for Gender Equality
<b>EISMEA</b>	European Innovation Council and SMEs Executive Agency
<b>ENSIE</b>	European Network for Social Integration Enterprises
<b>EP</b>	European Parliament
<b>EPSR</b>	European Pillar of Social Rights

<b>EPSU</b>	European Federation of Public Service Unions
<b>ESF</b>	European Social Fund
<b>ETUC</b>	European Trade Union Confederation
<b>ETUI</b>	European Trade Union Institute
<b>EU</b>	European Union
<b>FGB</b>	Fondazione Giacomo Brodolini srl SB
<b>FGTB</b>	(Belgium) Fédération Générale du Travail de la Belgique
<b>GDP</b>	Gross Domestic Product
<b>GDPR</b>	General Data Protection Regulation
<b>GECES</b>	European Commission's Expert Group on Social Entrepreneurship
<b>GPP</b>	Green Public Procurement
<b>GRPP</b>	Gender-responsive public procurement
<b>Greens/EFA</b>	The Greens/European Free Alliance
<b>ICLEI</b>	Local Governments for Sustainability
<b>ICT</b>	Information and Communication Technology
<b>ILO</b>	International Labour Organisation
<b>IMCO</b>	European Parliament's Committee on Internal Market and Consumer Protection
<b>LCSP</b>	(Spanish) Law no. 9/2017, of 8 November, on Public Sector Contracts (Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público)
<b>MEAT</b>	Most economically advantageous tender
<b>NAPP</b>	(Swedish) National Agency for Public Procurement
<b>NGO(s)</b>	Non-governmental organisation(s)
<b>NRRP</b>	National Recovery and Resilience Plan
<b>OECD</b>	Organisation for Economic Co-operation and Development

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<b>PwD</b>	Persons with Disabilities
<b>REVES</b>	European Network of Cities and Regions for the Social Economy
<b>RRF</b>	Recovery and Resilience Facility
<b>SALAR</b>	Swedish Association of Local Authorities and Regions
<b>SAPIENS</b>	Sustainability and Procurement in International, European, and National Systems
<b>SAW-B</b>	Federation of social economy companies in Wallonia and the Brussels Region
<b>SBI</b>	Social Business Initiative
<b>SDG(s)</b>	Sustainable Development Goal(s)
<b>SEAP</b>	Social Economy Action Plan
<b>SEE(s)</b>	Social economy enterprise(s)
<b>SGEI</b>	Services of General Economic Interest
<b>SME(s)</b>	Small and medium-sized enterprise(s)
<b>SPP</b>	Sustainable public procurement
<b>SPW</b>	(Belgium) Service Public de Wallonie
<b>SRPP</b>	Socially responsible public procurement
<b>SSE</b>	Social Services Europe
<b>SWD</b>	Staff Working Document
<b>TCO</b>	(Swedish) Trade Union Confederation ( <i>Swedish</i> Confederation of Professional Employees)
<b>TED</b>	Tenders Electronic Daily
<b>UGT</b>	(Spanish) Unión General de Trabajadores, a national trade union
<b>UN</b>	United Nations
<b>UNI-Europa</b>	European Services Workers Union
<b>VDAB</b>	(Belgium) Flemish Employment and Vocational Training Service

## EXECUTIVE SUMMARY

### Background

Compared with the previous directive, Directive 2014/24/EU on public procurement (hereinafter, the Directive) strengthens the possibilities for using public procurement in a strategic way, meaning for the achievement of social, environmental and innovation goals, while purchasing goods, services and works in the European Union (EU). The Directive entered into force in April 2016. This study looks in particular at the social dimension of public procurement, called socially responsible public procurement (SRPP).

There are many possibilities offered by the Directive to implement SRPP. It is important to acknowledge that most of the provisions of the Directive that are relevant for SRPP are not mandatory. They were not mandatory for Member States during the transposition and, in accordance with the national transposition laws, in most cases are not mandatory for contracting authorities. Therefore, contracting authorities have wide discretion whether to use these provisions or not.

First of all, the Directive introduced the 'mandatory horizontal social clause', which is the only mandatory provision of a social nature included in it. This clause requires Member States to ensure compliance with applicable environmental, social and labour laws (obligations established by EU law, national law, collective agreements and the eight specified core ILO conventions) in the performance of public contracts. The Directive then provides for other instruments during the performance of public contracts, such as the possibility to award contracts by attributing some points to the fulfilment of social criteria; or to require bidders to commit to employ workers with disabilities or disadvantaged workers; or to promote social inclusion, non-discrimination and gender equality. Moreover, additional instruments are set out to facilitate the participation of small and medium-sized enterprises (SMEs) and social economy enterprises (SEEs) in public procurement.

Seven years after its entry into force, it is legitimate to wonder what kind of social impact this Directive might have produced and to what extent SRPP is used in the EU. Until now, there has been no evaluation of this Directive from the European Commission. This study attempts to fill this gap and provide some answers on the state of play of SRPP in the EU.

### Aim

The aim of this study is to present the possibilities offered by Directive 2014/24/EU on public procurement for the achievement of social and employment goals and to analyse how these possibilities have been transposed into national law and implemented by contracting authorities across the EU. Another aim is to detect obstacles to the use of existing provisions and make recommendations with regards to possible future EU action.

### Key findings

Data about the volume and value of socially responsible public procurement (SRPP) in the EU does not exist, not even about the economic sectors in which it is used. Only anecdotal evidence exists based on some studies that have collected good practices and the views expressed by practitioners and stakeholders involved in SRPP.

The lack of data is due to the fact that both at the EU and national level, systems to collect data on SRPP in a uniform and consistent way do not exist. Tenders Electronic Daily (TED), in which Member States are required to publish tender notices of procurement procedures above a certain value (the so-called EU thresholds), was not designed as a tool to track information on SRPP, nor on green and innovation procurement. While it is true that TED allows the identification of tenders (above the EU thresholds)

which used the most advantageous economically tender (MEAT), it is impossible from TED to determine if a tender includes social criteria without further specification about the criteria that have been used in a tender. The use of MEAT as the award criterion might only suggest a better probability that bidders respect mandatory legislation in the social, employment and environmental fields and that qualitative criteria are included in a tender, without indicating whether they are related to social, environmental and innovation aspects.

From the analysis of the Single Market Scoreboard, the data is not very encouraging. It emerges that the use of the lowest price or cost instead of MEAT is still commonly used to award contracts above the EU thresholds in the EU. In 2021, 10 Member States awarded between 82 % and 95 % of their above-EU- thresholds tenders solely on the basis of the lowest price or cost; 6 Member States awarded between 60 % and 80 % of such tenders on this basis; and the remaining 14 countries between 1 % and 56 %.

However, it seems that SRPP is slowly making progress, although clearly below its full potential. Across the EU, more and more contracting authorities are showing an interest in SRPP. However, there is great variation among Member States in the use of SRPP, even within the same country. It is not uncommon to find a few cases of contracting authorities in a country, usually in large cities, that are advanced or even very advanced in the use of SRPP and often in strategic procurement, while in the rest of the country, SRPP is almost non-existent.

The study analyses the transposition of the social provisions of the Directive in 17 Member States. With the exception of the horizontal social clause, none of the other social provisions were mandatory, meaning that Member States had a degree of flexibility in the transposition into national law. As a result, transposition was not homogeneous. Nonetheless, it can be acknowledged that, overall, the Directive has triggered change across the EU, although national public procurement traditions are still influential.

The Directive provides contracting authorities with many instruments that allow for social goals to be achieved through public procurement. According to the experts and stakeholders interviewed, the mandatory horizontal social clause is a very important instrument to ensure respect of applicable legislation in the social, labour and environmental domains. Trade unions, however, believe that this provision does not offer sufficient legal clarity when there is no applicable collective agreement but a contracting authority would like to require economic operators to engage in collective bargaining and to apply collectively bargained labour standards. Representatives of SME associations also report that most of the complaints they receive from companies are about the non-respect of the mandatory social clause by contracting authorities, which award contracts only on the basis of the cheapest offer, thus undermining fair competition with bidders that want to comply with social and labour law.

Instruments such as social and employment clauses, reservations and division into lots are very important, but their use varies greatly across countries. The impact of the specific rules set out by the Directive for the award of social services and other services to the person is not clear and there is no data about their use.

An important key finding is that the use and correct implementation of SRPP requires, first of all, the willingness from the contracting authorities to use SRPP and, second, enough human resources with the right skills and technical capacity to implement SRPP. Even the most favourable legal framework for SRPP would remain inapplicable without awareness-raising of the benefits of SRPP, and the provision of adequate training and capacity-building measures. This is where the European Commission is putting its efforts, through a series of projects aimed at developing a dialogue with procurers across the EU and reinforcing their professional capacity.

The experts and stakeholders consulted are divided about the need to reform the Directive, at least at the moment. As a result, this study presents recommendations on action that could be taken now to promote better uptake of SRPP, and significant issues for the EU legislator in view of a possible future revision of the Directive.

## Recommendations to EU institutions

### *Recommendations under the current legal framework*

- To remedy a situation in which socially responsible public procurement (SRPP) implemented by EU institutions is almost non-existent and to respect the commitments made in the Social Economy Action Plan, each EU institution should review its internal public procurement policies, by setting targets for the implementation of strategic procurement, including SRPP, on an annual basis, with appropriate reporting and collection of data. The European Commission should lead by example.
- The European Commission should issue guidance to EU institutions on strategic procurement, including on social, employment and gender equality aspects, coupled with examples of how and when social considerations can be taken into account during each stage of EU institutions' tendering procedures.
- Each EU institution should organise adequate training of staff involved in procurement procedures, to ensure full respect of procurement rules, and develop the capacity to implement strategic procurement in its own tendering procedures. SRPP also involves designing procurement procedures that facilitate the participation of SMEs and SEEs in EU tenders.
- Develop interdepartmental (between DG GROW, DG EMPL, DG Environment and all other DGs) and interinstitutional collaboration (between all EU institutions) to increase understanding and application of strategic procurement, including SRPP, in procurement by the EU institutions.
- The European Commission should launch an evaluation study to thoroughly assess the implementation of the social aspects of the Directive in all EU Member States, with particular focus on the horizontal social clause.
- The European Commission should develop an interpretative communication to clarify the legal doubts regarding what is possible under the horizontal social clause, namely with respect to the promotion of collective bargaining and collective agreements across the procurement cycle.
- The European Commission should publish guidance clarifying under what circumstances, when a public authority needs to procure social services; it can make use of grants or other forms of financing; and how this can be justified.
- The European Commission should better clarify the interplay between public procurement and state aid rules, and align legal recognition of the specific characteristics of the social economy and the not-for-profit sector with public procurement and state aid legislation.
- The European Commission should continue to facilitate exchange of experience and good practices and mutual learning among EU institutions and agencies, Member States and contracting authorities, on strategic procurement, including SRPP. This is very important in the areas of the Directive where there is still some legal uncertainty, for example with respect to social considerations and the link with the subject matter, and with respect to the horizontal social clause, in particular the obligations deriving from collective agreements.

- The European Commission should revise and transform Tenders Electronic Daily into a tool that can be used to monitor and report on strategic procurement, including SRPP, and work with Member States to develop monitoring and reporting systems on strategic procurement, including SRPP, with common indicators.

*Recommendations for future reform of the EU public procurement framework*

- Review the Financial Regulation governing procurement carried out by EU institutions to clearly identify social goals – the promotion of quality employment, equality, gender equality, and sustainable development – as essential aims of procurement, in line with Articles 8, 9, 10 and 11 TFEU.
- Align the provisions of the Financial Regulation governing procurement carried out by EU institutions with all the opportunities offered by the public procurement Directive in relation to SRPP, such as reserved contracts, selection criteria, award criteria, contract performance clauses and rules on abnormally low tenders. Include provisions in the Financial Regulation similar to those of the Remedies Directive.
- Strengthen the conditionalities in EU funding related to public procurement, including SRPP; set requirements for monitoring and reporting; and develop programmes to enhance the capacity of managing authorities to implement strategic procurement and to report on it.
- Revise and clarify the mandatory social clause, by explicitly stating that collective agreements can never be considered a discriminatory measure in public contracts. Expand the list of ILO Conventions in Annex X. Refer to gender equality as one of the matters which may be addressed in award criteria and contract performance clauses to ensure compliance with equal pay legislation.
- In the revision of the procurement Directive, limit the use of the lowest price or cost criterion as much as possible, and define the sectors in which the application of MEAT based on a BPQR (Best Price-Quality Ratio) assessment is mandatory, following the example of sectoral legislation on green procurement.
- Exempt collective agreements as a general rule from the link to the subject matter, and give Member States the possibility of justifying exceptions to the link to the subject-matter requirement where important social objectives cannot effectively be addressed through measures which are strictly limited to the goods, services or works being purchased.
- Lower the threshold for reserved contracts for the social and professional integration of persons with disabilities and disadvantaged workers and cancel or extend the maximum duration of three years for reservations of public contracts for social and other personal services.
- Consider developing specific Directives to regulate public procurement in specific sectors, such as in labour-intensive, low-skilled service sectors.



## INTRODUCTION

The study was commissioned by the European Parliament, Directorate-General for Internal Policies of the Union, Policy Department for Economic, Scientific and Quality of Life Policies (the EP) from Fondazione Giacomo Brodolini SRL SB (FGB).

The study comprises four chapters.

Chapter 1 sets the scene by giving an overview of the state of play of the development of socially responsible public procurement (SRPP) in the European Union (EU), based on desk research and the views of the stakeholders consulted at the EU and national level. Available data is provided about the volume and value of SRPP in the EU and the economic sectors in which it is used. However, existing data is limited and inconsistent. The chapter then highlights the main trends observed in the implementation of SRPP at the national level, and presents the views of significant stakeholders at the EU and national level about the main opportunities offered by SRPP to contracting authorities and the main challenges in the promotion and implementation of SRPP. The chapter concludes with an overview of the non-legislative measures that complement the legal framework and are important for the promotion and implementation of SRPP.

Chapter 2 provides an analysis of the entry points for SRPP across the public procurement cycle – pre-procurement, procurement and post-procurement stages – as laid down by the current legal framework, as well as other relevant EU policies that support SRPP. In relation to the pre-tender stage, the chapter illustrates the following steps and instruments: pre-market consultations, defining the subject matter, choosing the procedure, the light regime, choice of reservations, and choice about dividing the contract into lots. The possibilities for SRPP at the procurement stage include the use of exclusion grounds, selection criteria, technical specifications, award criteria, contract performance conditions, and the use of labels/certifications. At the post-procurement stage, the possibilities include, again, contract performance conditions plus subcontracting, monitoring and reporting, and enforcement. Finally, the analysis of the legal framework is complemented with a summary of the most relevant and recent EU policies that support SRPP.

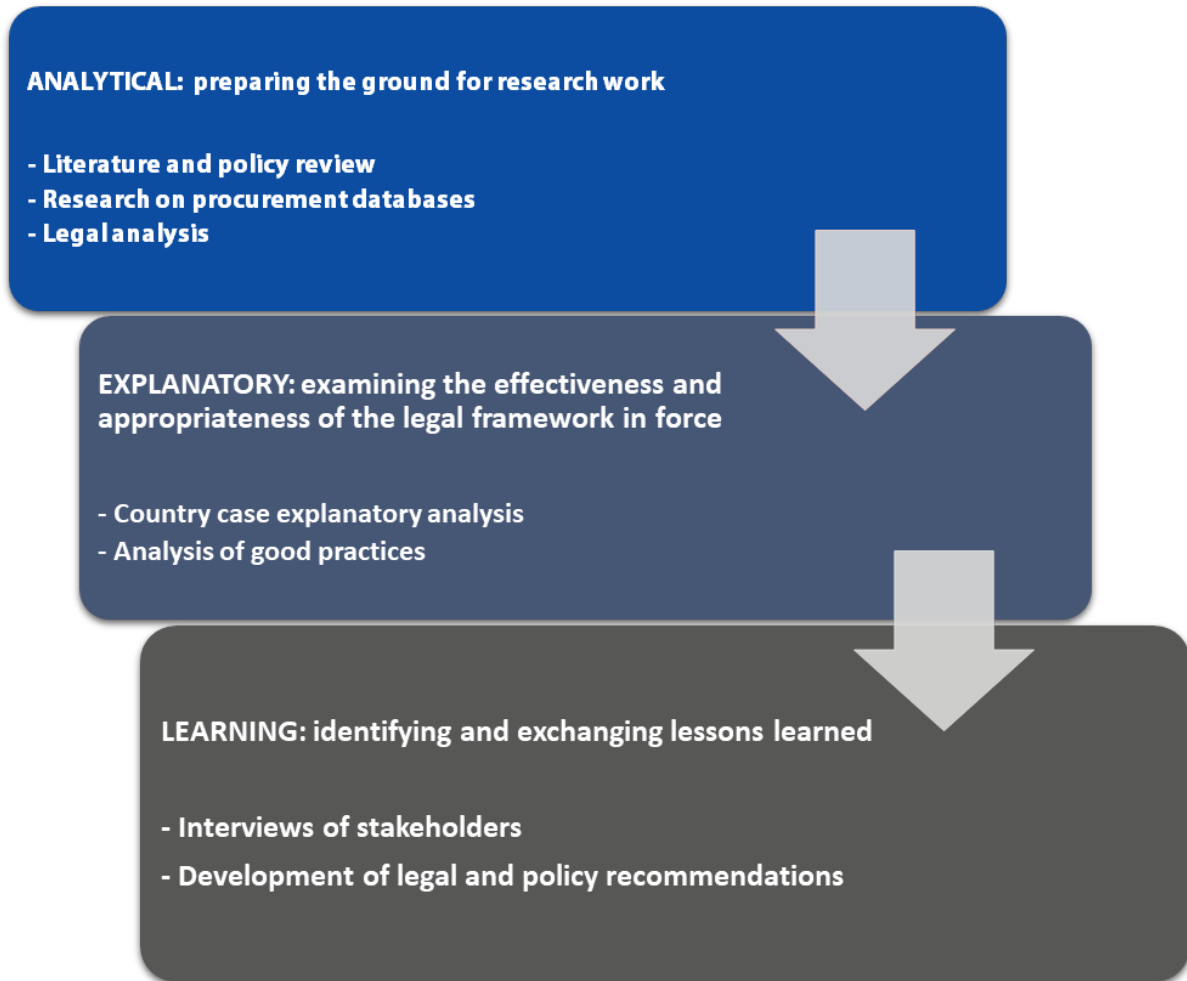
Chapter 3 summarises in general terms how Member States have transposed the social provisions of Directive 2014/24/EU on public procurement (hereinafter, the Directive), highlighting the common trends and where deviations can be observed. This summary is supplemented by an in-depth analysis of SRPP in five Member States (Belgium, Czech Republic, Italy, Spain and Sweden), including successful transposition and the advantages and the weaknesses of the national models. Some good practices of public procurement procedures and policies encouraging SRPP are also presented. Some examples also cover collective bargaining and collective agreements.

Finally, Chapter 4 provides the main key findings from the research, along with recommendations to the EU institutions, Member States, contracting authorities and other stakeholders. The recommendations first suggest what could be done now for better uptake of SRPP under the Directive in force, and secondly, provide indications in view of a future revision of the Directive.

## METHODOLOGY

The overall methodological approach to the study is shaped around the following three **complementary elements**: analytical, explanatory and learning (Figure 1).

Figure 1: Overall methodological approach



Source: Authors' own elaboration.

The study has been based on the use of triangulation to allow for the synthesis of different types of evidence and from different information sources, and the adoption of a **multi-method approach involving qualitative analysis** (e.g. literature review, research on administrative data and on existing assessment reports, interviews at the EU and national level, in-depth analysis of the EU public procurement legal and policy frameworks, and scoping of five Member States) **and quantitative analysis** (with a descriptive analysis of available statistics and data sets at the EU and national level).

A **combination of different research methods and tools, combining qualitative and quantitative methodologies**, has been used: **legal and policy analysis conducted** at the EU level provides a coherent assessment of the data and information available and data gaps at the EU level; **desk research at the national level** provides qualitative evidence on the implementation of SRPP at the national level, highlighting the opportunities and challenges of the national frameworks; **a significant number of interviews of relevant EU and national stakeholders** adds qualitative inputs regarding the interviewees' perceptions of the implementation of SRPP in Member States, as well as recurring challenges, and suggestions for improvements of SRPP.

# 1. STATE OF PLAY OF SOCIALLY RESPONSIBLE PUBLIC PROCUREMENT ACROSS THE EU

## KEY FINDINGS

- Data about the volume and value of socially responsible public procurement (SRPP) in the EU does not exist, not even about the economic sectors in which it is used. Only anecdotal evidence exists.
- The Single Market Scoreboard shows that in 2021 the use of the lowest price or cost instead of the most economically advantageous tender (MEAT), in public procurement procedures equal to or above the EU thresholds, was still widespread in the EU. This implies that the use of quality criteria, including social, environmental and innovation considerations alongside price or cost as award criteria is still very limited in the EU.
- The use of MEAT as an award criterion could suggest a better probability that bidders respect the mandatory legislation in the social, employment and environmental fields. Nevertheless, it is not possible to determine any direct correlation between the use of MEAT and compliance with social and employment legislation, nor between MEAT and the presence of social aspects in a tender.
- This study confirms findings from previous research. Tenders Electronic Daily (TED) was not designed as a strategic procurement policy tracking tool. Moreover, TED, as well as national and regional public procurement databases, are not suitable tools to identify SRPP tendering procedures, neither quantitatively nor qualitatively. At present, in the EU there is no system in place to collect data in a uniform and consistent way about SRPP, nor about green and innovation procurement. The European Commission is working on this, to partly remedy this situation.
- The stakeholders and experts consulted, overall, believe that the instruments available in Directive 2014/24/EU on public procurement may be sufficient to achieve social impact, and that the focus should be on how rules are applied and implemented, how they are used and why they are not used. While the 2014 Directive created more opportunities to procure more sustainably, it is still not used to its full potential. Its social impact partly depends on the level of voluntary versus mandatory application of social considerations.
- An important exception is represented by the mandatory horizontal social clause [Article 18(2) of Directive 2014/24/EU], which requires Member States to ensure compliance with applicable environmental, social and labour laws (obligations established by EU law, national law, collective agreements and eight specified core ILO conventions) in the performance of public contracts. This provision does not offer sufficient legal clarity when there is no applicable collective agreement but a contracting authority would like to require economic operators to engage in collective bargaining and to apply collectively bargained labour standards.

### Background

The legal framework put in place by Directive 2014/24/EU on public procurement<sup>1</sup> (hereinafter, 'the Directive') enables governments to use the 'power of the purse' to advance social, environmental and innovation goals while purchasing goods, services and works.

According to the European Commission's definition in the 'Buying Social' guide, socially responsible public procurement (SRPP) aims to address the impact on society of purchases by the public sector.

<sup>1</sup> Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

This guidance acknowledges that SRPP 'helps public authorities deliver quality services and products to their communities, to achieve additional social and ethical benefits even when budgets are limited and can, therefore, contribute to countering the negative impact of the COVID-19 crisis' (European Commission, 2021d, p. 4).

The European Commission had already stated in 2017 in its Communication '*Making Public Procurement work in and for Europe*' that strategic procurement possibilities, those that allow achieving social, environmental and innovation goals by the means of public procurement, are insufficiently used. A total of 55 % of procurement procedures still use the lowest price as the only award criterion. The public procurement directives allow public buyers to opt for purchases based on cost-effectiveness, quality-based criteria. Yet, most do not use approaches that include social, environmental, innovative, accessibility or other qualitative criteria (European Commission, 2017b).

As it will be illustrated in Section 2.5, since then, the European Commission has implemented several capacity-building initiatives to raise awareness and increase the professional skills of public buyers on strategic procurement, including SRPP. Despite these efforts, implementation of public procurement at the Member State level indicates suboptimal use of the potential for SRPP contained in the Directive.

While a comprehensive mapping of the uptake of SRPP has not yet been carried out at the EU level, evidence collected at the EU and national levels suggests that many public bodies are exploiting the opportunities under the Directive. This uptake is uneven across the different countries of the EU, and often with significant regional disparities in the same country. The particular objectives targeted by SRPP also vary widely – from tackling unemployment to promoting social inclusion for persons with disabilities (PwD), and from fair trade, human and labour rights to working in partnership with social enterprises. One area which appears to be the most underdeveloped is the use of public procurement to address gender inequalities and promote gender mainstreaming. As will be highlighted in Sections 2.2 and 2.4, another area in which contracting authorities fail to comply is the application of mandatory applicable environmental, social and labour laws in the performance of public contracts (the so-called 'horizontal social clause').

This chapter presents the main trends observed in the implementation of SRPP at the national level, including available data on the volume and value of SRPP and the economic sectors in which it is used (Section 1.1). Then, it illustrates stakeholder and expert views on the main opportunities offered by the Directive to achieve social policy goals (Section 1.2) and the challenges encountered in its implementation (Section 1.3). Finally, it gives an overview of the non-legislative measures that are essential to effectively support the implementation of SRPP, beyond the legal framework (Section 1.4).

#### *Methodological approach*

The methodology used in this chapter was developed on the basis of the four main available sources of information on strategic procurement in the EU: (a) desk research, including the monitoring reports submitted by Member States to the European Commission, pursuant to Article 83 of the Directive, and relevant national and European comparative studies and reports and position papers or contributions from stakeholders; (b) analysis of Tenders Electronic Daily (TED); (c) analysis of the Single Market Scoreboard; and (d) semi-structured interviews or consultations in writing of key informants at the EU level and in five Member States, chosen from public procurement officers of contracting authorities, legal experts specialised in public procurement, representatives of local and regional governments, social partners, social economy enterprises and civil society organisations engaged in public procurement.

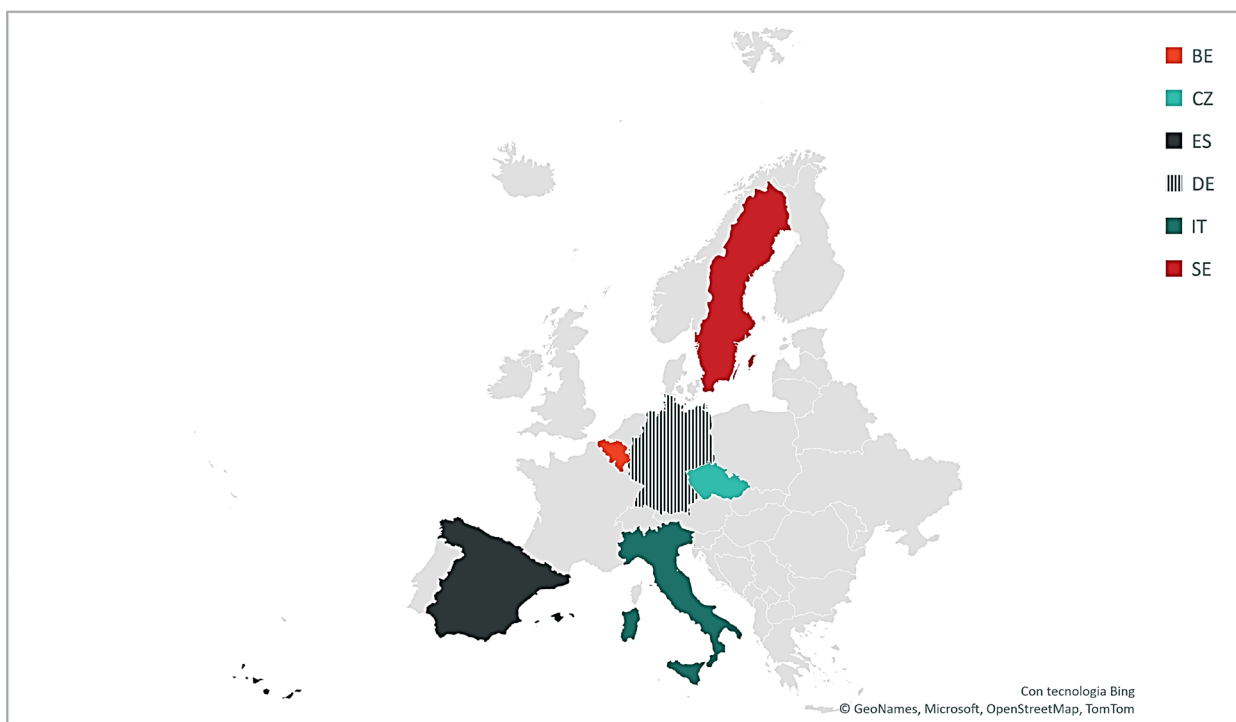
From a methodological point of view, it is important to highlight that the analysis and the findings presented in this chapter are solely based on the sources mentioned above, and above all on the views of stakeholders interviewed or consulted at the EU and national level. Legal analysis of the opportunities provided by the Directive to achieve social goals and the identification of legal challenges in the interpretation and concrete application of the rules will be presented in Chapter 2.

The findings of this chapter are based on 11 interviews carried out at the EU level and 24 interviews conducted at national level in Belgium, Czech Republic, Italy, Spain and Sweden. At the EU level, the interviews were carried out with two representatives from the European Trade Union Confederation (ETUC) and the European social partner representing the voice of businesses (BusinessEurope), one representative each from UNI-Europa, the European Federation of Public Service Unions (EPSU), Social Services Europe (SSE), SMEUnited, Local Governments for Sustainability (ICLEI), the European Commission (DG GROW), and a legal expert specialised in strategic procurement. Furthermore, written input was received from the European Commission, DG Employment. At national level, procurement experts from contracting authorities at different levels, trade unions and social economy organisations were interviewed. The list of the organisations that were interviewed is included in Annex I.

### *Geographical scope*

As highlighted in the introduction, the geographical scope of this study covers the whole of the EU, with a specific focus on Belgium, Czech Republic, Italy, Spain and Sweden. In addition, one good practice on the promotion of collective bargaining and collective agreements by means of public procurement refers to Germany.

Figure 2: Geographical scope



Source: Authors' own elaboration.

The reasons for the geographical scope were to ensure geographical balance and because, based on the authors' previous work on SRPP, it is known that these are some of the Member States in which SRPP is used, although with different degrees of maturity. In fact, in these countries a generally good transposition of the social provisions of the Directive into national law (with some exceptions for the

Czech Republic) is coupled with the existence of other laws or strategies promoting SRPP as a tool to promote other policy objectives, such as the development of the social economy or the promotion of gender equality or the circular economy (e.g. in Spain, Belgium and Italy), the existence of support structures (such as the network of facilitators of social clauses in Belgium) and/or the existence of initiatives launched by the central administration to promote SRPP or more strategic procurement in general. As an example of the last initiative, in Sweden the Procurement Agency developed a national procurement strategy whose Objective 7 focuses on social criteria. In 2020, the Swedish Association of Local Authorities and Regions (SALAR) and the National Agency for Public Procurement agreed to develop a common toolkit and new guidelines for gender-responsive public procurement. In eastern European countries, SRPP is almost non-existent. In the Czech Republic, SRPP is used more than in the other eastern European countries. In the Czech Republic, an important role was played by the Ministry for Employment and Social Affairs, which carried out education, training and competence building in SRPP in the framework of the project 'Promoting the Implementation and Development of Socially Responsible Public Procurement'. In the countries covered by this study, it is also possible to find a significant or higher number of tendering procedures relevant for SRPP compared to other EU Member States.

## **1.1. Main trends observed in the national implementation of socially responsible public procurement**

This section presents the main trends that can be observed in the implementation of socially responsible public procurement in EU Member States, as well as the very scarce data available on the volume and value of SRPP, and on the economic sectors in which it is used. Sources of information used are the analysis of the Single Market Scoreboard and Tenders Electronic Daily (TED), as well as desk research. Desk research has been complemented by semi-structured interviews of key informants.

It is important to highlight that the European Commission itself does not have a precise overview of the extent to which SRPP is spread, but the impression is that there is very little. Moreover, data on the volume and value of SRPP do not exist (interview with DG GROW). This will be elaborated further in the following sections.

### **1.1.1. Findings from the Single Market Scoreboard**

The Single Market Scoreboard<sup>2</sup> is a tool that monitors the performance of EU countries in implementing the four freedoms. It provides a detailed overview of how EU Single Market rules were applied in the European Economic Area (EEA) in a given year, and evaluates how Member States have performed as regards implementation and enforcement of EU law, integration and market openness, governance tools as well as specific policy areas. One of the policy areas analysed to measure business framework conditions is access to public procurement. Access to public procurement is measured through 12 indicators, out of which 4 might be partially relevant for SRPP.

As a caveat and introductory remark, it is important to consider what was reported by the European Commission official interviewed: 'The data included in the Single Market Scoreboard concerning procurement, which are based on information that can be retrieved from TED, have nothing to do with SRPP' (interview with DG GROW). This statement will be further elaborated below.

The most important indicator for our analysis is indicator 5 on award criteria, which measures the proportion of tenders awarded solely on the basis of cheapest price or cost. It is worth outlining that

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<sup>2</sup> The Single Market Scoreboard, Available at: <https://single-market-scoreboard.ec.europa.eu>.



procurement procedures based on the most economically advantageous tender (MEAT)<sup>3</sup> rather than the lowest price or cost do not necessarily produce a social value. Tenders based on MEAT can include quality criteria, social, environmental and innovation considerations, in addition to economic considerations. Thus, MEAT tenders are relevant for SRPP only when they include social considerations (see Section 2.2).

It is also important to keep in mind that contracting authorities can also include quality criteria in the technical specifications and award contracts on the basis of the lowest price or cost. This practice is less common. It should now be clear that MEAT alone, without additional information about the use (or not) of social considerations, does not give a definite indication that a tender is relevant for SRPP. Nonetheless, it is likely that economic operators that comply with the mandatory horizontal social clause, namely with social and labour law legislation, submit tenders that are more expensive. For this reason, the use of MEAT as award criterion could suggest a better probability that bidders respect the mandatory legislation in the social, employment and environmental fields. Nevertheless, it is not possible to determine any direct correlation between the use of MEAT and compliance with social and employment legislation, nor between MEAT and the presence of social aspects in a tender.

It is interesting to note that the European Commission set 80 % in the Scoreboard as the acceptable proportion of EU procurement procedures based only on price or cost. Some EU-level interviewees argued that this percentage is too high.

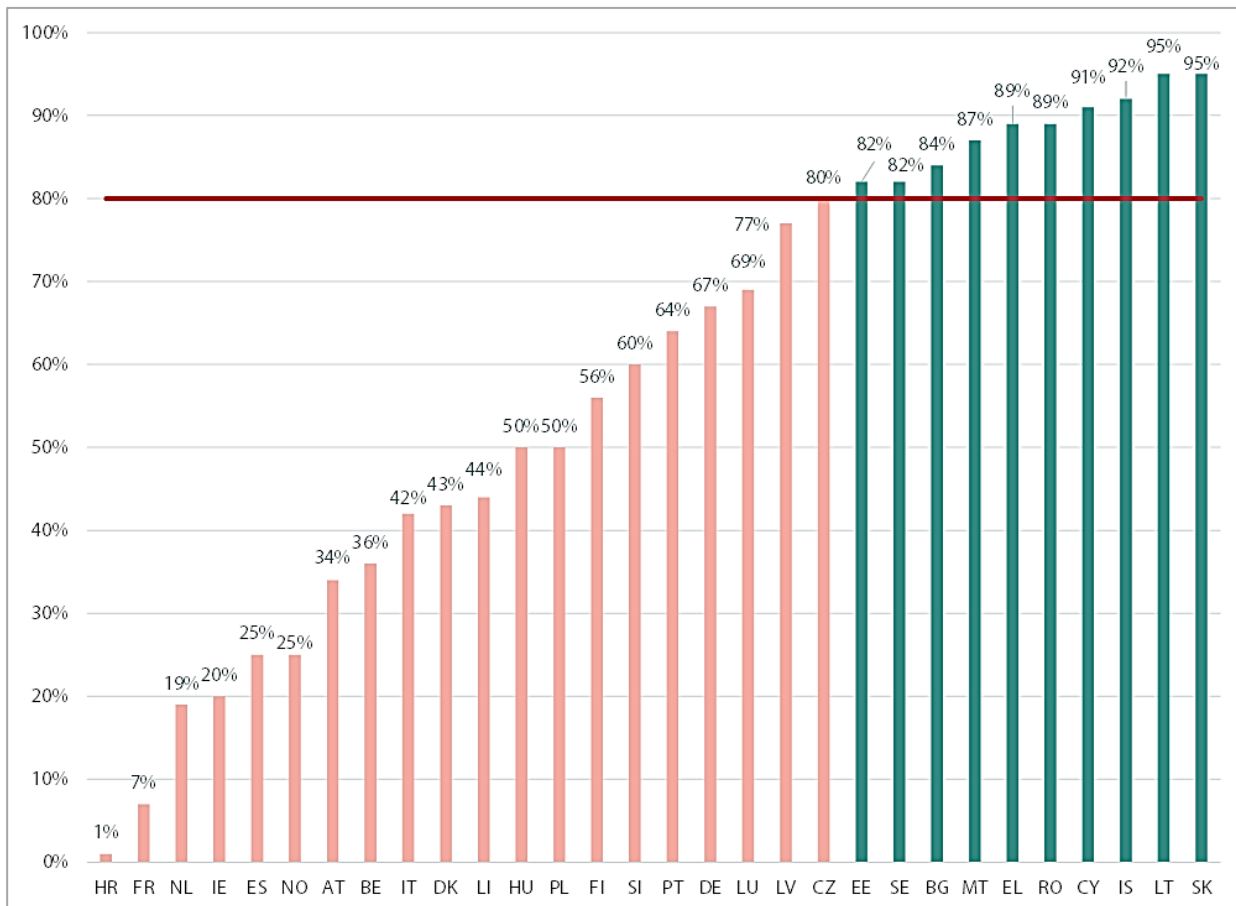
As shown in Figure 3, the data that emerges in relation to year 2021 (reporting period) is that 17 Member States award from 1 % to 80 % of their tenders (above the EU thresholds) solely on the basis of price or cost, and that 9 Member States are above the accepted threshold of 80 %.

Among the Member States that are included in the first group, there are great variations. Croatia, France, the Netherlands and Ireland are the best performing (ranging from 1 % in Croatia to 20 % in Ireland of tenders awarded only on price or cost). Spain, Austria, Belgium, Italy, Denmark, Hungary and Poland award from 25 % to 50 % of their procedures only the basis of on price or cost. Finally, Finland, Slovenia, Portugal, Germany, Luxembourg, Latvia, and Czech Republic award from 56 % to 80 % of their procedures on the basis of price or cost. The countries that are above the 'acceptable' EU threshold of 80 % are Estonia, Sweden, Bulgaria, Malta, Greece, Romania, Cyprus, Lithuania and Slovakia.

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<sup>3</sup> The 'Most Economically Advantageous Tender (MEAT)' criterion aims to ensure the best value for money (rather than the lowest price), i.e. it takes into account the quality of the works, goods or services in question, as well as the price and life cycle costs. This criterion places greater emphasis on quality, the environment and social considerations, as well as innovation.

Figure 3: Share of procedures awarded solely on the basis of price or cost in the EU in 2021

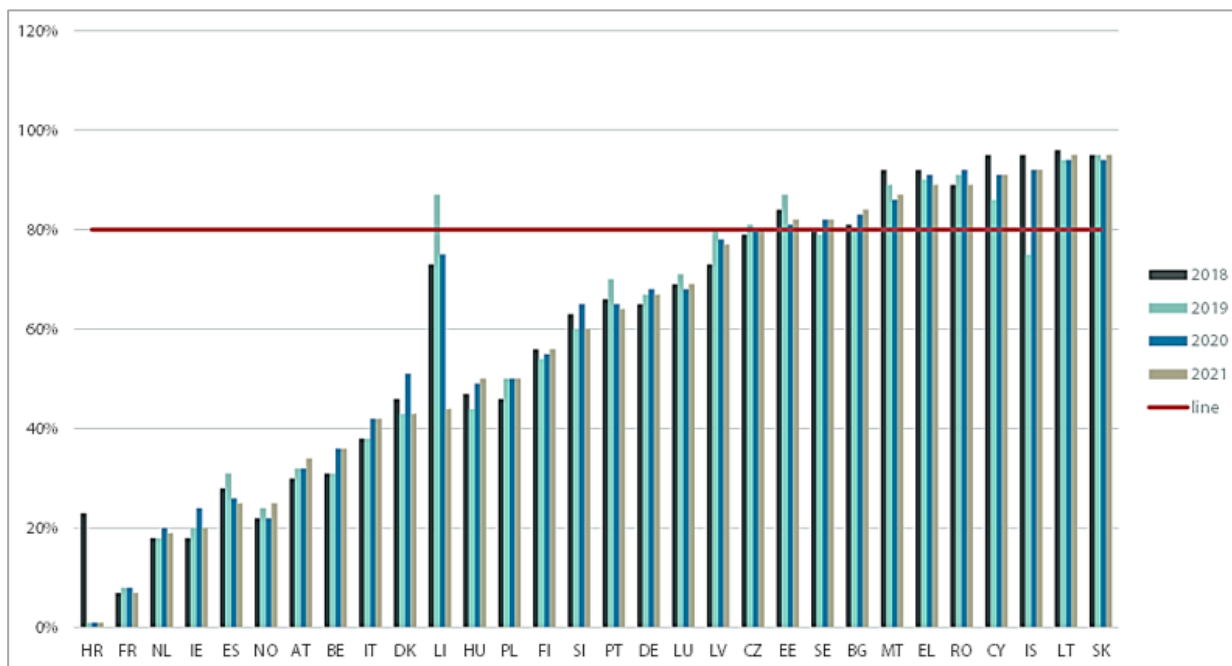


Source: [https://single-market-scoreboard.ec.europa.eu/business-framework-conditions/public-procurement\\_en](https://single-market-scoreboard.ec.europa.eu/business-framework-conditions/public-procurement_en).

Figure 4 shows the variations of procedures awarded only on the basis of price or cost in the EU in the period 2018–2021. In many countries, an increase of this share can be observed in 2020 and 2021, which is likely due to the Covid-19 pandemic.



Figure 4: Variations in the proportion of procedures awarded only on the basis of price or cost in the EU in the period 2018–2021



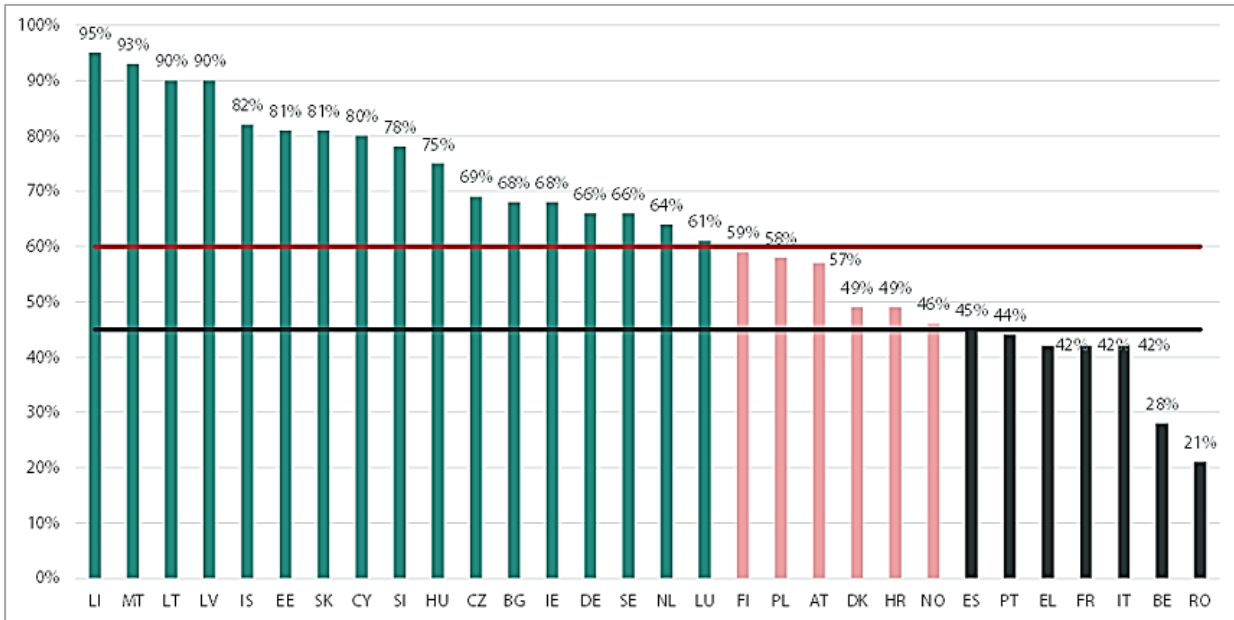
Source: [https://single-market-scoreboard.ec.europa.eu/business-framework-conditions/public-procurement\\_en](https://single-market-scoreboard.ec.europa.eu/business-framework-conditions/public-procurement_en).

Another indicator that could be relevant for SRPP is Indicator 7, which relates to the percentage of contracts awarded that have small and medium-sized enterprises (SMEs) as contractors. This indicator might be relevant, because most social economy enterprises and civil society organisations fall into the definition of an SME. As highlighted by the European Commission, high percentages are desirable, as most companies in the EU are SMEs. By contrast, low percentages could indicate barriers preventing smaller firms from accessing procurement markets, for instance due to bureaucracy, calls for tenders biased against smaller firms or the low capacity of SMEs to compete.

As shown in Figure 5, Portugal, Greece, France, Italy, Belgium and Romania are the Member States with the lowest percentages of bids that are awarded to SMEs (from 44 % in Portugal to 21 % in Romania). The European Commission has set a benchmark from 45 % to 60 %. The best-performing countries are Malta, Lithuania, Latvia, Estonia, Slovakia, Cyprus, Slovenia, Hungary, Czech Republic, Bulgaria, Ireland, Germany, Sweden, the Netherlands and Luxembourg, ranging from 93 % in Malta to 61 % in Luxembourg. Finland, Poland, Austria, Denmark, Croatia and Spain are in the middle category, ranging from 59 % in Finland to 45 % in Spain.

An interesting remark was made by an interviewee who stated that SMEs provide 60 % of added value to the EU GDP, but, according to TED, in public procurement they represent only 40 % of contractors. As known, TED contains tenders above the thresholds. So it is important to be cautious about this data, as 93 % of micro enterprises have access to public procurement below the EU thresholds (interview with SMEUnited).

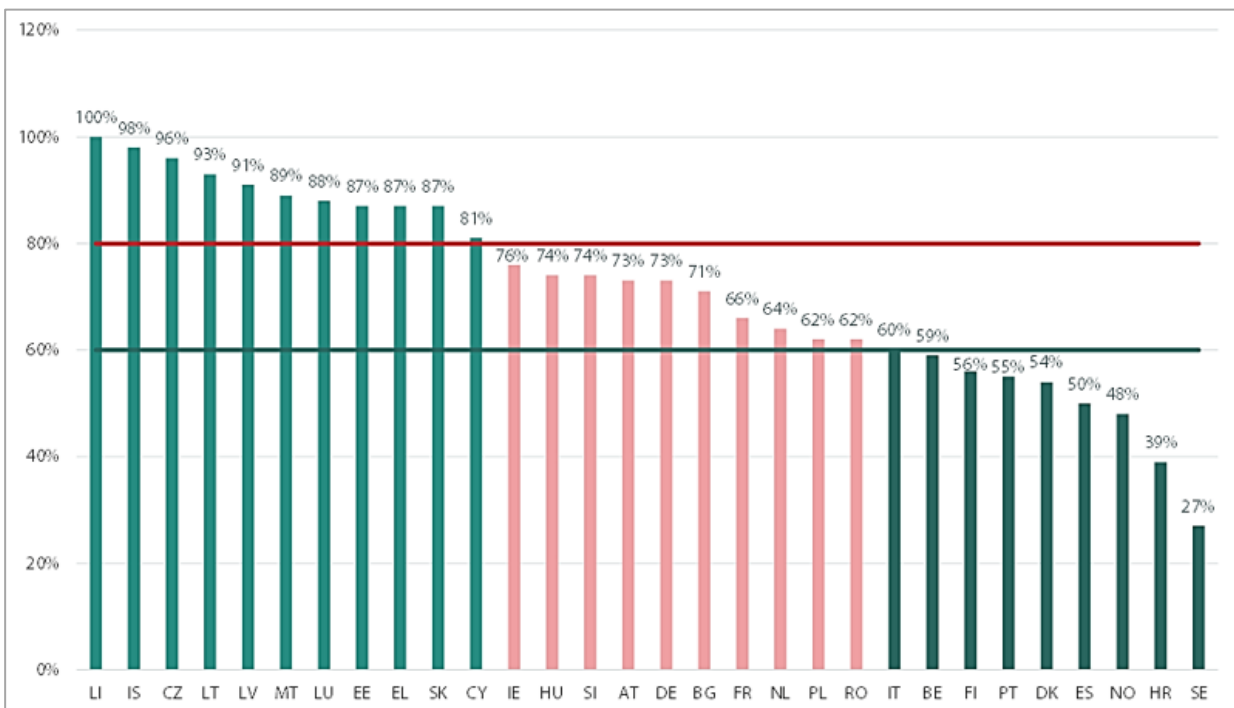
Figure 5: Percentage of contracts awarded that have an SME as a contractor in the EU in 2021



Source: [https://single-market-scoreboard.ec.europa.eu/business-framework-conditions/public-procurement\\_en](https://single-market-scoreboard.ec.europa.eu/business-framework-conditions/public-procurement_en).

Indicator 8 relates to the percentage of tenders in which SMEs have participated. It can be relevant for SRPP, for the same reasons as explained concerning indicator 7 (see figure 6).

Figure 6: Proportion of bids in which SMEs participated in the EU in 2021

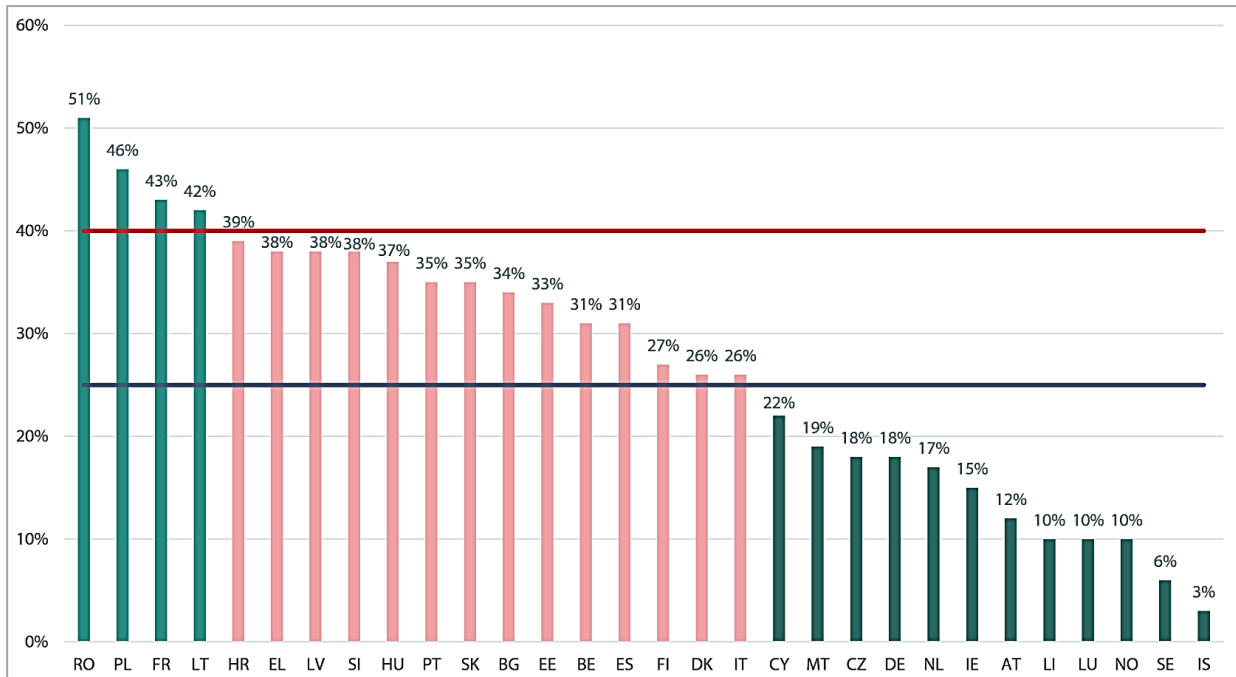


Source: [https://single-market-scoreboard.ec.europa.eu/business-framework-conditions/public-procurement\\_en](https://single-market-scoreboard.ec.europa.eu/business-framework-conditions/public-procurement_en).

Another indicator that is relevant for SRPP is indicator 9 that measures the proportion of procedures divided into lots. As will be explained in Section 2.1, dividing large contracts into smaller lots can be effective in increasing the participation of SMEs, social economy enterprises and civil society organisations in public procurement.

As seen in Figure 7, the European Commission set the ideal threshold of procedures divided into lots in a range from 25 % to 40 %. The countries that are above 40 % are Romania, Poland, France and Lithuania, and those that are below 25 % are Cyprus, Malta, Czech Republic, Germany, the Netherlands, Ireland, Austria, Luxembourg and Sweden.

Figure 7: Share of tenders divided into lots in the EU in 2021



Source: [https://single-market-scoreboard.ec.europa.eu/business-framework-conditions/public-procurement\\_en](https://single-market-scoreboard.ec.europa.eu/business-framework-conditions/public-procurement_en).

In conclusion, it can be argued that in the EU, most tenders are still awarded solely on the basis of the lowest price or cost and that in most Member States procurement is not SME-friendly, indicating that public buyers are missing the opportunities that smaller economic players, including social economy enterprises and civil society organisations, can offer.

### 1.1.2. Findings from Tenders Electronic Daily data analysis

Tenders Electronic Daily (TED)<sup>4</sup> is commonly used as a source for procurement information, because its EU-wide coverage and uniform template allow researchers to track information across the EU. For this study, the authors preferred to use TED over national public procurement databases, which are not based on commonly accepted definitions and estimation standards for green public procurement, SRPP and procurement for innovation (so-called 'strategic procurement'). Moreover, 'there are many differences in the ways in which public procurement is conducted across Member States. Sometimes it is highly centralised and in other cases is very much decentralised. This explains why, in certain countries, some contracting authorities at the regional or local level have systems in place to monitor contracts and collect statistics that are relevant for SRPP and GRPP, but also why these systems are not available or harmonised at the national level' (European Institute for Gender Equality, EIGE, 2022, p. 30). In summary, the information that can be found in national and regional public procurement databases is partial and uneven for the different contracting authorities<sup>5</sup>.

<sup>4</sup> Tenders Electronic Daily (TED) is available at: <https://ted.europa.eu>.

<sup>5</sup> This was also one of the key findings of the research conducted in the context of the service contract on gender-responsive public procurement on behalf of the European Institute for Gender Equality (EIGE).

Although TED is considered a more reliable source of information than national databases from a comparative perspective for EU-wide research, it is important to keep in mind that TED has some significant limitations and cannot provide a full and reliable picture of SRPP implementation:

- First, publishing information on TED is mandatory for procedures that exceed EU thresholds in value<sup>6</sup>. It is voluntary below them.
- Second, contract notices and contract award notices are not systematically published on TED, and the proportion of notices published thus varies among Member States. It is also to be noted that tender documents for restricted procedures cannot be found in TED.
- Third, keyword searches on TED only identify where these terms are included in the contract notice, not the tender documents. Moreover, the fact that a keyword is included in a contract notice does not necessarily mean that the tender considered is relevant for SRPP.

A 2016 study from the European Court of Auditors outlined that notices in TED can be sorted and searched by country, business sector, place of delivery and a number of other criteria. The TED search function allows different criteria to be combined to search for potentially interesting contract notices. Through testing, several issues concerning search options were identified, leading to unsatisfactory results (ECA, 2016, p. 37).

For this study, the desk research carried out in the TED system was done for the years 2020 to 2022 for the Czech Republic, Italy, and Sweden<sup>7</sup>. The intention was, despite the limitations highlighted above, to get more quantitative evidence for the actual weight of SRPP and to better understand which terms are used in the public tenders. The following search terms were used:<sup>8</sup>

- social;
- employment;
- working conditions;
- fair (as in 'fair trade' or 'fair wages');
- labour law standards;
- collective agreements and collective bargaining;
- social dialogue;
- social enterprise/social economy enterprise;
- reserved contract/reservation;
- social service(s);

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<sup>6</sup> Directive 2014/24/EU applies to the procurement of works, services and goods of a value equal or above the EU thresholds. The current thresholds – as of 1 September 2023 – are: EUR 5,382,000 for works contracts; EUR 750,000 for social services and other services specified in Annex XIV; EUR 140,000 for all other service contracts and design contests; and EUR 140,000 for supply contracts. For tenders of lower value, national rules apply, which nevertheless have to respect general principles of EU law, e.g. transparency, non-discrimination and proportionality. View DG GROW website, Available at: [https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/thresholds\\_en#:~:text=Works%20contracts%3A%20%E2%82%AC5%2C382%2C000%20All%20services%20concerning%20social%20and,all%20design%20contests%2C%20all%20supplies%20contracts%3A%20%E2%82%AC431%20000.](https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/thresholds_en#:~:text=Works%20contracts%3A%20%E2%82%AC5%2C382%2C000%20All%20services%20concerning%20social%20and,all%20design%20contests%2C%20all%20supplies%20contracts%3A%20%E2%82%AC431%20000.)

<sup>7</sup> Search on TED was carried out by Adam Gromnica for the Czech Republic, Stefano Rossi for Italy and Mathias Maucher for Sweden. Author of Section 1.1.2 is Mathias Maucher, with contributions by Valentina Caimi and Stefano Rossi.

<sup>8</sup> Keyword searches on TED only identify where these terms are included in the contract notice, not the tender documents. The results thus cannot provide a full picture of SRPP implementation. Moreover, the fact that a keyword is included in a contract notice does not necessarily mean that the tender considered is relevant for SRPP.

- social inclusion;
- persons with disabilities;
- women;
- gender equality/equal rights/opportunities; and
- discrimination.

The research results show differences in the frequency with which the three Member States analysed – the Czech Republic, Italy, and Sweden – make use of the above-mentioned terms in tender documents. The number of hits indicate correspondence with the key term in the text of the tender notices as searches cannot be restricted to the field 'title' only. Across the board, the term appearing most widely in the tenders is 'social', the second most frequent is 'social services' (which is not too surprising, as public authorities use procurement to purchase social services from private not-for-profit and for-profit organisations instead of providing them in-house), and the third most frequently found was 'persons with disabilities'.

For all other terms, the frequencies differ considerably when comparing the Czech Republic, Italy and Sweden. The two terms found most rarely in the tender procedures launched for goods and services in all three Member States are 'social dialogue' and 'labour law standard'. It is also important to highlight that the searches in the TED database were done in Czech for the Czech Republic and in Italian for Italy, whereas for Sweden, as a rule, the English terms were used and the corresponding key words in Swedish were used only for some terms. As explained below, this led to a different number of hits. It should be noted that the type of keyword search on TED produced results that were conditioned by the different meaning the terms can take in Czech, Italian and Swedish depending on the context in which they are used. The data presented below can thus only illustrate some trends, as the comparative research does not apply the same methodology. The research also indicates the limitations of the database to provide an adequate and comprehensive view of the use of SRPP in tender documents and public contracts.

The main insights are presented for the Czech Republic, Italy, and Sweden. For the 3.5 years between January 2020 and December 2022, the number of hits per key word is presented in Table 1.

For the **Czech Republic**, the keyword that generated the most results was 'social', followed by 'working conditions', 'employment', 'social services' and 'reserved contract'. Very few hits, from 2020 to 2022, were generated when using the terms 'social dialogue', 'social inclusion', 'gender equality/equal rights/opportunities' and 'discrimination'. The very clear majority of results from the range of search terms used for this report, however, does not imply the use of social clauses. The use of the term 'social' generates a hit for the use of reserved contracts for cleaning services, e.g. in 2020 for [cleaning services – 133437-2020](#) procured by the Olomouc Region. The use of the term 'employment' generates a hit for the definition of social clauses as award criteria, e.g. in 2022 for [gardening services – 723656-2022](#) in the city of Ústí nad Labem. The search words 'collective agreement' and 'collective bargaining' rarely appear, and then if they do, with a vague link to the calculation of price in accordance with requirements of collective agreements. The term 'fair' – or more precisely 'fair trade' – is used in some tenders for catering services (in 2020) and more generally for different types of services when including fair trade requirements in the award criteria. These social clauses are often coupled with general statements on decent working conditions; in these cases, the key word 'working conditions', unsurprisingly, also generates some hits.

Table 1: Results of the key word searches in the TED database for the years 2020, 2021, and 2022 for the Czech Republic, Italy and Sweden

Search terms	Hits	Hits	Hits	Hits	Hits	Hits	Hits	Hits	Hits
	Czech Republic	Czech Republic	Czech Republic	Italy	Italy	Italy	Sweden	Sweden	Sweden
	2020	2021	2022	2020	2021	2022	2020	2021	2022
Social	1322	994	1204	3152	3916	3586	1529	1931	1797
Employment	129	126	140	29	39	63	4	1	0
Working conditions	186	185	156	9	4	8	0	0	0
Fair (fair trade; fair wages)	12	10	10	0	4	0	3	0	0
Labour law standards	17	30	26	0	0	0	1	0	0
Collective agreements & Collective bargaining	12	5	4	24	29	23	6	0	6
Social dialogue	1	3	4	0	0	0	0	0	0
Social enterprise & Social economy enterprise	33	23	18	31	65	47	0	0	0
Reserved contract & Reservation	22	30	41	0	0	0	0	0	0
Social service(s)	571	28	0	0	473	76	103	120	139
Social inclusion	4	1	0	0	62	49	0	0	0
Persons with disabilities	21	8	8	60	97	94	52	69	49
Women	23	25	30	46	50	69	0	3	2
Gender equality & Equal rights/opportunities	4	0	1	262	275	37	0	9	6
Discrimination	2	4	7	51	36	41	1	0	2

Source: Authors' elaboration from TED.

For **Italy**, the TED search – based on the Italian terms indicated – confirmed the results of the desk research.

- The analysis of the search showed that the keyword that generated the most results was 'social'. This is justified by the different usage of the word in the Italian language and the different meanings it can take on. The most significant tender notices to meet social objectives are social clauses<sup>9</sup>, formulated, for example, by mentioning the requirement to maintain employment levels or by stipulating the obligation of the new contractor to use, as a priority, the permanent and fixed-term staff already being employed by the facility or former provider.
- In tender documents using the term 'social', the legal instruments used are social clauses and Most Economically Advantageous Tender (MEAT). This was done in 2020 for purchases of services in the following fields: (1) Social work services for older people; (2) Educational services for minors and families; (3) Car park management services; (4) Helpdesk and support services; and (5) Services for persons with disabilities. Examples from 2021 and 2022 are 'Guidance services' (Services – 587972-2021) purchased by the Municipality of Prato and 'Services for Persons with Disabilities' (Services – 233255-2021) procured by Central Purchasing Val di Cecina and Val di Fine or by the Municipality of Macerata (Services – 2022/S 114-322579).
- The search for the word 'employment' confirmed that the use of social clauses is widespread in calls for tenders, illustrated by requirements to promote the stability of employment of personnel employed in the service being tendered. In a tender document issued by the Municipality of Foligno in 2021, the social clause reads: 'The contractor is obliged to employ people with social disadvantages for the performance of the service (or to maintain their employment) in a number at least equal to one staff unit.' In 2022, for the procurement of welfare services for the elderly, the tender document reads: 'In compliance with Article 50 of Legislative Decree 50/2016, to promote stable employment of personnel employed in the service covered by the contract, the successful tenderer undertakes to hire as a priority, for the performance of the service, if available, the workers who were already employed under the former contract for the same service.'
- Looking at the search term 'working conditions', the Region Marche in 2021 issued a tender document including as a social clause the quality criterion 'Verification of working conditions along the supply chain' for the purchase of sausage products. In 2022, the Municipality of Napoli (Naples) defined as a first social clause that the 'successful tenderer is required to absorb the personnel already employed by the outgoing successful tenderer as a matter of priority' and as a second social clause that 'the personnel assigned to the service must be classified with contracts that at least respect the working conditions and the minimum wage of the national collective bargaining agreement in force for cleaning and multi-service companies, signed by the main trade unions'.
- The terms 'fair' and 'fair trade' appeared in tender documents rewarding the use of fair-trade products.
- When using the search words 'collective agreement' or 'collective bargaining', hits came up for the subject matter of the public contract – 'social work services with accommodation' (2020), 'social work services' (2021) and 'supply services of personnel including temporary staff' (2022). In the first case, the social clause reads: 'In order to promote the employment stability of the personnel employed, a social clause is foreseen, providing for the application by the successful

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<sup>9</sup> Pursuant to Article 50 of Legislative Decree 50/2016 (the old Procurement Code), they constitute a particular condition of execution.



tenderer of the sector collective agreements'. In tender documents issued in 2022, the social clauses are formulated as follows: 'Promoting the employment stability of the personnel employed, providing for the application by the contractor of the sector collective agreements' and 'The personnel must be employed with contracts that fully respect the economic and regulatory treatment established by the national and territorial collective agreements in force for the sector and for the area in which the services are performed'.

- In tender documents using the term 'social services', the legal instrument used is MEAT. This was done in 2020 for (1) accommodation management services, (2) social work services and (3) social work services with accommodation; in 2021 for (1) services for persons with disabilities and (2) social work services without accommodation; and in 2022 for social work and related services (Services – 2022/S 048-125488). A clause included in a tender document in 2020 prescribed the 'priority absorption of personnel by the new provider from the previous provider' and in a tender document in 2021 the 'assignment of home care services aimed at the elderly and frail adults'.
- In tender documents using the term 'social inclusion', the instrument used is again MEAT, e.g. in a tender document issued in 2020 by the Union of Valmarecchia Municipalities. More specific requirements are included in a tender document published in 2021 by the Province of Monza and Brianza for the assignment of the management and organisation of reception services and accompaniment to social inclusion by the successful bidder or in a tender document issued in 2022 by the Province of Lucca which applies an 'open procedure reserved for third sector entities', for the 'reception, integration and protection service aimed at holders of international protection.'
- The Municipality of Brugherio stipulated in a tender document published in 2022 containing the search term 'social enterprise/social economy enterprise' that as award criteria MEAT should be used and – as the social clause – that 'the successful tenderer of the contract must be willing to take on the staff already employed by the outgoing successful tenderer.'
- The search with the term 'disability' highlighted the presence of tenders in which non-compliance with obligations relating to the employment of persons with disabilities was a reason for exclusion; or contracts reserved for economic operators whose objective is the social and professional integration of persons with disabilities. When using the key word 'persons with disabilities', social clauses used in tender documents in 2021 are (1) aimed at maintaining employment levels when it comes to the social and professional integration of people with disabilities and (2) at achieving employment stability to guarantee the personnel currently employed in the contract. The social clauses used in a tender document issued in 2022 by the Municipality of Taranto prescribe as a reason for the exclusion of economic operators from the tender procedure non-compliance, at the time of submitting the offer, with the obligations regarding the work of persons with disabilities, and the use of MEAT. The Municipality of Pesaro has published, again in 2022, a tender document asking potential bidders to submit offers for a reserved contract for the inclusion of persons with disabilities.
- The word 'women' showed search results of tenders relating to projects concerning the protection of women from male violence, equal treatment of women and men in employment matters and training of women. In addition, women are mentioned in public tenders in health and social services. In some cases, qualitative award criteria have been included in the tendering procedure (e.g. by the Region Marche), such as the possession of SA8000 2008 or an



equivalent social and ethical responsibility certification, and the absence of records of gender discrimination.

- The use of the term 'equal opportunities' reflects good application of the provision of Article 41 of the Equal Opportunities Code (Legislative Decree 198/2006) in the calls for tenders. It requires the contracting authority to exclude any economic operator that has committed discriminatory acts against its employees. Another requirement found in tender documents is the quality criterion aimed at ensuring gender and generational equality. An example is a social clause formulated in a tender document issued by the Province of Lucca in 2022: 'Equal opportunity requirements and job inclusion in public contracts: the bidder undertakes, under penalty of exclusion, in the event of the contract being awarded, to ensure (1) a 10 per cent share of youth employment and (2) a 10 per cent share of female employment'.
- The key word 'discrimination' highlighted the provision in some cases of the exclusion clause provided for in Article 41 of the Equal Opportunities Code for an economic operator that has committed discriminatory acts against its employees. Other results concern projects for the inclusion of people in vulnerable situations and the monitoring of discriminatory phenomena. The Marche Region specified in a tender document issued in 2020: 'Maintenance service of fire-fighting systems of buildings: among the quality criteria is the absence of reports of gender discrimination'. The same quality criterion and social clause, 'absence of reports of gender discrimination', was used in a tender document issued in 2022 by the Municipality of Bologna. It should be noted that the high number of results refers to the principle of non-discrimination of economic operators.
- The search for the other key words – social services, social inclusion, collective agreements/collective bargaining, working conditions, gender, social enterprise/social economy enterprise – confirmed the widespread use of social clauses in calls for tenders and the awarding of contracts through the economically most advantageous tender.
- The use of the terms 'social dialogue', 'labour law standards', 'work–life balance', 'equality' and 'reserved contracts' did not bring about any relevant number of search results.

For **Sweden**, the search terms used on TED were mostly in English. The term 'social service' was only looked up in the plural, i.e. 'social services'. The term 'fair' was combined with 'wage' and 'trade'.

- In some cases, the Swedish alternative terms was also tested for 2020, e.g. for collective agreement' = 'kollektivavtal', collective bargaining' = 'kollektivförhandling', 'social dialogue' = 'social dialog', 'social economy (enterprise) = 'social ekonomi', persons with disabilities = 'person med funktionsnedsättning' and 'equal rights' = 'lika rättigheter'. This led to important differences in results, e.g. for the key word 'social'. For 2020, the English term 'social' had 1 529 hits, the Swedish term 'socialt' (male) 298 hits and Swedish term 'sociala' (female) 85 hits – depending on the term following and if it is male or female in Swedish. In the first case, for 'socialt', the results are basically social services procured by local and regional authorities, e.g. 'social services', 'health and social work services', 'social work services with accommodation', 'provision of services to the community' (e.g. for the prevention of general violence and men's violence against women or the delivery for good for persons for at home) and 'supply services of personnel including temporary staff' (to recruit social workers in the event of vacancies, illness and other temporary positions). Similar types of services procured come up when searching with the (female) key word 'sociala', but to a much lesser extent.
- Over the entire period covered by the research – the three years between January 2020 and December 2022 – the key word producing the highest number of hits is 'social'. 'Social services'

and 'persons with disabilities' followed with much lower numbers of hits. The terms, in English, of 'social dialogue', 'social inclusion', 'fair trade' or 'fair wage', 'women', 'gender equality/equal rights/opportunities' and 'discrimination' did not result in a significant number of hits. However, it is a significant caveat to say that the results cannot be interpreted to mean that the listed terms are ignored in public tenders in Sweden or that they are not taken account of in the context of SRPP, as this could well be done by other tools or based on European or national legislation or other types of regulation with which public tenders already have to comply with.

- The term 'employment' appears for the procurement of administration services, but not in relation to provisions to promote SRPP.
- The term 'fair' is used when the subject matter of the contract, for example, is 'washing and dry-cleaning service' or 'coffee, tea and related products', but it cannot be said with any clarity without knowing the concrete text, if their use is motivated by an intention to realise SRPP.
- In 2021, the Swedish search term 'person med funktionsnedsättning' (persons with disabilities) resulted in 69 hits for the following types of services: vocational rehabilitation services; social work and related services (e.g. housing services for persons with disabilities); health services; interpretation services; sanitation and cleaning services; and taxi services. The English search term 'persons with disabilities' had no hits.
- The key word 'women' is used in tender documents where the subject matter of the contract is the procurement of software packages and information systems (e.g. in two cases in 2022) or 'systems and technical consultancy services' or 'business and management-related services'. As a rule, these references are not included to promote women's rights or the objectives of gender equality.
- In relation to the term 'gender equality/equal rights/opportunities', a tender document aiming at the procurement of an equal opportunities' consultancy service, stipulates that: 'The procurement involves the establishment of a framework agreement on gender equality'. The procurer in 2021 was the Swedish International Development Consultancy Agency (Sveriges biståndsmyndighet), see Services – 568896-2021. In 2022, results were for the procurement of 'business and management-related services' and of 'equal opportunities consultancy services', and in 2023 only for the first category of services, 'business and management-related services').
- The key word 'discrimination' appears in tender documents issued by the Swedish Board of Student Finance (Centrala studiestödsnämnden), for the procurement of education and training services (for training courses for staff) and where the subject matter reads 'Business and management-related services'. However, the primary aim when using the word 'discrimination' in each case is not the promotion of SRPP.
- As indicated below for 2020, in some cases the following specification is made for 'Award criteria': 'Price is not the only award criterion, and all criteria are stated only in the procurement documents.' It is, however, not possible to provide an estimation of the frequency of this specification or a similar one, and thus its relative relevance to realising SRPP, without looking up hundreds of public tenders and reading through the whole tender document.
- There are public tenders with stipulations – put under the heading 'Taxes and social security contributions' in the description of the procured service – which require the purchasing body to exclude certain suppliers, if they have not fulfilled their obligations to pay taxes and social security contributions: 'A contracting authority shall exclude a supplier from participating in a

procurement if the authority becomes aware, through checks ... or by other means, that the supplier has not fulfilled its obligations with regard to payment of taxes or social security contributions in its own country or in the country where the procurement takes place, and this has been established by a binding court decision or an official decision that has gained legal force.' An example can be found in this tender document of the City of Växjö (Växjö kommun): Services – 637535-2020. For the reason explained above, it is not possible to provide an estimation of their frequency and thus of the relative weight of such stipulations.

- Some public tenders contain a labour clause<sup>10</sup>, e.g. for cleaning services: 'Wages, holidays and working hours must at least be in line with central collective agreements applied in Sweden. Self-reporting regarding labour law conditions must be provided. Cleaning staff must undergo ... training.' An illustration of such a labour clause can be found in this tender document issued by the Luleå Technical University (Luleå tekniska universitet): Services – 186774-2020.

The search on TED carried out for the purpose of this study confirms the findings of previous research and ongoing projects, in which some of the authors were or are involved. In the #WeBuySocialEU<sup>11</sup> project, the study on gender-responsive public procurement (GRPP, meaning the use of public procurement to promote gender equality) (EIGE, 2022b) and the collection of good practices in the framework of the Green Public Procurement (GPP) Helpdesk<sup>12</sup>, most experts argue that TED and national and regional public procurement databases are not the best tools to quantitatively or qualitatively identify SRPP tendering procedures. A key finding from the European Institute for Gender Equality (EIGE)'s project on GRPP is that the lack of a common tracking or reporting system for GRPP (which is part of SRPP) in the EU impedes the identification of the exact number of public procurement procedures relevant for GRPP in the EU (EIGE, 2022b, p. 30).

In conclusion, the finding from a 2015 European Commission study that TED was not designed as a strategic procurement policy tracking tool can be confirmed (European Commission, 2015, pp. 25–26). The good news is that from October 2023 the introduction of e-forms in TED is expected to improve the quantity and quality of data collected on TED. They include questions on strategic procurement. Seven to eight countries have made the compilation of this data mandatory. Therefore, from 2024, it will be possible to start using harmonised data on strategic procurement at the European level (interview with DG GROW).

### 1.1.3. Findings from the first reporting exercise by the Member States

Article 83 of Directive 2014/24/EU sets minimum requirements for the monitoring of procurement at the Member State level. In particular, every three years, the Member States have the obligation to submit a report to the Commission which includes 'information on the most frequent sources of wrong application or of legal uncertainty, including possible structural or recurring problems in the application of the rules, on the level of SME participation in public procurement and about prevention, detection and adequate reporting of cases of procurement fraud, corruption, conflict of interest and other serious irregularities'. The same provision empowers the Commission to monitor strategic

<sup>10</sup> The so-called 'mandatory social clause' requires Member States to ensure compliance with applicable environmental, social and labour laws in the performance of public contracts. The article refers to obligations established by EU law, national law, collective agreements and the eight core ILO conventions listed in Annex X of the Directive. See Section 2.2.

<sup>11</sup> The #WeBuySocialEU contract, which was carried out by ICLLEI and the European Association for Innovation in Local Development (AEIDL), researched and wrote 'Making socially responsible public procurement work – 71 good practice cases', Available at: [https://commission.europa.eu/funding-tenders/tools-public-buyers/social-procurement/making-socially-responsible-procurement-work-71-good-practice-cases\\_en](https://commission.europa.eu/funding-tenders/tools-public-buyers/social-procurement/making-socially-responsible-procurement-work-71-good-practice-cases_en).

<sup>12</sup> See Section 2.5 for a description of the Green Public Procurement Helpdesk is available at: [https://green-business.ec.europa.eu/green-public-procurement\\_en](https://green-business.ec.europa.eu/green-public-procurement_en).

procurement and to report on it every three years.

The 2021 European Commission's report on the implementation of national procurement policies presents the first reporting exercise's results related to the year 2017 (European Commission, 2021a).

In terms of the **number and value of procurement**, the report acknowledges that 'qualitative information prevailed over quantitative data in all the reports submitted to the Commission. However, the incompleteness of the latter limited the possibilities for a comprehensive aggregation and/or comparability of the available data at the EU level. When asked to report the volume and value of procurement, Member States mentioned various problems encountered while conducting this reporting exercise, e.g. partial or missing input data or lack of such data etc.'. The report includes a table on the number and value of above and below EU thresholds procurement in 2017, which is very incomplete, because some Member States did not submit the report, while in many cases Member States were not able to provide all the data requested. For example, sometimes data related to above and below thresholds was not available and at other times only the value is available but not the number of tenders. The key finding from the report is therefore that there is no data about the number and value of procurement in the EU.

It is widely published on European Commission websites and documents that every year in the EU, over 250,000 public authorities spend around EUR 2 trillion (around 13.6 % of GDP) on the purchase of services, works and supplies<sup>13</sup>. However, it is not clear from where this data is derived. If data is not available on overall procurement in the EU, data on the volume and value of SRPP would also not be available.

Concerning **SRPP**, the Commission's report states: 'In general, the quality of information provided was insufficient for a clear and comprehensive assessment of this aspect of public procurement policy across the Member States. National authorities engaged in preparing the reports sometimes included information on labour law and social provisions, without providing a clear link to the public procurement legislation. Additionally, the majority of Member States provided hardly any data on SRPP.' The report adds that around two thirds of Member States have provisions in national laws or strategies on the implementation of SRPP. However, the quality of information provided by Member States in their reports was insufficient for a clear and comprehensive assessment of SRPP policy across the EU. Moreover, the report identified four main difficulties with SRPP implementation: '(a) the lack of clear guidance about correct implementation; (b) difficulties in calculating social effects and life-cycle costing; (c) difficulties in connecting social considerations to the subject matter of a contract; and (d) absence of a generally accepted definition of SRPP' (European Commission, 2021a, pp. 9-10).

What can be concluded is that there is still no comprehensive mapping of SRPP across the EU, most likely due to a lack of data and comprehensive reporting about strategic procurement. The general lack of reliable and meaningful data on the outcomes of tenders and especially on the outcomes of contracts was also identified by the European Court of Auditors regarding procurement carried out by the EU institutions themselves (ECA, 2016).

A positive development is that, partly to remedy the lack of data, on 16 March 2023, the Commission unveiled a plan to build a European data space for public procurement data, alongside the Commission Communication on the single market at 30 (the 30<sup>th</sup> anniversary). The plan outlines the basic architecture and analytics toolkit to be put in place by mid-2023 and procurement data published at the EU level to then be available in the system. By the end of 2024, all participating national publication

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<sup>13</sup> See, for example, the webpage on the Public Procurement Data Space, Available at: [https://single-market-economy.ec.europa.eu/single-market/public-procurement/digital-procurement/public-procurement-data-space-ppds\\_en](https://single-market-economy.ec.europa.eu/single-market/public-procurement/digital-procurement/public-procurement-data-space-ppds_en).

portals should be connected, historic data published at the EU level integrated, and the analytics toolkit expanded. The Public Procurement Data Space will pool data on the preparation for tenders, calls for tenders and outcome of tenders. This data is currently dispersed in different formats and at different levels, European and national<sup>14</sup>.

#### 1.1.4. Stakeholder and expert views on the volume, value and economic sectors of SRPP

##### *EU level stakeholder and expert views*

When asked about the degree of development of SRPP in the EU, on the basis of their knowledge, four out of the 11 EU-level stakeholders interviewed are of the opinion that the **development of SRPP in the EU is basic with variations across Member States** (interviews with the legal expert, UNI-Europa, ICLEI and Social Services Europe). Two representatives from EU-level trade unions responded that it is impossible to say anything about the state of play of SRPP in the EU and the economic sectors in which it is used with so little data. A representative from another trade union believes that, in principle, it is possible to implement public procurement by respecting or promoting collective bargaining, but in practice there are many obstacles to it, as it is likely that in the end you will end up in courts. This is what all contracting authorities want to avoid.

The stakeholders and experts who provided information on the state of play of SRPP in the EU stressed that it is based more on perceptions from their work (legal analysis, collection of good practices, training and capacity building of public buyers) rather than on scientific reliable data. Some EU stakeholders (interviews with the legal expert, ICLEI and SSE) consider that it is well developed in France, Belgium, and the United Kingdom (in these three countries, a lot was also done on labour clauses and personal social services). From interviews with the legal expert, ICLEI and SSE, it was stated that SRPP exists in Scandinavia and Germany, but the focus is on the supply chain (ICLEI and legal expert). In Scandinavia and in Germany, SRPP can be mainly found in the sectors of food, electronics and cleaning, while in the Netherlands, Germany and Belgium, it is used to enhance the employment of persons with disabilities (interview with ICLEI). By contrast, in Ireland and Eastern European countries such as Poland, Czech Republic and Bulgaria, SRPP is close to non-existent. There are some practices, but it is not common and it is difficult to apply and enforce existing legislation. For instance, in Germany the introduction of SRPP criteria and verification schemes did need some time to develop. A good example is the cleaning sector where the debate on minimum wages steered a process of further SRPP practices applied throughout contracts (interview with ICLEI). In Italy and Spain, there are regions with many good practices, but on the national level, there are many variations (legal expert), and SRPP is often a mix of green criteria and respect of minimum wage provisions (ICLEI). However, none of the EU stakeholders interviewed has ever collected data on the development of SRPP through their national members.

The interviewee from the Commission confirms what reported by stakeholders. The only countries where SRPP is more developed are the Scandinavian countries, Denmark, Spain and to some extent Italy. In Italy, in the National Recovery and Resilience Plan, some provisions to promote gender balance through procurement have been added. This has had the effect that some central purchasing bodies have used gender clauses in the tendering procedures for their framework agreements (interview with DG GROW).

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<sup>14</sup> Public Procurement Data Space, Available at: [https://single-market-economy.ec.europa.eu/news/public-procurement-data-space-unlocking-wealth-eu-public-procurement-data-europe-2023-03-16\\_en](https://single-market-economy.ec.europa.eu/news/public-procurement-data-space-unlocking-wealth-eu-public-procurement-data-europe-2023-03-16_en).



From the business sector, a very interesting remark was made. During the last negotiations on the 2014 Directive, the discussions were that if a procurer wants to set higher standards from a social or an environmental point of view, they can of course do it. Their red line was that companies should not be excluded from a tender only because on other contracts they are doing no more than respecting the legal requirements and paying the salaries agreed in collective bargaining. In reality, this does not seem to be the problem. Most issues come from contractors that have no ambition and stick to the lower price. Moreover, contracting authorities too often award contracts on the basis of the lowest price and do not exclude tenderers that do not respect minimum wages or the salaries agreed through collective bargaining. This is why sometimes companies stop bidding, because if they want to fulfil national legislation or with collective agreements, they lose tenders (interview with SMEUnited).

In terms of the existence of **data on the volume and value of SRPP**, there is consensus among all EU-level stakeholders interviewed that data is **extremely poor**. The legal expert remarked that it is always very surprising whenever data and percentages are communicated. In fact, TED is a very poor source of data, because it contains incomplete notices and data on countries above the threshold, while most of SRPP is below the threshold or under the light regime, where notices usually do not provide very detailed information about the criteria used. The only data that can be found on TED is about the percentage of contracts that use non-cost criteria. The Single Market Scoreboard provides the statistic that 62 % to 63 % of contracts are awarded on the basis of price or cost only. **From this information, it can be estimated that at least two thirds of contracts do not have any social aspects.**

A trade union representative pointed out that it is common to read in European Commission documents that 55 % of tenders are awarded on the basis of MEAT. But this data is from 2017 and the reality is that Member States seldom collect data on SRPP.

The representative from SSE outlined that TED shows percentages of MEAT across all sectors, but for example, there is no data available about the use of MEAT in social services. He also added a very interesting point, that when TED indicates that MEAT has been used, instead of the lowest price or cost, no one really knows what is in MEAT and what the ratio is for social, environmental, innovation and fair-trade factors. Indeed, MEAT can include quality criteria, social, environmental and innovation considerations, or a mix of all this, but this information cannot be retrieved in TED. Moreover, he wondered if the inclusion in MEAT of a few social criteria would be sufficient to qualify a tender as being relevant for SRPP.

Representatives of employer organisations responded that they have no data or have never heard of data about SRPP (interviews with BusinessEurope and SMEUnited). Lack of data on the volume and value of SRPP was also mentioned by the interviewee from the Commission, who believes that SRPP is overall insufficiently developed and that in many Member States it is close to inexistent (interview with DG GROW).

Concerning the **economic sectors in which SRPP is predominantly used**, the legal expert reported the impression that if someone considers compliance with the horizontal social clause as being part of SRPP, this is or should be done in most contracts, especially in works and services contracts, because it is compliance with mandatory legislation. In the countries where SRPP is well developed, SRPP can be found in works contracts, for example in the use of training and apprentices clauses or work with the community. Another area where SRPP is present is social services, which are covered by the light regime (interview with legal expert). The representative from ICLEI mentioned that they had some conclusions on the data related to the use of SRPP while developing the collection of 71 good practice cases for the European Commission (EASME, 2020). The main sectors in which SRPP is used are cleaning, food, electronics, construction, and surprisingly, not that much in social care. In terms of analysis of the supply chain and in respect to relevant ILO Conventions, SRPP can be found in other sectors too, such

as solar panels and renewables. Concerning the instruments, the use of employment clauses<sup>15</sup> was found to be very widespread, as well as examples of awarding reserved public contracts to sheltered workshops/social enterprises which employ disabled and disadvantaged workers, in particular for contracts relating to maintenance, gardening services and social services. By contrast, it was not possible to identify a single case study using social criteria in exclusion grounds (see section 1.1.5). The ICLEI representative also highlighted that there is no data about the impact created by SRPP and it would be useful if a study on this would be commissioned. Finally, the representative from SSE affirmed that data about the use of SRPP in subsectors of social services is not available. The interviewee from the Commission confirmed that data about the economic sectors in which SRPP is used do not exist (interview with DG GROW). The interviewee from SMEUnited guessed that SRPP might be used in the social services sector. He added that most of the complaints they receive from their members or companies are about contracting authorities not respecting the minimum requirements of social and labour law, rather than complaints about contracting authorities that have been too ambitious in SRPP. Most of the complaints they receive come from the construction, transport and food sectors (interview with SMEUnited).

#### *National stakeholder views*

In **Belgium**, all the stakeholders who were interviewed reported that statistics are largely incomplete, if not virtually non-existent, at federal level. The only solid model for collecting statistics exists in the Walloon Region for public works contracts published in the 'Bulletin officiel des annonces des marchés publics (BOAMP)' or the Official Journal of the European Union (OJEU). These statistics are kept by the Walloon Network of Social Clause Facilitators and provide a measure of the impact of the inclusion of social clauses in public works contracts. An observatory of Walloon public contracts has recently been established and in the future will take over the function played by the Walloon Network of Social Clause Facilitators.

In **Italy**, the only interviewee who was able to provide some data about SRPP is Invitalia, the National Agency for Inward Investment and Economic Development, owned by the Italian Ministry of Economy, which is the Purchasing Body and Contracting Authority for the strategic execution of actions at the local level. Invitalia, in accordance with Article 10 of Decree-Law No. 77/2021, has been carrying out centralised procurement activities on behalf of numerous Implementing Entities called upon to implement the measures provided for in the National Resilience and Reform Programme (NRPP). As of 15 July 2023, Invitalia appears to have called for and managed 77 tenders, of which 42 were divided into lots, among which 29 tenders were divided into both territorial lots and performance sub-lots, for a total of 796 contracts and framework agreements to be awarded, for a value of over €10.2 billion. As of 15 July 2023, a total of 691 contracts and framework agreements had been awarded out of the 796 to be awarded. In compliance with the cross-cutting priorities set out in the relevant legislation, all contracts and framework agreements were awarded in accordance with Article 47 of Decree-Law No. 77/2021 and included clauses complying with the provisions protecting gender equality, generational equality and the employment inclusion of persons with disabilities. With regard to framework agreements, these clauses also apply to the subsequent specific contracts (interview with Invitalia).

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<sup>15</sup> Employment clauses are social considerations which can be included in tendering procedures, to require bidders to employ a number or a percentage of the staff, that will execute the contract, of persons with disabilities or 'disadvantaged workers', such as the unemployed or long-term unemployed, and other people in vulnerable situations. Employment clauses can be included as award criteria, part of MEAT, or as contract performance conditions. When they are included as award criteria, in the weighting of the different criteria used, some points are attributed to the fulfillment of the employment clause. When they are included as contract performance clauses, at the tender stage, bidders have to commit that in case the contract will be awarded, they will employ a number or a percentage of persons with disabilities or disadvantaged workers, as required in the tender documents, during the performance of a contract. Thus, employment clauses are a very powerful tool to foster the employment of vulnerable people by the means of public contracts.

Another interviewee stated that there is no publicly available dataset on the implementation of socially responsible public procurement measures within public contracts, therefore volume or proportion of SRPP is not easy to assess (interview with the Central Purchasing Body of Lazio Region).

Concerning the economic sectors in which SRPP is used in Italy, prior to the entry into force of the regulations on NRPP contracts, and therefore considering the contracts awarded by Invitalia, as a contracting authority and central purchasing body, pursuant to the previous regulations on public contracts set forth in Legislative Decree no. 50/2016, the sectors in which SRPP was most used were contracts and concessions for labour-intensive services (e.g. maritime transport concessions, facility management services, catering services, etc.).

In specific construction and land reclamation works contracts, Invitalia also introduced certain criteria for the evaluation of technical offers aimed at taking into account the employment of disadvantaged workers proposed by the economic operator in its offer. Subsequently, the legislation introduced by Decree-Law No. 77/2021 for contracts financed with NRPP resources does not appear to have left the contracting authority any margin of discretion as to whether or not to apply to certain sectors the rules laid down by the Legislator and protect the social sustainability of contracts. Whenever the contracting authority intends to disapply the regulations in question, it is required to provide adequate justification on a case-by-case basis (interview with Invitalia).

In the opinion of another contracting authority, social safeguard clauses are mostly used in labour-intensive sectors and contracts, where the workforce cost is at least the 50% of the contract amount (e.g. cleaning services, portage services, security services, catering, etc.). As regards SRPP measures such as award criteria, their usage is more common in purchasing of services than of goods (interview with the Central Purchasing Body of Lazio Region).

In **Sweden**, whereas it is difficult to provide exact statistics about the volume or proportion of SRPP across the different economic sectors or for a specific category of public buyers, mainly due to a lack of comprehensive monitoring tools or reporting requirements on SRPP or specific aspects thereof, a number of high-risk sectors were mentioned [interviews with the National Agency for Public Procurement (NAPP); Stockholm Region; Swedwatch; Trade Union Confederation (TCO)], such as construction, cleaning, transport, fruit distribution, textiles, ICT and medical devices/surgical instruments. These economic sectors are also those where social clauses, in particular, labour clauses, are mostly being used. Issues around subcontracting were identified as relevant in particular in the first sector, challenges in relation to supply chain management in ICT and medical devices/surgical instruments as the procurement takes place to a large extent from markets outside Sweden and the EU. Swedwatch mentioned the need to improve the risks assessments for social clauses to be formulated, implemented and monitored more effectively, which implies the channelling of more resources into this task at the pre-procurement stage.

In **Spain**, the existing public procurement platforms in Spain, both national and regional, do not provide easily accessible and reliable data and information on contracts awarded on the basis of MEAT and which include social criteria. In the national platform, which is the most important since it publishes most of the public procurement notices of all Spanish administrations, it is not possible to search in tender documents by using keywords. Currently, the weight or relevance of SRPP criteria in the awarding of contracts cannot be ascertained by consulting these procurement platforms. However, it is possible to find documentation produced by different national procurement bodies, such as the State Public Procurement Advisory Board (JCCE) and the Independent Office for the Regulation and Supervision of Procurement (OIRESCON), which refers to the volumes and trends in the use of performance conditions and award criteria referring to SRPP in Spanish public procurement in recent years.



However, once again, it is important to highlight that the reports and other information prepared by these bodies in this regard is the result of their own elaboration based on the use of data from the Public Sector Procurement Platform (PLACSP) and the other regional and autonomous regional procurement platforms, so it is not easy to access this data or to prepare information in this regard.

The experts and key informants interviewed for the study had a similar opinion regarding the difficulty of obtaining information on the volume and value of public contracts related to SRPPs.

By way of example, some of the answers received to the question of 'What data are available about its volume or proportion (about SRPP)?'

- 'Only those obtained from the analysis of the different tender documents published, thus there are no official data. And the data offered centrally by the State Public Procurement Board do not reflect this circumstance.' (interview with Unión General de Trabajadores, UGT – Servicios Públicos, a National Trade Union).
- 'The current technical configuration of the Procurement Platform makes it impossible to obtain data in this respect.' (interview with a Comptroller and Treasurer in Local Public Administration, Provincial Council of Málaga).
- 'We do not have any data on this. Despite progress made in legislation, there is still much to be done to ensure that the implementation of these measures is effective and widespread.' (interview with the NGO Assembly of Cooperation for Peace, Asamblea de Cooperación por la Paz).

In **Czechia**, the representative of the Ministry for Regional Development stated that availability of useful data on procurement is a challenge in general, and not just with regard to SRPP. Until now data on SRPP have not been systematically collected, there has not been a structured and holistic approach to this so far. Not even data on reserved contracts are being collected, which are the ones, whose collection should be easy. Collection of data on SRPP (or at least identification of individual tenders with social aspects) is moreover incidental and is mostly initiated by European projects, such as Buying for Social Impact. Also, the above mentioned projects were used to collect best practice examples of SRPP in Czechia, but those examples cannot be considered as describing the landscape of SRPP in the country (interview with the Ministry for Regional Development). The same finding emerged from the interviews with two representatives from the social economy (TESSEA and P3). The interviewees from the Railway Infrastructure Administration and Charles University confirmed that, overall, data are insufficient and their collection is incidental. Both organisations have started collection of data on sustainable public procurement (SPP). The Railway Infrastructure Administration published data on SPP and SRPP in the annual report (publicly available on the internet in Czech and English at [Výroční zprávy - www.spravazeleznic.cz](https://www.vyrocnizpravy.cz) (interviews with Railway Infrastructure Administration and with Charles University).

Most relevant areas for SRPP in Czechia are sectors with low-paid jobs (cleaning, greenery or facility management, and security services), since contracting authorities can easily connect social aspects with the material quality of the subject matter of the contract. To a certain extent, high risk jobs might also be of interest (waste management and construction). When it comes to supplies or catering services, a fair-trade approach is being used. Reserved contracts are used mainly due to the legal obligation to employ people with disabilities (interview with Ministry for Regional Development). The representatives of the social economy organisations interviewed replied that SRPP can be found in maintenance of green spaces, catering (and cafeterias), merchandising, graphics, and small construction works. Other sectors that have been mentioned are laundry services (Charles University) and office supplies (Railway Infrastructure Administration).

In conclusion, research and interviews at national level confirm that official data about the value and value of SRPP, as well as about the economic sectors in which SRPP is used, do not exist and collection of these data is incidental. Only anecdotal evidence about economic sectors exists.

#### 1.1.5. Findings from collection of good practices

To complement stakeholders' views on the sectors in which SRPP can be found, interesting findings emerged from the work carried out during two service contracts commissioned by the Executive Agency for Small and Medium-sized Enterprises (EASME) and DG GROW. The 'Buying for Social Impact (BSI)' project was aimed at increasing the capacity of public buyers and social economy enterprises (SEEs) in the use of SRPP<sup>16</sup>. The project found that SRPP involving SEEs is more widespread in certain sectors of the economy than others, particularly in maintenance of green spaces, cleaning services and social services. SRPP is also found to a lesser extent in construction, food/catering/restaurants, transport services and textiles. Another key finding from the same project is that SEEs are often overlooked in public procurement, simply because public authorities are not familiar with them. In most of the countries analysed, SEEs are economically active in healthcare, education, environmental services and energy, sport and recreational services, culture, art and ICT. However, it was very difficult in these sectors to find tendering procedures that were accessible to SEEs (European Commission and EASME, 2020, p. 2). There are two main reasons that might explain this. First, contracting authorities are often not very well aware of SEEs and of the economic sectors in which they operate, and thus they do not design or do not have the capacity to design tendering procedures that are accessible to SEEs. Usually the contract value of tendering procedures in the ICT, healthcare, environmental services and energy is very high. To facilitate the participation of SEEs in those procedures, contracting authorities could use a combination of instruments such as division into lots, reserved contracts, and employment clauses. They could also organise pre-market consultations and market dialogue events, so as to favour contacts between traditional companies and SEEs, possibly leading to the formation of consortia and/or the participation of SEEs as subcontractors. Second, SEEs operating in these sectors, especially in education, sport and recreational services, culture and art, are small in size, and might lack the capacity to participate in procurement processes.

An analysis of the collection of good practices included in the European Commission publication, *Making socially responsible public procurement work – 71 good practice cases*, gives an indication of the countries and economic sectors in which SRPP is mostly used (EASME, European Commission, 2020). The publication features 71 cases from 22 Member States plus 5 non-EU countries, which range from entry-level/beginner level to intermediate and advanced. Case studies were not found in Cyprus, Croatia, Estonia, Luxembourg and Portugal: this testifies that SRPP in these countries is close to non-existent.

Case studies were found in the following sectors and countries as described below:

- 10 cleaning service and facility management case studies from 9 European countries (Czech Republic, France, Hungary, Malta, Poland, Spain, Sweden, 2 from Denmark and 1 from the European Commission in Belgium).

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<sup>16</sup> The Buying for Social Impact project was carried out by the European Association for Innovation in Local Development (AEIDL), the European Network of Cities and Regions for the Social Economy (REVES), Social Economy Europe, Diesis Network and the European Network for Social Integration Enterprises (ENSIE). It covered 15 Member States: Croatia, Czech Republic, Denmark, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, the Netherlands, Poland, Romania, Slovakia and Sweden. Findings are available at: [https://commission.europa.eu/funding-tenders/tools-public-buyers/social-procurement\\_en](https://commission.europa.eu/funding-tenders/tools-public-buyers/social-procurement_en).

- 7 case studies from the construction sector from 5 Member States (2 from France, 1 each from Germany, Spain and Ireland plus 1 case study from Norway and 1 from Canada).
- 6 food and catering examples from 6 different European countries (Austria, Belgium, France, Greece, Spain and Norway).
- 2 furniture procurement case studies from 2 EU Member States (Italy and Romania).
- 3 case studies on reserved contracts for gardening services from 2 EU Member States (2 from Spain and 1 from Italy).
- 3 case studies in the healthcare sector from Finland, Norway and Ukraine.
- 12 cases in social services from 6 Member States (Finland, Italy, Latvia, Lithuania, the Netherlands and Poland) and a cross-border case from Italy and Slovenia, plus 1 from South Korea.
- 4 cases in the ICT sector from 3 EU Member States (Finland, Spain and Germany).
- 5 examples of textile procurement, from 5 EU Member States (Belgium, Czech Republic, Germany, Spain and Sweden).
- 1 case study focuses on the procurement of transport services in Poland and 1 on the biofuels industry in France.

The collection ends with 17 case studies, from 11 Member States (Austria, Bulgaria, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands, Spain and Sweden), plus 2 non-EU countries (Canada and the United Kingdom), looking at cross-sectoral or policy-level initiatives which support SRPP. It is also interesting to note that, out of 71 case studies, more than 30 were good practices in which a SEE or NGO was involved as the contractor or service provider (individually or in a consortium), subcontractors or the target audience of a strategy to promote SRPP. These cases were mostly from France, Italy and Spain, but there is at least one case study each from Austria, Bulgaria, Germany, Greece, Finland, Hungary, Lithuania, Latvia, the Netherlands, Slovenia and South Korea (EASME, European Commission, 2020, pp. 6–9).

Similar results can be derived from the collection of good practices that was carried out in the context of the BSI project, which analysed 22 case studies, 18 on public procurement procedures and 8 on policies relevant for SRPP. The case studies came from Belgium, Croatia, Czech Republic, France, Greece, Hungary, Ireland, Italy, Poland, Slovenia, Spain, Sweden and the UK. They cover the following economic sectors: construction; food, catering and restaurants; cleaning; maintenance of green spaces; textiles; and transport (EASME, European Commission, 2019b).

## **1.2. Main opportunities of socially responsible public procurement**

This section provides an overview of EU level stakeholder and expert views of the main opportunities and concrete instruments offered by the 2014 Directive to achieve social goals by the means of public purchasing compared to the 2004 Directive. The legal analysis of the entry points for SRPP provided by the Directive will be the subject of Chapter 2.

### **1.2.1. Views of EU level stakeholders and experts**

All stakeholders interviewed at the EU level were asked their opinion on the main mechanisms and provisions by which public procurement can have a social impact. It is important to start by saying that most of the EU level stakeholder organisations interviewed said that they were very active on the public procurement file during the discussions and negotiations preceding the adoption of the 2014

Directive. In general, EU level stakeholder organisations tend to focus their work on influencing policymaking and legislation rather than on implementation of EU policies and legislation. Since the entry into force of the Directive, their work on public procurement has diminished. For example, BusinessEurope has been focusing mainly on facilitating information to their members and has recently developed a paper identifying barriers in the EU public procurement market, in particular related to the accessibility and openness of national public procurement markets (BusinessEurope, 2023)<sup>17</sup>.

Firstly, one interviewee commented that the social impact of the Directive is limited by the lack of data about it, because only anecdotal evidence is available (interview with the legal expert).

Overall, the view is that the instruments available in the Directive may be completely sufficient to achieve social impact, and that the focus should be on how rules are applied and implemented, how they are used and why they are not used. In other words, the legal provisions as such generally work. While Directive 2014 created more opportunities to procure more sustainably, it is still not used to its full potential, partly because its social impact depends on the level of voluntary versus mandatory application of such sustainability requirements (interview with ETUC). Some criteria could be made more mandatory, but no one can be sure if this would create more impact as implementation would still need to be enforced and monitored (interview with ICLEI).

From the business sector, BusinessEurope agrees with using procurement to achieve strategic goals, provided that strategic criteria are not used as an unjustified additional barrier to access public markets. Many problems can still be observed in cross-border procurement. Over prescriptive tender requirements tend to favour the regional and national suppliers, as illustrated in the example on healthcare provided in their paper on barriers (interview with BusinessEurope). The interviewee from SMEUnited believes that the new Directive provides more clarity about what it is possible and feasible in relation to SRPP compared to the past. The Directive contains all provisions that would allow a procurer to make the process socially responsible. But in reality, they do not see many procedures that go above the baseline as regards social, environmental and innovation aspects, because contracting authorities are on the safe side if they do the minimum. SRPP, GPP and innovation procurement still happen too little. If contracting authorities do not have a political backing, it is too risky for procurers to be more ambitious. However, whether to implement SRPP or not should be the political decision of contracting authorities and should not be regulated or imposed by the EU legislator (interview with SMEUnited).

Looking now at the specific instruments included in the Directive that can produce social impact, EU-level stakeholders' views are summarised as follows.

All EU stakeholders agree that the **horizontal social clause** is extremely important (see Section 2.2), because it has gained legally binding status, while in the 2004 Directive a similar clause was included only in a recital, therefore, with no binding effect. However, its impact has been more limited than expected (view Section 1.3) and stakeholder views on the impact of this provision differ a lot.

It is firm belief of SMEUnited that all companies that do not respect the baseline (e.g. European and international social law, workers' protection, minimum wages, working time, quality, collective bargaining, etc.) should be excluded from tendering procedures. Taxpayers' money should not be spent on companies that do not meet these basic and fundamental requirements. From the complaints they receive from their members and companies, these provisions, namely those on minimum wages

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<sup>17</sup> BusinessEurope (2023), Unlocking the full potential of the European Public Procurement Market, Available at: [https://www.business-europe.eu/sites/buseur/files/media/position\\_papers/internal\\_market/2023\\_business-europe\\_paper\\_european\\_public\\_procurement\\_market.pdf#:~:text=To%20fully%20unlock%20the%20potential%20of%20the%20EU%E2%80%99s,Market%2C%20rather%20than%20revising%20the%20current%20legal%20framework.](https://www.business-europe.eu/sites/buseur/files/media/position_papers/internal_market/2023_business-europe_paper_european_public_procurement_market.pdf#:~:text=To%20fully%20unlock%20the%20potential%20of%20the%20EU%E2%80%99s,Market%2C%20rather%20than%20revising%20the%20current%20legal%20framework.)

and wages established through collective bargaining, are the ones that are most often not respected by many contracting authorities, which simply award contracts on the basis of the lowest price. This is especially true in the problematic sectors of construction, transports and food. SMEs that fulfil all social requirements often lose contracts because other companies submit very low offers and are contracted at a much lower price (interview with SMEUnited). Another stakeholder argued that how the clause is formulated, theoretically, makes it possible to ensure that labour rights and relevant collective agreements can be respected including throughout the subcontracting chain, however, its likelihood of becoming probable remains uncertain (interviews with legal expert and UNI-Europa).

The possibility of including **social clauses in award criteria and contract performance conditions** is another effective instrument to produce social impact (See Sections 2.2 and 2.3). Before the entry into force of the Directive, it was possible to see social clauses included only in contract performance clauses, while now more take-up can be observed in award criteria. The Dutch North Holland case<sup>18</sup> opened the way for including social considerations in award criteria and then, this possibility was codified in the Directive (interviews with legal expert and EPSU). The use of social clauses in award criteria is seen as the biggest opportunity offered by the Directive, as it opens up many possibilities. The Directive has allowed the improved use of MEAT, therefore it should be more difficult to award tenders solely based on the lowest price, as in principle contracting authorities should justify why they are using the lowest price only. The Directive has enhanced the concept of value for money. The concept of the life cycle cost, even if it explicitly refers to green, i.e. environmental aspects, is a great novelty, compared to the previous directive that could also be developed for social aspects (interview with EPSU).

Perhaps the reasons why social aspects in award criteria haven't been used much in some countries is that in those countries, the focus of public authorities is still on cost, which is one structural issue that can be found in many Member States. Another possible explanation for its limited use is that many contracting authorities do not have sufficient technical capacity and adequately trained members of staff to evaluate those criteria and hence are hesitant about their legality. But overall, the use of social considerations in award criteria can be seen to be increasing and this is promising (interview with legal expert). This instrument represents a huge opportunity for public procurement to play a role in advancing social responsibility, as it makes it possible to favour the labour market and/or social inclusion of vulnerable groups. The mentality of public buyers has changed in the last 15 years, when tenders were mostly assessed on the lowest price only (interview with ICLEI). Furthermore, it was observed that despite green procurement being more established than SRPP, if a contracting authority includes environmental considerations in the award criteria, it is uncertain that the chosen offer will strongly take up such considerations. However, if a contracting authority includes social criteria, in 90 % of cases, it gets what it is looking for. This finding is from Germany, where about half of the procurement is awarded on the basis of the lowest price and where it seems that social clauses, once defined, have a higher impact than environmental considerations, looking at their actual inclusion in the bids submitted by suppliers. This seems to be attributable to specific sectoral market realities and provider landscapes relevant for SRPP. There are simply fewer potential providers in the market in Germany to implement SRPP than those who could supply goods or services in the context of green procurement. This, in turn, means a higher probability for the procuring agencies that they will eventually obtain bids to choose from, which respect the requirements they wanted to set. Another positive factor is that purchasing bodies, as a rule, do more market research before defining the criteria to implement SRPP compared to green procurement, in order to be sure to get appropriate offers to choose from (interview

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<sup>18</sup> Commission v Netherlands (C-368/10) which concerned the use of environmental and fair trade considerations in the context of a contract award procedure.



with SSE).

From the business sector, the link of strategic considerations with the subject matter of a contract is considered to be very important. Social considerations need to be reasonable, and not to change completely the approach to public procurement, which is value for money. However, in the last few years they haven't had discussions on the use of MEAT and the lowest price as award criteria (interview with BusinessEurope).

The impact of **reserved contracts** (see Section 2.1) is assessed to be uncertain. It is an instrument that was present in some national legislation, such as in France and Italy, before it was introduced in the 2004 public procurement Directive. In Germany and France, reserved contracts have always been used, although they seem to be mainly used for the labour market integration and social inclusion of persons with disabilities (PwD) in 'sheltered workshops', or other similar settings which are rather segregating, or in work integration social enterprises (WISEs), and much less for other disadvantaged groups. In Italy, reserved contracts have a long tradition, since the entry into force of Law 381/1991 on social cooperatives, which defines the categories of 'disadvantaged persons'. In Italy sheltered workshops do not exist and reserved contracts are solely awarded to social cooperatives of type B, whose mission is to provide employment opportunities to disadvantaged persons and which operate in many economic sectors, such as industry, agriculture, trade and services. By contrast, in other countries such as Ireland and in eastern European countries, even after the entry into force of the Directive, they have never been used or only to a very limited extent. Reserved contracts make the inclusion of vulnerable groups possible, but the motivations and incentives of each contracting authority are decisive. In the Buying Social Guide, the European Commission expanded the list of who could be considered a 'disadvantaged worker'. It is an expansive list (interview with legal expert). Reserved contracts are very important for the social and professional inclusion of PwD and people in vulnerable situations. In other countries, such as Sweden, contracting authorities tend to use employment clauses instead of reserved contracts for achieving social and professional inclusion. Issues are not in the legislation in itself, but in its application. No robust data exists to assess if reserved contracts are sufficiently used (interview with SSE).

The **light regime for social, health and educational services** (see Section 2.1) is another novelty of the Directive. However, there are no data to understand to what extent this set of rules have been used. This is an area where there could be more guidance from the European Commission or more good practices showing what is possible (interview with legal expert). Another interviewee wonders if the light regime has been implemented – as it has been difficult to get any detailed information from important providers of the not-for-profit social services sector on this in recent years. In other words, this option of the Directive has not been flagged up as an important issue – and it is unclear if it has brought any additional opportunities compared to national rules. There is no information or evidence on the extent to which it has been implemented. In countries with a significant share of not-for-profit social service provision, it is fair to assume that it might not have had much impact, as the light regime merely stipulated in EU legislation what was already possible or in any case considered as a more appropriate procurement regime for the sectors concerned, especially as they are part of services of general economic interest (SGEI) and given the specificities of the services and their users, their objectives, their embeddedness in social protection schemes and their "inherent" not-for-profit logic". By contrast, in countries with more public provision such as Denmark and Sweden, it is likely that in the future these provisions could have a bigger impact (interview with SSE).

For SMEs, the provision about **division into lots** and the requirement on contracting authorities to explain the reasons when it is not used, is very good. The **tendency to centralise procurement** (so-called joint procurement) can be observed in many Member States, because it is more efficient and

cheaper. Joint procurement is also useful in countries with a very high number of contracting authorities, which are often small and are likely to have limited human resources with the necessary technical capacity to design quality tendering procedures. For example, in Austria there are about 2,000 municipalities. For them it is very complicated to procure in line with EU directives. The **Remedies Directives**<sup>19</sup> are not used too often, but it is a really a good instrument. It is very important to have associations lodging complaints against contracting authorities when an issue arises in procurement procedures and not to leave individual tenderers on their own. Companies will never complain, because they want to get the next contract (interview with SMEUnited).

**Exclusion grounds** (see Section 2.1) are aligned with the horizontal social clause. They have been seldom used. There has also been some case law on this instrument, so in some Member States, they are becoming more important. For instance, in Germany they have a registry of companies which have been excluded from public contracts. Exclusion grounds related to human trafficking and child labour are very important, although in practice it is not known if any company has ever been excluded on the basis of these grounds. Non-compliance with exclusion grounds usually happens in the supply chain (interview with legal expert). No information is available yet for the social services sector about the use of social criteria as exclusion grounds criteria (interview with SSE).

An important instrument are **selection criteria** (see Section 2.1). Relevant for large contracts, though little used, they provide contracting authorities with the possibility to require economic operators to have in place a supply chain management system, meaning a system to manage their suppliers and subcontractors, to check compliance with labour law or minimum wages. However, there is little previous experience and weak capacity linked to the social element of the contracts, likely because the Directive does not explicitly mention that some social aspects can be included in selection criteria (interview with legal expert). No precise information is available yet about the use of social criteria as selection criteria in the social services sector (interview with SSE).

On the extent to which the Directive helps boost the **participation of social economy enterprises in public procurement**, EU-level interviewees agree that the possibility exists, but it should be exploited more in a positive way (ICLEI) and the existing data is not convincing about the effectiveness (legal expert). The reasons why it is not or little used should be investigated. Is it too complicated to apply? Are public buyers not sufficiently trained? Is there lack of political support for this? Does it need to be legally enforced? These are some of the questions that should be asked (ICLEI). The challenge is that the Directive can only boost the participation of SEEs in public procurement in the countries where the mission, functions, values and specific aspects of the social economy are legally recognised. By contrast, where such recognition is lacking, the Directive risks not being that effective or that it depends on the political will of the different Member States and contracting authorities (interview with SSE).

Two interviewees mentioned that the rules on increasing transparency in **subcontracting** are a step forward, even if joint and several liability is not mandatory. The same interviewee valued the recognition of **in-house provision** of public services. Before outsourcing, a contracting authority should assess the consequences on quality of services as well as jobs, especially in sectors where pay is lower, working conditions more challenging, and where gender pay gaps or risks of gender inequalities

<sup>19</sup> The Remedies Directives set minimum national review standards to ensure that rapid and effective means of redress are available in all EU countries when an economic operator that has an interest in a public procurement procedure believes that it has been run without proper application of the EU Public Procurement Directives. There are two Remedies Directives, a general one for public contracts and one on utilities, Available at:

[https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/remedies-directives\\_en#:~:text=The%20Remedies%20Directives%20set%20minimum%20national%20review%20standards,proper%20applicati on%20of%20the%20EU%20Public%20Procurement%20Directives.](https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/remedies-directives_en#:~:text=The%20Remedies%20Directives%20set%20minimum%20national%20review%20standards,proper%20applicati on%20of%20the%20EU%20Public%20Procurement%20Directives.)

are higher, to avoid putting even more pressure on the workers in these sectors. It is important to push standards up and not down (interview with EPSU and with ETUC).

The civil servant interviewed from the Commission also pointed out that in the Directive there are clauses related to innovation that can enable more social procurement. These clauses tend to favour innovative solutions focusing on organization and processes, and social innovation, not so much technological innovation. However, these provisions are little known (interview with DG GROW). See Section 2.1 on innovation partnerships.

Finally, this section briefly summarises the findings arising from the 71 good practice cases about the use of the different instruments (EASME, European Commission, 2020, pp. 6–9).

- SRPP considerations in the cleaning sector typically include requirements for good working conditions (including occupational health and safety, gender equality, and measures to promote work–life balance), award criteria and contract performance clauses which promote job creation and training, plus reserved lots for social enterprises.
- SRPP considerations in the construction sector are typically focused on working conditions and the creation of employment opportunities for target groups. Examples can also be found about the use of quality labels to ensure socially responsible sourcing of construction materials, to prevent serious human and labour rights violations in the mining and processing of natural stone.
- In the food and catering sectors, the use of reserved contracts is common, with the goal of supporting social enterprises and the employment of people with disabilities or other groups with barriers to labour market participation. In addition, the fair sourcing of commodities with global supply chains (including coffee, tea, sugar, chocolate and bananas) was discussed in several case studies.
- Reserved contracts are also commonly used in procurement for gardening services.
- Furniture procurement case studies regarded the use of accessibility requirements in technical specifications.
- The case studies in the healthcare sector focused on making public contract opportunities more accessible to non-profit operators, in recognition of the additional societal value such operators provide, and attention to the production process (including employee rights, working conditions and health impacts) in the purchase of material such as protective gloves.
- Procurement of information, communication and technology (ICT) equipment has the particular challenge of long, complex supply chains, which is a challenge for contracting authorities and suppliers alike when trying to ensure compliance and verification. Case studies show that a suite of measures exist, including codes of conduct, technical specifications, award criteria and contract performance clauses, all of which aim to increase transparency, and establish due diligence as a standard practice. One case study pertained to web accessibility for all citizens.
- Examples of textile procurement consider different approaches to increasing compliance with ILO conventions in the textile supply chain, including selection criteria, award criteria and contract performance clauses, and focus on job creation conditions, either as part of a supply contract or a contract for the collection of textile waste.



### 1.3. Main challenges of socially responsible public procurement

This section provides an overview of EU level stakeholder and expert views of the main challenges faced in the use of SRPP. Legal uncertainty was identified mainly in two areas, in relation to (a) the mandatory horizontal social clause, in particular when it comes to the obligations set out by collective agreements, and (b) in the use of social criteria across the public procurement cycle, namely in the so-called link between those criteria and the subject matter of the contract. Moreover, the implementation of the provisions of the Directive on the light regime for social services and those aimed at fostering the participation of social economy enterprises in procurement has presented various difficulties and their concrete effect remains unclear for a number of Member States (interview with SSE).

#### 1.3.1. The application of the mandatory horizontal social clause

Most EU-level stakeholders share the opinion that the **impact of the mandatory horizontal social clause has been more limited than what was expected** (interviews with the legal expert, ETUC, EPSU, UNI-Europa and SSE). The different stakeholders gave varying reasons.

One main reason for this limited impact was seen as the lack of clarity about which authority should enforce this provision. Article 18(2) of the Directive provides that 'Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with' mandatory legislation. Thus, the Directive assigns the responsibility to Member States. Transposition laws often passed this responsibility to contracting authorities, which often delegate it to other authorities (e.g. employment agencies, labour inspectorates). The horizontal social clause applies to anyone who is employed in a public contract, regardless of their role. Some contracting authorities are checking compliance with mandatory legislation in the whole supply chain. In the opinion of the legal expert, it is unrealistic to expect all contracting authorities to have the capacity to do this (interview with the legal expert). Furthermore, two interviewees highlighted that there is an inconsistency between the mandatory character of the horizontal social clause and the fact that the exclusion of an economic operator which does not apply social, labour and environmental legislation, is discretionary (interviews with the legal expert, UNI-Europa and EPSU). Clarifications are also needed in countries where collective bargaining is regionalised, as jurisprudence from the Court of Justice of the European Union (CJEU) seems relatively unclear on this point and only makes it possible to draw clear conclusions where specific legislation exists at the national level (interview with SSE).

Another reason that was highlighted is that the sentence 'Member States shall take appropriate measures' is vague, because it is not sure what could be considered an 'appropriate measure' (interview with ETUC). This might explain why this provision was not transposed in a clear way or fully in line with the wording of the Directive in some Member States (interview with EPSU – see Section 3.1).

The horizontal social clause lays down mandatory compliance with legislation that everybody should always apply (interviews with ETUC, UNI-Europa and EPSU). Trade union representatives stress that it is necessary to do more to implement and enforce this provision in supply chains and subcontracting, and link it with due diligence requirements. If an economic operator is not able to show that it is complying with labour law and collective agreements, it should not be allowed to participate in tendering by applying exclusion grounds and relevant selection criteria. The horizontal social clause is not enough. For example, ILO Convention 94 (Labour Clauses in Public Contracts Convention), which stipulates that tenders may not apply less favourable conditions of employment than those in force at the local level<sup>20</sup>, is not explicitly mentioned in the Directive. Compliance with ILO Convention 94 could

<sup>20</sup> ILO Convention 94 is ratified by 59 countries among them several EU Member States: Austria (1951), Denmark (1955), France (1951), Finland (1951), Belgium (1952), Spain (1971), Italy (1952), the Netherlands (1952) and Cyprus (1960).

be included in the award criteria. Trade unions would like for public procurement to become an instrument, not just to ensure compliance with mandatory legislation and collective agreements, but also to advance good working conditions and promote quality work (interviews with EPSU and with ETUC).

Moreover, trade union representatives stressed that Article 18(2) does not give enough legal certainty about how to ensure compliance with the applicable obligations established by collective agreements. Moreover, the application of this provision in relation to collective bargaining and collective agreements has to take into account the collective bargaining systems that are used in the different Member States.

Jurisprudence has clarified that the horizontal social clause applies even when a contracting authority awards a contract on the basis of the cheapest price. Furthermore, if there is a universally or otherwise applicable collective agreement in a sector, it applies and should be respected and enforced. The issue is when there is no applicable collective agreement, but a contracting authority would like to require economic operators to engage in collective bargaining and to apply collectively bargained labour standards. This is where the Directive offers less legal clarity, which as a consequence may have a chilling effect on contracting authorities wishing to promote collective bargaining under public contracts (interview with ETUC).

Clearly, the definition of what is an applicable collective agreement cannot be limited to collective agreements that are declared universally applicable, but rather the question of applicability largely depends on national law and practice, whereby due regard needs to be given to the specificities of national labour market models and industrial relations systems. As illustrated by the 2018/957 Posting of Workers Directive, the definition of applicable collective agreements covers not only those declared universally applicable, but in the absence of, or in addition to such agreements, also those 'generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned', and/or those 'concluded by the most representative employers' and labour organisations'<sup>21</sup>.

ILO Convention 94 has a very clear hierarchy. Any EU legislation should respect the Posting of Workers Directive and ILO Convention 94 (interview with UNI-Europa).

The interviewee from UNI-Europa gave some examples. In the Member States, like Sweden, where collective agreements are negotiated at the sectoral level, the horizontal social clause applies only to those companies that have signed or are otherwise bound by<sup>22</sup> the agreements in question. In the Member States where sectoral agreements have been extended and given the force of law, such as Austria, Belgium and France, all collective agreements fall under the scope of Article 18(2). In other countries, like Germany, sectoral collective agreements can be extended, but this is not done in all cases. However, in Germany, collective agreements cover a considerable number of sectors. For example, in Sweden, it is not legally possible to extend collective agreements to entire sectors or to give them the force of law. In other words, the question of what is to be considered an applicable collective agreement is largely dependent on the laws and practices of each Member State, in particular

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<sup>21</sup> Article 3.8 (as revised) of Directive 2018/957 on the Posting of Workers provides: 'In the absence of, or in addition to, a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

- collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or
- collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory.'

<sup>22</sup> For example, if they are a member of the employers' association or industry federation which has signed the collective agreement in question with the relevant trade union in the sector.

with regard to their national labour market model and industrial relations system (interview with UNI-Europa).

When, in a tendering procedure, a contracting authority requires the application of a sectoral collective agreement, if an economic operator counter argues that it has not signed that agreement, it is not clear from the Directive and the transposition laws in what ways this operator can be required to comply with it. Trade union representatives believe that, over the years, businesses, employers, some lawyers and even the European Commission have considered or attempted to establish the application of non-universal collective agreements as a possible source of discrimination and unfair competition among economic operators. Employers usually consider that favouring a company with a collective agreement in public procurement or applying a sectoral collective agreement creates competitive disadvantages, which goes against the freedom to contract, or that it disproportionately affects SMEs. The interviewee believes that the purpose of collective agreements is, on the contrary, to create a level playing field among economic operators in a given sector and to avoid unfair competition on labour costs (interview with UNI-Europa). The opposite view was shared by the representatives of BusinessEurope consulted. In their view, creating certain conditionalities for companies to access public procurement markets, such as limiting participation in tendering procedures to companies that engage in collective bargaining, contradicts the principle that access to public procurement should be open to all companies. Putting these conditionalities in place means going against the key principle of industrial relations that is founded on voluntary organisations taking part in collective bargaining, when they want to do so. EU legislators should stay away from this and respect the autonomy of social partners (interview with BusinessEurope).

However, according to the trade unions consulted, the public procurement Directives have thresholds that need to be applied and SMEs usually participate in tenders below the thresholds. In their view, respect for collective agreements should never be seen as an anti-discriminatory measure. They consider public procurement crucial to steer the whole economy towards responsible production, consumption and sustainable development (interviews with ETUC, UNI-Europa and EPSU).

One interviewee suggested that the Directive on public procurement should take inspiration from legislation on cartels, which recognises that collective agreements cannot be seen as a discriminatory measure<sup>23</sup>. It is generally agreed that that collective bargaining pursues legitimate objectives in the public interest and should therefore not be seen as breaching competition law. Similarly, EU legislation on public procurement could be interpreted to mean that respect for a sectoral collective agreement is a legitimate objective in the public interest and cannot therefore be seen as a discriminatory measure. If procurement legislation does not ensure the respect of collective agreements, especially in the highly labour-intensive service sectors, such as cleaning and security where the focus is on labour costs, the risk is that it will always be the companies that undercut other companies by paying workers less that will win the contracts (interview with UNI-Europa).

Legal uncertainty is considered to be mainly about the use of collective agreements that are not generally applicable (i.e. extended) as part of selection criteria, award criteria and contract performance clauses, and depends on the collective bargaining system in place. In countries with multi-employer agreements that are not always or never made generally applicable (extended), respect for the wages and working conditions set in such an agreement could or should be part of the **selection criteria**. A company that undercuts the market by not paying collectively agreed wages would therefore be

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<sup>23</sup> Schömann, I., Collective bargaining and the limits of competition law, ETUI Policy Brief 2022.01, Available at: [https://www.etui.org/sites/default/files/2022-02/Collective%20bargaining%20and%20the%20limits%20of%20competition%20law\\_2022.pdf](https://www.etui.org/sites/default/files/2022-02/Collective%20bargaining%20and%20the%20limits%20of%20competition%20law_2022.pdf).

excluded from the tender, ensuring the level-playing field. In countries with mostly single-employer bargaining, collective bargaining should be strengthened and ensured through its inclusion in the **award criteria**. As companies with a company-level collective agreement are more likely to have higher salaries than those without agreements, they are more likely to be penalised in procurement, if tenders are awarded only on the basis of price or cost. In such a situation, award criteria should be used to re-establish a level playing field again by rewarding companies that have company-level agreements with more award points. However, in Malta, which has a system of single employer bargaining, contracting authorities that gave extra points as award criteria to companies with company-level collective agreements have constantly been involved in lawsuits (interview with UNI-Europa).

It was also observed that in the 'Buying Social' guide, the Commission is treating Article 18(2) in an unclear way, causing confusion between 'what must be' with 'what would be nice to have'. The guide does not offer clear guidance on where and how contracting authorities could go beyond what is mandatory, while at the same time giving the impression that already complying with the bare minimum under the horizontal social clause would qualify as SRPP. The only time when collective agreements are mentioned in the guide is in relation to the horizontal social clause, but there is no example of collective agreements having been used as part of selection or award criteria. It is a minimum requirement for contracting authorities to ensure compliance with the horizontal social clause as part of each and every public contract, but to fully implement SRPP, contracting authorities have to be much more ambitious (interview with ETUC).

At institutional level, the interviewee from the European Commission believes that the horizontal social clause makes it possible to ensure that labour rights, collective bargaining and relevant collective agreements are respected and promoted. What should be done is to update the annex of the Directive that lists the ILO Conventions to which the horizontal social clause refers to. This is something that can be done through comitology, without changing the Directive (interview with DG GROW).

Stakeholders' views were varied on the interplay between the public procurement Directive and the recently adopted **Directive on adequate minimum wages**. There is general consensus among interviewees that the inclusion of provisions on public procurement in sectoral EU legislation, such as the minimum wages Directive, can be useful, although it is unsure if this will have a significant positive social impact. It was also argued that what has been provided for in the Directive on adequate minimum wages does not add anything compared to the provisions of the current public procurement Directive (interviews with EPSU and BusinessEurope; written contribution from DG EMPL). The main framework for public procurement in the EU is the 2014 Directive. Freedom of association is mentioned in Article 9 of the minimum wage Directive. It is important to have freedom on both sides, employers like workers are also free to decide whether to engage in collective bargaining (interview with BusinessEurope).

Overall, the Directive on minimum wages is considered, by all the social partners' representatives who were consulted, to be a step in the right direction (interviews with BusinessEurope, ETUC, UNI-Europa, and EPSU). It provides clarification on subcontracting and the opportunity for Member States during the transposition to look at their procurement legislation, in order to make it more social. However, it does not solve the issues of legal uncertainty described above. Much will depend on how the Directive is transposed and the work that is done in the working group set up for its transposition (interview with UNI-Europa). The setting up of a working group in which Commission and Member States representatives convene with the social partners is considered a very positive initiative, as usually social partners and other stakeholders do not take part officially in the work dealing with the transposition of EU Directives. During these meetings, the ETUC has suggested that the Commission recommends to the Member States to put in place monitoring and data collection systems to monitor the

implementation of the provision on public procurement. In the social field, it is not so easy to quantify information about social obligations relating to decent work, gender equality, equal pay, the use and effectiveness of social dialogue and supply chain liability. The more qualitative the criteria are, the more difficult is to collect information on them, although this does not mean that such criteria would be any less important (interview with ETUC). The fact that both employers' associations and trade unions are associated in the transposition of the Directive on minimum wages was highly appreciated also by a BusinessEurope's representative, who pointed out that this is not a novelty. In fact, in the last ten years, for all DG EMPL directives which have Article 153 TFEU as a legal basis, the Commission set up working groups for the transposition of such legislation, in which representatives of social partners participate alongside Member States representatives. Moreover, the same interviewee drew attention to the fact that in the minimum wage Directive the figure of 80 % as collective bargaining coverage is not a target. The discussions in the Council have been carefully calibrated on this point. 80 % is a number that is not binding on Member States to reach by a certain time. What is crucial is how the Member States will prepare their reports on how to progress on collective bargaining coverage and the commitment of each Member State concerning this. It is important that Member States agree as much as possible, with both employers and trade unions, in a tripartite way, about the ways forward to make progress on collective bargaining coverage (interview with BusinessEurope).

### 1.3.2. Use of social considerations throughout the procurement cycle

Difficulties in the application of the Directive are also related to the existence of some **open legal questions about the use of certain social criteria in award criteria and in technical specifications**, and in particular their so-called '**link with the subject matter** of the contract' (interviews with EPSU, UNI-Europa, ETUC and ICLEI). On this point, it was observed that the link with the subject matter is generally interpreted in a very restricted way, which makes the inclusion of any social or environmental considerations extremely technical and difficult to implement in practice (interview with UNI-Europa). Such a narrow understanding of the link to the subject matter makes it difficult for contracting authorities to define social and sustainability criteria in tender documents, and consequently to assess bids based on those criteria, due to a lack of appropriate assessment tools. To stimulate more SRPP, **the starting point should rather be that working conditions are considered as inherently and by default linked to the subject matter, regardless of the goods, services or works in question**. Such a purposeful approach to the subject matter would also facilitate the use of collective agreements as award criteria and quality indicator in terms of social sustainability (interview with ETUC). **The abundant case law on green procurement, including on invisible aspects of products, could serve to support the increased use of social criteria**. One interviewee felt it would be very useful to have some case law in the social field to bring better clarity, including cases specifically brought by contracting authorities and suppliers to ensure legal certainty (interview with ICLEI).

Similarly, it was noticed that the Directive does not explicitly stipulate that contracting authorities can use social criteria, such as working time, accessibility and quality of the goods, works and services that are purchased. From a social perspective, quality can also derive from requiring bidders to show previous experience in similar contracts with a social component and from requesting specific qualification of staff in relation to the social aspects of contracts. During COVID-19, it was common to see care workers with part-time contracts, sometimes with no access to social security, working in different elderly homes, which was also a health and safety risk for them and for the clients. Trade unions would also like to use public procurement to promote stability of employment (see section 3.2.3 describing how the Italian legislator is pursuing this objective in labour-intensive sectors – in particular, Article 50 of the 2023 Public Contracts Code). Although the Directive applies to Member States and not to contractors, in a future reform of the Directive the European Commission could put more obligations



on contractors in terms of due diligence. Due diligence includes respect of obligations arising from social and environmental legislation (interview with EPSU).

Finally, it has been observed that SMEs have difficulties in fulfilling all requirements set in tenders, and they have to learn how to do it. To develop such a capacity, they need to constantly participate in public procurement, because if they participate only once, they won't succeed and won't develop their capacity (interview with SMEUnited).

### 1.3.3. Use of the light regime for social services

There is consensus among EU-level stakeholders that there is a lack of data to assess what could have been the impact of the **light regime for social services**<sup>24</sup> on the ground (see section 2.1). It was highlighted that the limitation of three years set for reserved contracts in the field of social services is not appropriate. If a contracting authority wants to work with a social enterprise, three years is not enough to deliver high-quality social services (interviews with the legal expert, SSE and EPSU). Some public authorities are afraid to apply this provision. It would be useful to make a survey to understand to what extent this provision has been used and the reasons for its limited use (interviews with the legal expert and SSE).

In the past, many public authorities used grants to finance certain activities (e.g. homelessness, drug addiction treatment services). In the last decades, there has been much case law from the European Court of Justice stating that the contract in question was a public contract and not a (public-private) partnership. The effect of this jurisprudence is that public procurement has expanded and has become the norm in the provision of social services. This has had a negative impact on the relations between public authorities and social enterprises or charities, which were obliged to submit a tender for services that previously were funded with a grant. Clear guidance from the Commission on what is a grant and what must be procured is lacking (interview with the legal expert). Moreover, it was argued that these services should be provided in a way that ensures affordability and quality. If they are delivered on the basis of competition, competition should be fair and be based on value for money. Competition should be considered as a means and not as an end, and it should never be used to decrease the quality of working conditions and of employment. Fostering competition on social services can be detrimental, as it can undermine the quality and stability of service provision, especially if it is not well regulated (interviews with EPSU and SSE).

Furthermore, there is no evidence that procedures other than the ordinary procedures – concretely, competitive procedure with negotiation, competitive dialogue and innovation partnerships – have been used to award social services. The impression is that procurers and social service providers are either not aware of these other procedures or that they simply are not an appropriate alternative tool in the social services sector, given the specificities of the service organisation, delivery and funding. From this, it can be deduced that contracts for social services are awarded on the basis of the ordinary procedure either opting for the lowest price or for MEAT (interview with SSE).

### 1.3.4. Participation of social economy enterprises in public procurement

Has the Directive helped boost the **participation of social economy enterprises (SEEs) in public procurement**? A necessary precondition identified is the existence of a legal framework on the social economy and the not-for-profit sector which recognises in law their specific characteristics and the advantages of not-for-profit services provision, such as in Norway or Spain and in the recent EFTA Court

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<sup>24</sup> The light regime (Articles 74–77 of Directive 2014/24/EU) is a particular procurement regime dedicated to public contracts for social and other specific services when they are equal to or greater than EUR 750,000.

Advisory Opinion<sup>25</sup>. Legal frameworks must be coupled with a good awareness and understanding by the public administration of the social economy and the not-for-profit sector, of how they function and their values and service mission. The starting point should be acknowledging the specific characteristics of these economic actors, by taking into account their social mission and the reinvestment constraint, which are two of their specific features recognised in the Social Business Initiative (European Commission, 2011), the Social Economy Action Plan (European Commission, 2021e) and in the Council Recommendation on developing social economy framework conditions (European Commission, 2023). If there is no legal framework governing these aspects, the application of the light regime or of reserved contracts happens on a case-by-case manner and not in a systematic way (interview with SSE).

It was highlighted that the lack of a commonly agreed EU definition of social enterprise is an issue (interview with EPSU) and that the definition of a social enterprise contained in Article 77 is unclear, although the recent EFTA Court Advisory Opinion is a positive development as it brings clarity (interviews with ETUC and SSE). It was also mentioned that the concept of 'reasonable profit' used in state aid legislation is a better concept than not-for-profit, because provision of services is an economic activity in which money is involved. This concept could be used in public procurement too. Moreover, the concept of 'disadvantaged worker' is not defined in the Directive, although there are different definitions in different pieces of EU legislation. Specific attention should be paid to not label certain groups as vulnerable or to 'institutionalise' vulnerable groups as, for example, a migrant or an unemployed person could be vulnerable only for some time in their life (interview with EPSU).

These considerations closely align to the relevant findings of the literature review. The Buying for Social Impact (BSI) project highlighted that SRPP is easier to implement in countries where legal frameworks or legal forms for social enterprises are in place. The project also identified five challenges that hinder the uptake of social clauses in public procurement:

- Variations in the transposition of the EU Directive into national law.
- Lack of knowledge of the Directive among public authorities responsible for awarding contracts.
- Difficulty implementing the social aspects of the EU Directive.
- An underdeveloped social economy ecosystem.
- Lack of public sector awareness of social economy enterprises (EASME, European Commission, 2019a, p. 4).

According to the Social Business Initiative (SBI) follow-up study, despite improvements achieved with the transposition of the 2014 Directive into national law in all Member States, new national legislation has not yet provided benefits for social economy enterprises (SEEs). The study identifies the following main obstacles to implementing SRPP: inadequate national or regional legislation (sometimes adding unnecessary additional requirements); lack of knowledge and capacity among public procurement officers or decision-makers; lack of understanding; and fear or uncertainty that would lead to unfavourable audits or control checks. Among the interviewees, 13 % observed the need to improve SEE managerial skills and competences, especially for cooperation with public authorities and including for public procurement. The study also underlined the political will of politicians and policymakers to implement SRPP, and their ability to engage with public administrations and to

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<sup>25</sup> Advisory Opinion of the EFTA Court rendered on 28 March 2023 concerning Case E-4/22 Stendi AS & Norlandia Care Norge AS v Oslo commune, Available at: <https://eftacourt.int/cases/e-4-22/>.

establish a dialogue with stakeholders on the ground who share the same objectives (Haarich et al. 2020, pp. 152–196).

Other studies also confirm that the use of social clauses in procurement is still far from being fully leveraged by contracting authorities due to various reasons, including the persistent low level of recognition and visibility of SEEs, lack of understanding of their specific characteristics and lack of political will, technical capacities and experience (Vamesu et al. 2021).

'The last set of challenges relates to SEEs' own skills and capacities. They often find procurement processes too complex and overwhelming, and they lack the knowledge, capacity or time to participate in the process or draw up a bid. While expert support and consultants may be ready to help, SEEs often cannot afford to pay for them. In some cases, SEEs are simply not aware of their rights to participate in procurement tenders or are not aware of their publication. They also often lack the skills, methods and capacity to measure their social impact, and cannot clearly communicate it in tenders. Financial and human resource capacity constraints may also prevent them from winning larger public sector contracts' (Varga, E., 2021). SEEs are often also small in size (in terms of the number of employees, turnover, financial capacity and financial reserves) which makes all the above-mentioned challenges relevant for and applicable to them.

Moreover, the Social Economy Action Plan (SEAP) highlights that, despite some local and regional authorities having realised the power of strategic public procurement to meet societal challenges, most public tenders are still awarded based only on the price criterion and SRPP is still far less known than green public procurement. In the Staff Working Document accompanying the SEAP, the Commission shares stakeholder analysis that SRPP is not sufficiently promoted within the EU and anticipates that further encouraging its development will be one of the priorities of the Action Plan (European Commission, 2021e and 2021f).

The stakeholders highlighted specific challenges in the preparation of the Action Plan: (a) 'social economy entities do not know how to identify and successfully bid for public tenders'; (b) 'most procurement officials do not have the necessary skills and background knowledge to prepare tenders that are accessible to social economy actors'; and (c) 'Member States and public authorities are not sufficiently aware of the significant opportunities Directive 2014/24/EU on public procurement can generate for Work Integration Social Enterprises (WISEs)' (European Commission, 2021f, p. 30).

Finally, the recently adopted Commission' proposal for a Council recommendation on developing social economy framework conditions (European Commission, 2023) points out that 'most tenders are still awarded solely on the basis of price. Since social economy entities aim to provide societal and collective benefits rather than to provide services at the lowest price, they struggle to compete in regular public procurement processes, despite the fact that they can provide broader added value to the procurement process. There is also room to increase the capacity of social economy entities to do business, including through more systematic integration into mainstream business value chains and partnering with them to bid jointly for public procurement and create new market opportunities.' To this purpose, the proposal for a Council recommendation puts forward very useful recommendations in three directions:

- It proposes the adoption of different policy initiatives, including policy guidance and procurement strategies with targets to be reached and designed by means of a structured, transparent and non-discriminatory dialogue with the social economy, awareness raising actions on SRPP, and encouragement to contracting authorities to refer in tender documents to specific obligations under social and labour law and collective agreements that apply to procurement.



- It recalls the instruments included in the 2014 Directive that can be used to facilitate the participation of SEEs in tendering procedures (pre-market consultations, setting proportionate and inclusive selection criteria that are accessible to small businesses including SEEs, reserved contracts, use of social considerations in award criteria and contract performance conditions, division of the contract into lots, and use of certain labels).
- It makes proposals to 'foster cooperation between social economy entities and mainstream businesses, in particular by: (a) raising awareness about social added value by promoting best practices that encourage mainstream businesses to involve social enterprises in their long-term supply and value chains and consumers to buy goods and/or services produced by social economy entities'; (b) stepping up the 'provision of mentoring, matchmaking, and facilitation services to help social economy entities develop long-term partnerships with the wider business community'; (c) 'promote and support work integration social enterprise employees in working with mainstream businesses to gain experience on the open labour market;' (d) 'helping social economy entities and entrepreneurs to make the best use of new technologies to access private markets through social economy-driven online platforms, collaborative spaces and the digital commons'.

#### **1.4. Views of national stakeholders on opportunities for SRPP and challenges in implementation**

This section gives an overview of the opinions on opportunities for SRPP and challenges in implementation, of the experts and stakeholders that were interviewed in the Member States covered by this study.

##### *Belgium*

Five interviews were conducted in Belgium: with three experts from the Walloon Public Service [Service Public de Wallonie (SPW)], with one expert each from the social services [Centre Public d'Action Sociale (CPAS)] of the Municipality of Auderghem (one of the 19 Municipalities of the Brussels Capital Region), the Federal Institute for Sustainable Development, the Flemish Employment and Vocational Training Service (VDAB, the Public Employment Service of Flanders), and with a former trade unionist from the Fédération Générale du Travail de Belgique (FGTB).

When asked about the main mechanisms and provisions by which public procurement can have a social impact, the stakeholders interviewed in Belgium answered that Belgian law transposed the 2014 European directives very faithfully. However, the implementation landscape varies from one region to another, from one level of government to another, and from one sector of activity to another. The social clause as a contract performance condition is most widely used in Wallonia and the Brussels-Capital Region for all works contracts (interviews with the experts of SPW, and of CPAS from Auderghem). The cross-cutting horizontal social clause is regularly included in the specifications for cleaning and construction contracts (SPW experts and trade union expert). Reserved contracts used for smaller contracts, such as for catering services and maintenance of green spaces (CPAS Auderghem). Social considerations in award criteria are used much less frequently, because evaluation methods are contested, particularly when the criterion is qualitative.

It is regrettable that the federal legislator has not defined the notion of 'disadvantaged worker' or the notion of 'economic operators whose main aim is the social and professional integration...'. The Regions partially compensate for these gaps in the federal framework and have each taken various and sometimes different initiatives. Some, moreover, are inspired by initiatives in neighbouring regions: e.g. Wallonia is considering the adoption of the contract performance condition of integration

contracts used by the Brussels Capital-Region (SPW experts). Generally speaking, the social clauses aim to promote the training and employment of persons with disabilities, and people who are far from employment (disadvantaged people). Few social considerations are used on a large scale with the strategic objective of promoting the inclusion of vulnerable groups, such as gender clauses, clauses aimed at new arrivals, etc. Vulnerable groups and local specificities need to be taken into account (Auderghem CPAS). The lowest bidder model is in contradiction with a strategy of social consideration (VDAB expert). In terms of limitations of the social clauses, several experts pointed to a real need for including in the tender requirements provisions on monitoring and inspection, to guarantee the correct implementation of social considerations. Such monitoring is rare in supply and service contracts (interview with the Federal Institute for Sustainable Development).

Concerning the horizontal social clause, the trade union expert emphasised the useful contribution of a European sectoral guide and regional guides on cleaning contracts that encourage abandoning the price criterion as the sole award criterion, so as to open up public contracts to various social dimensions (working hours, task safety analysis, continuous training of workers, etc.), while considering the agreements of joint committees on hourly prices negotiated between the social partners. This approach could be replicated by other sectors at European level. Disputes concerning dumping are very often brought to light during the performance of the contract. The employer is co-responsible, but lacks the skills and control tools. A support body should be set up systematically, and the social inspection staff should be increased and supported (interview with trade union expert).

Finally, one expert argued that the tools for supporting the social economy through procurement exist in Belgium, but the problem is defining the social economy and extending this definition to economic operators that are genuinely part of the economic transition (CPAS Auderghem).

When asked about what should be changed, a suggestion made by the expert from the Auderghem CPAS is to allow a specific weighting in the award criteria for social and solidarity-based enterprises.

### *Czechia*

A total of six interviews were held with the Ministry for Regional Development, representatives of two NGOs (TESSEA, and People, Planet, Profit - P3), a representative from a trade union (OSSS), and procurers from two contracting authorities (Railway Infrastructure Administration and Charles University). TESSEA covers more than 70 social enterprises and social economy supporters from all over the Czech Republic and it contributes to strengthening the social entrepreneurship sector in the country. P3 is an NGO focusing on the development of the social economy in the Czech Republic.

Looking at the main instruments of the Directive for achieving social impact, the representative interviewed from the Ministry for Regional Development believes that award criteria, contract performance conditions and exclusion grounds are considered to be the most used. Reserved contracts or qualification of the bidder appear to be less frequently used. The provisions relevant for SRPP were transposed almost completely in Czech legislation, except for the horizontal social clause and reserved contracts for social, health and other similar services, under Article 77 of the Directive. The opportunities for SRPP are available, relatively well known, and the list of possibilities seems to be sufficient. In general, the current status of procurement regulation allows the contracting authorities to use social criteria. However, trade unions and public procurement represent two silos, which do not interact very often (interview with a representative of the Ministry for Regional Development).

The representatives from the social economy confirmed that reserved contracts are not being used very frequently. Awarding on the basis of the lowest bid price only criterion is considered a barrier, especially for the participation of SEEs in procurement. The possibility to update the remuneration of the personnel included in long-term tenders (for instance of 4 years) is rarely included in tender

documents, which makes it hard for SEEs to participate in those tenders due to high levels of uncertainty (TESSEA and P3).

According to the trade union representative, contract performance conditions, qualification of bidders and award criteria are the main instruments used. It should be possible to use criteria with regard to gender pay gap or social dialogue under the current legal framework, as barriers to their use are not in the law itself. It is possible to use both, either as mandatory minimum or as award criteria. When it comes to restricting participation in tenders to economic operators respecting existing collective agreements, rules seem to be unclear. Use of 'Logib'<sup>26</sup> to assess the gender pay gap on the bidder's side - which was mentioned by the Ministry of Labour and Social Affairs in the National Equality Strategy - seems to be limited by the 'link to the subject matter' principle of public procurement law. Opening a discussion between procurers and trade unions on the national level might bring new insights and discussions regarding further developments on the promotion of collective bargaining through procurement (interview with OSSS).

The contracting authorities interviewed consider award criteria, contract clauses (for instance 'no agency employment' clause), and the provision on abnormally low bids the main instruments that can produce social impact (Railway Infrastructure Administration and Charles University). One interviewee added that, although there is the possibility to exclude a bidder with an abnormally low tender, he is not aware of many practical examples. Of course, some general declaration of commitment to social standards might be used in procurement practice, but they might not produce real benefits. They recently used an employment clause in one of their tenders. There is no actual barrier to the use of any of those instruments, it simply depends on the willingness of the contracting authority to invest efforts and energy (Charles University).

The mandatory social clause has not been transposed into national legislation in a proper way, apart from on exclusion grounds (Ministry for Regional Development and Charles University). There has been a principle on sustainable public procurement introduced in the law quite recently (see Section 3.2.2), but it is not really in compliance with Article 18(2) of the Directive. Some concerns were expressed about the practical implications and the feasibility of its goals and instruments in real life. Without a sufficiently developed national system, for instance, such requirements might represent too much of a burden for the contracting authority to effectively bear (Charles University). Although it is not easy to prove a breach of rules by the bidder, at least the Ministry of Labour and Social Affairs managed to exclude one bidder from a tender who was ready to violate employees' rights (Ministry for Regional Development).

Most interviewees believe that the existing provisions make it possible to both promote the inclusion of vulnerable groups and to help boost the participation of social economy enterprises in public procurement, but they are little used (Ministry for Regional Development, Railway Administration, Charles University, TESSEA, P3). A law on social enterprises is lacking in the Czech Republic, so the contracting authorities who want to support SEEs have to create their own definition or rely on other available definitions of SEEs (TESSEA and P3). It is also felt that contracting authorities often lack interest in using social enterprises (or social clauses in general) in procurement (Railway Administration). One reason might be that the level of unemployment in the Czech Republic is rather low, therefore contracting authorities do not feel the need to use their purchasing power to integrate unemployed people. Previously, some contracting authorities in remote locations with higher unemployment rates have tried to include employment clauses in their social-inclusion strategies, and the Government

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<sup>26</sup> European Commission webpage: Tools and action for more gender equality, Available at: [https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/equal-pay/tools-and-actions-more-gender-equality\\_en](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/equal-pay/tools-and-actions-more-gender-equality_en).

Agency for Social Inclusion offered to help with that (Ministry for Regional Development). Yet, the level of maturity of the social economy market and their willingness to participate in procurement procedures are low, because there is a mismatch between what they produce and the demands of contracting authorities. Besides the reserved contracts, SEEs might not be able to compete for the lowest bid price only (Ministry for Regional Development). This situation might change in the future, as there is a piece of legislation pending, which should regulate social enterprises and also cover reserved contracts (Gromnica, 2023).

Analysing the legal difficulties or barriers that have been encountered in the implementation of SRPP, an interviewee mentioned GDPR issues when trying to promote employment clauses, and the lack of definition of social enterprise and reserved contracts (Railway Administration and Charles University).

One interviewee reported that in her previous job at the Ministry of Labour and Social Affairs, they encountered fraud regarding engagement of social enterprises in tenders (on the side of the bidder, who was not a social enterprise) and also mistreatment of employees. In the past there have been severe problems with reserved contracts in the Czech Republic (even under the former Directive).

The law focuses on reserving the contract in the award-phase. There is no guarantee that the subject matter of the contract will be effectively carried out by the social enterprise (and therefore people with disabilities will actually benefit from this reserved contract through having an actual job opportunity). For instance, one social enterprise, which used to be quite successful in various tenders, created a bad reputation for the instrument in the procurement community. On the other hand, current decisions of the Czech Office for the Protection of Competition (ÚOHS) are generally in favour of the principles, but they sometimes criticize the actual application of social criteria in tenders (Ministry for Regional Development).

More generally, some of the limitations in the use of SRPP might be attributed to a lack of taking responsibility for general well-being by contracting authorities, with the common assumption that it is the government's (not the economic operator's, nor the contracting authority's) responsibility to deal with labour conditions or employment opportunities, while procurement has to deliver what is needed for the organisation (Railway Administration).

There are issues and challenges with SRPP, which have a lot to do with the fact that contracting authorities need to have strategies, skills, time and instruments to actually pursue social aspects in tenders and contracts. For social aspects, contracting authorities have to make an extra effort, must collect data, and sometimes even deal with GDPR. Many of those issues will be dealt with in the currently prepared National Strategy on Public Procurement, which should be adopted by 2024 (Ministry for Regional Development).

To conclude, the stakeholders interviewed believe that the framework is in place, but the willingness of contracting authorities to use SRPP should be encouraged with soft instruments (rather than imposing it by law). Soft instruments might include capacity building and market engagement (Ministry for Regional Development, TESSEA and P3), creating an ecosystem that is favourable for SEEs to take part in tenders (TESSEA and P3), provision of guidance, professionalisation in SRPP, focusing on management of quality (Railway Administration), professionalisation on both sides (contracting authorities, as well as bidders), available templates to apply certain provisions or instruments, where applicable, as well as creating and maintaining networks of experts who share their experience and learn from each other (Charles University).

*Italy*

Three interviews were carried out in Italy: with experts from Invitalia (the National Agency for Inward Investment and Economic Development, owned by the Italian Ministry of Economy), with the Central Purchasing Body from Lazio Region and a representative from the European Network of Cities and Regions for the Social Economy (REVES), who contributed in relation to Italy.

When asked their opinion on the main mechanisms/provisions by which public procurement can have social impact, the Italian stakeholders who were interviewed gave a positive assessment overall of the instruments included in the Directive. One interviewee believes that all the mechanisms/provisions relevant for SRPP can have a high social impact, if it is actually possible for the contracting authority to verify their due application by the contractor in a speedy and efficient manner. In Italian legislation, social criteria relate both to the award phase, as requirements for participation in tendering procedures, and to the contract execution phase, as performance requirements, which do not lead to exclusion from the tender. Though, if they are not met, they lead to the application of penalties and/or contract termination or, in a specific case, even to the exclusion of the economic operator for one year from future tendering procedures. Furthermore, they can be used as award criteria (interview with Invitalia).

Along the same lines, another interviewee thinks that the national legislation on public procurement allows for various measures to implement SRPP, ranging from labour safeguard clauses, promotion of fair treatment of workers through the application of collective agreements and regulation of subcontracting, implementation of award criteria related to the possession of gender equality certifications, etc. These measures can impact on different socially relevant aspects, for example: social clauses and rules on subcontracting impact on labour market stability and on fair wages, whereas award criteria impact on the profile of the supplier selected by the contracting authority. In this regard, the contracting authority should be able to implement mechanisms and provisions offered by public procurement regulation so as to fulfil its strategic goals from a social perspective. Nevertheless, the implementation of SRPP should always take into consideration the specific sector and the type of goods/services to be purchased (interview with the Central Purchasing Body of Lazio Region).

According to the representative from REVES, the Directive fits the Italian experience in terms of social considerations and clauses quite well; indeed, it had been transposed almost slavishly. However, different approaches are used across the country. The mandatory social clause is generally considered binding. With respect to the inclusion of social considerations in award and performance criteria, the situation is more fluid, and closely linked to the political will to support this type of approach. There are, however, well-established front-runners in many regions (e.g. Tuscany, Emilia Romagna) and municipalities (e.g. Brescia, Turin) that show a certain familiarity with these tools. Reserved contracts, on the other hand, are an instrument that have been present in Italy for at least three decades (such as the relationship between public administrations and type B social cooperatives<sup>27</sup>), even though over the years their implementation has undergone alternating phases.

The rules then relating to the 'light regime' deserve a completely different discussion. In fact, the so-called 'Code of the Third Sector'<sup>28</sup> introduced the conditions, later confirmed through ministerial

<sup>27</sup> The Social Cooperative is a particular form of Cooperative introduced and regulated by Law 381/1991 and Decree 112/2017 as a Social Enterprise. It qualifies as a particular form of Cooperative Company aimed at pursuing the general interest of the community in the human promotion and social integration of citizens. Social cooperatives are of two types: 1) aimed at carrying out social, sociomedical and educational services, vocational education and training, out-of-school training, job placement (type A); 2) carrying out different activities - agricultural, industrial, commercial or services - aimed at the labour insertion of disadvantaged persons (type B). At least 30% of the workers in type B social cooperatives must be disadvantaged persons.

<sup>28</sup> Legislative Decree 3 July 2017, n. 117, Third Sector Code, pursuant to Article 1, paragraph 2, letter b), of Law no. 6 of 2016 June 106. (17G00128) (OJ General Series n.179 of 02-08-2017 - Ordinary Suppl. n. 43), in Italian 'Decreto legislativo 3 luglio 2017, n. 117, Codice del



guidelines, for the full use of this type of regime in partnerships between public administrations and specific private entities, which are listed in quite a precise manner in the same code. The code also sets out which social services of general interest fall under the scope of application of the light regime. Finally, subcontracting is mainly used as a vehicle to broaden the pool of potential participants in contracts that include social inclusion clauses (interview with REVES).

In relation to the horizontal social clause, both interviewees from Invitalia and the Central Purchasing Body of Lazio Region believe that the Directives on public contracts and concessions have been transposed in line with this provision. In particular, Legislative Decree 36/2023, the so-called 'Code of Public Contracts'<sup>29</sup> provides for some social clauses that include the protection of labour rights, collective bargaining and relevant collective agreements (see Section 3.2.3). This, however, cannot take into account the animated political debate underway, to translate into law the proposal of the opposition parties to the current government to introduce in Italy the minimum wage, i.e. to set a gross hourly remuneration below which the national labour collective agreement cannot fall. In Italy, in fact, the setting of a minimum wage is delegated to collective bargaining, so that the remuneration due for both the minimum contractual wages and the overall economic treatment is the one established by the applicable national collective agreement.

The representative from REVES added that there is no known data on the implementation of the horizontal social clause, but, judging by the number of queries concerning its use and implementation, it would seem to be a rather usual procedure for central procurements. According to well-established case law and sound practice, the horizontal social clause seems to be binding in nature, although the limits of this binding nature are not fully clarified, both in quantitative and, above all, qualitative terms (interview with REVES).

Moreover, the existing provisions make it possible for a partial promotion of vulnerable groups mainly through reserved contracts. Indeed, such promotion could be achieved with a wider system reform that includes social and labour measures. The existing regulation also makes it possible to help boost the participation of SEEs through specific measures, such as reserved contracts and a light regime for social services. However, the participation of SEEs in ordinary procedures is constrained by a lack of specific provisions (interview with the Central Purchasing Body of Lazio Region). Compared to other EU countries, it can be said that the inclusion of vulnerable groups and the participation of SEEs in procurement is quite good. This does not mean that it should be considered satisfactory. Furthermore, it is not easy to discern whether this situation is due to the present legal framework or to a well-established national practice on reserved contracts since the 1980s. Certainly, some elements of clarification concerning some provisions of the Directive have helped to restart or reinvigorate some national policies already in place. For example, the lowering of the percentage of persons with disabilities or disadvantaged workers set out in Article 20 on reserved contracts and the inclusion of the 'light regime' (interview with REVES).

In line with the limitations to the use of SRPP provided by the current EU legal framework as transposed into the Italian legislation, one interviewee highlighted that the inclusion of additional gender equality and social equality criteria is only provided for in relation to reserved contracts (Article 61 of 2023 Public

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Terzo settore, a norma dell'articolo 1, comma 2, lettera b), della legge 6 giugno 2016, n. 106. (17G00128) (GU Serie Generale n.179 del 02-08-2017 - Suppl. Ordinario n. 43)', Available at: <https://www.gazzettaufficiale.it/eli/id/2017/08/2/17G00128/sg>.

<sup>29</sup> Legislative Decree 31 March 2023, n. 36, Code of public contracts in implementation Article 1 of Law no. 21 of 2022 June 78 delegating to Government in the field of public contracts, together with the relevant notes. (23A02179) (OJ General Series n.87 of 13-04-2023 - Suppl. Ordinario n. 14), in Italian 'Decreto legislativo 31 marzo 2023, n. 36, Codice dei contratti pubblici in attuazione dell'articolo 1 della legge 21 giugno 2022, n. 78, recante delega al Governo in materia di contratti pubblici, corredato delle relative note. (23A02179) (GU Serie Generale n.87 del 13-04-2023 - Suppl. Ordinario n. 14)', Available at: <https://www.gazzettaufficiale.it/eli/id/2023/04/13/23A02179/sg>.

Contracts Code). Moreover, not all the measures are mandatory and there is a lack of guidance on how to effectively implement and monitor such measures throughout the contract execution phase (Central Purchasing Body of Lazio Region). The general limitation, in the opinion of another interviewee, is the need to provide contracting authorities with simple tools for verifying the application of the social criteria by contractors even during the execution of the contract. However, the fact that public procurement can be - as it is - a very valuable tool for the promotion of the country's social policies should not be to the detriment of the operation of contracting authorities, whose main interest should be to achieve the result of awarding contracts and their execution with the utmost timeliness, and with the best possible relationship between quality and price, in compliance with the principles of legality, transparency and competition (interview with Invitalia).

According to REVES, an important limitation is that the rules of the Directive were transferred, but not its spirit. This results in a loss of many of the innovative aspects of the Directive, which were well explained by the European legislator in the recitals, and leaves intact the perception of many that the Directive safeguards harsh competition and is not an instrument for regulating the internal market or for making the best use of public spending. Nevertheless, it would have been very useful to strengthen social considerations among the selection and implementation criteria of contracts, similar to what happens with environmental clauses (interview with REVES).

In terms of implementation, however, there are, unfortunately, alongside extremely virtuous experiences (e.g. the Municipality of Brescia), examples of 'hasty' use of the system, which in this way risks creating real regression in practice (interview with REVES). Another barrier that affects the implementation of SRPP concerns acceptance by the market: for example, it may take time before non-mandatory measures generate a real change in the culture of economic operators and have a relevant impact on the labour market (interview with the Central Purchasing Body of Lazio Region).

### *Spain*

The following interviews were carried out in Spain: with experts from the Provincial Council of León, Malaga Provincial Council, the National Trade Union (Unión General de Trabajadores, UGT – Public Services), and the Assembly of Cooperation for Peace (ACPP), one of the most important and experienced NGOs in Spain in the field of social economy. The interview with the former Secretary General of the Valladolid City Council covered only the good practice that will be described in Section 3.2.4.

There are limitations on the existing legal framework for the use of social criteria in Spain. In particular, there are serious doubts as to their use in award criteria. Although they are stipulated in the law, the case law of the national Courts, based on the Court of Justice of the European Union's (CJEU) jurisprudence concerning award criteria, has often considered them to not fulfil a key aspect. Specifically, they do not allow bids to be evaluated in terms of performance and they also require being linked with the subject matter of the contract, which is not always easy to achieve (interviews with Spanish legal expert and ACPP).

Reserved contracts are another tool used to promote the awarding of contracts to companies that employ people with disabilities or who are at risk of social exclusion. These contracts are designed so that they can only be awarded to companies that meet certain social criteria. The 'light regime' for social and health services is a provision that allows social and health services to be contracted to companies that do not have the financial or technical capacity to meet all the quality criteria required by regulations (interviews with Spanish legal expert and ACPP).

Spanish legislation has incorporated social criteria in the various phases of public procurement, including exclusion grounds, subcontracting, use of contract performance conditions, and award criteria.

Regarding exclusion grounds, criteria have been established to exclude bidders who have committed certain crimes, and tax or labour irregularities. In addition, social criteria have been incorporated into subcontracting to ensure that subcontractors also respect labour rights and working conditions.

Regarding the use of contract performance conditions, requirements have been established to ensure that contractors respect labour rights and working conditions, as well as to promote social inclusion and equal opportunities. These conditions must be objective, non-discriminatory and proportionate to the object of the contract (interviews with Spanish legal expert and ACPP).

However, there is a considerable lack of control in the implementation phase concerning wages, payments, etc., and subcontracting. Therefore, monitoring of contractors' compliance with labour obligations needs to be facilitated. Perhaps this could be evidenced by certificates of compliance with social security contributions and salaries or similar certificates for employees linked to the public contract (interviews with Spanish legal expert and UGT Union Trade).

The current legal framework is adequate, both at the level of European and national directives, although further practical development is needed at the level of state legislation (interviews with Spanish legal expert and Provincial Council of León).

There is a lack of alignment between procurement regulations and other sectoral regulations, e.g. labour regulations. The current regulatory framework does not provide for sufficient measures to ensure compliance with collective bargaining agreements. This shortcoming can prevent the revision of prices of administrative concessions in service contracts when a new collective agreement is signed that implies an increase in labour costs or the inclusion of some basic regulation (e.g. Minimum Interprofessional Wage, increase in Social Security contributions, etc.) that increases minimum working conditions (interviews with Spanish legal expert and UGT Union Trade).

Furthermore, there is no guarantee that, in setting the price of the public procurement contracts, the company's collective agreement applicable in the specific area where the activity is to be carried out is respected and taken into account. This can result in a higher sectoral agreement that does not include the improvements contemplated in the specific agreement. Moreover, it should be noted that it is extremely difficult for contracting authorities to verify the fulfilment of labour obligations by contractors. In the execution phase, the salaries received by the workers are never checked (interviews with Spanish legal expert and UGT Union Trade).

The Courts are often strict when interpreting public procurement rules. They tend to reject the application of various social clauses and criteria, deeming them incompatible with the law if they are not closely related to the contract's subject matter or do not enhance the contracted services.

Stakeholders have suggested that the Directive be modified to make the LCSP (Spanish Law 30/2007 on public sector contracts) more flexible and to facilitate the use of social criteria. This would help justify the use of social criteria in public procurement as a political strategy to achieve social objectives, without it being considered irregular (interviews with Spanish legal expert and Provincial Council of Málaga, Ministry of Finance and Public Function).

Prior to the publication of contract announcements, it would be advisable to establish dialogues with stakeholders, including bidders, on SRPP matters that, thanks to their knowledge, facilitate the achievement of the proposed social objectives during the execution of the contract, as well as the monitoring of the contract to verify compliance with the conditions and criteria offered.



It is fundamental to promote social dialogue among bidders, public institutions and civil society organisations, trade unions, consumer organisations to ensure that social criteria are effectively incorporated into public procurement (interviews with Spanish legal expert and ACPP).

The stakeholders noted a lack of specific specialised training in SRPP for public procurement officials and managers. They called for the strengthening of training, learning, and knowledge exchange of public procurement officials in the specific field of SRPP (interviews with Spanish legal expert and ACPP).

### *Sweden*

A total of 5 interviews were held with the representatives of the National Agency for Public Procurement (*Upphandlingsmyndigheten* in Swedish) (NAPP); the Stockholm Region; the Swedish Association of Local Authorities and Regions (SALAR); the Trade Union Confederation (TCO) (*Swedish Confederation of Professional Employees*); and Swedwatch, an independent, non-profit research organisation striving to promote responsible business practices, including in the context of public procurement, to represent the NGO sector.

All interviewees underlined that the social clauses are to be seen as additive to existing legislative and regulatory requirements, including those stipulated in the Swedish labour law, which normally set high-quality standards for the goods and the services tendered out (at least when compared to other EU countries). The misconception assuming that the lack of social clauses in a public contract implies that no quality criteria are being requested needs to be addressed, as many quality criteria are obligatory – based either on Swedish or on EU legislation – and thus have to be observed anyway and fulfilled by the enterprise winning the public tender. This is the case also in the sectors of health care, social services and education (interview with SALAR).

Looking at social clauses in public procurement, the NAPP highlighted areas for which compliance anyway is obligatory in public tenders: with Swedish labour law, with the ILO Core Labour Norms when work is done abroad, with the applicable Swedish collective agreements for work done in Sweden and with accessibility requirements for persons with impairments as stipulated in EU directives and Swedish legislation. It has to be noted, that the follow-up on the actual implementation and impact of the accessibility requirements also can be considerably improved, even though the situation is better for accessibility to ICT as a consequence of dedicated EU legislation and with respect to the use of accessibility requirements in public transport for which the regions are responsible, also actually including them in the public tenders in 9 out of 10 cases (interview with NAPP). Regarding the first 'block' of obligatory requirements around employment, working and pay conditions, the NAPP has elaborated guidance on compliance with collective agreements and with the ILO Core Labour Conventions (NAPP). In October 2022 it also ran a survey asking municipalities, regions, government agencies and public companies – a total of about 700 organisations – to what extent they analyse the risk of unfair working conditions and to what extent they define follow up requirements for labour law conditions in their public tenders when the production of the goods takes place in Sweden. Almost 9 out of 10 of the regions state that they impose labour law conditions in their procurements to a great extent. This is likely due to the fact that, according to procurement legislation, contracting organisations must set labour law conditions if it is deemed necessary (NAPP).

The transposition of the transversal/horizontal social clause into Swedish legislation was seen as being in line with the requirements and intentions of the Directive. It is mostly used in the context of contract performance conditions and when stipulating the conditions for subcontracting with the aim of addressing the risks of undercutting labour rights and of safeguarding the relevant employment, working and pay conditions laid out in the applicable collective agreements. None of the interviewees

was aware of a relevant number of cases where tenderers were excluded due to breaches of the Swedish labour and social law, the non-payment of taxes or social security contributions established by an administrative or judicial decision or as a consequence of non-compliance with collective agreements. No explicit reference was made by any of the interviewees to any expected or already "materialised" effects stemming from the stipulations of the Directive on Adequate Minimum Wages in relation to public procurement on the Swedish public procurement legislation or practices.

Contract performance clauses are considered a key instrument on a standard basis where subcontracting is used and/or where supply chains play a role (interviews with Stockholm Region and Swedwatch). Depending on the economic sectors, goods and services and type of risks to be addressed, this is often done by making use of labels, for example, for fair trade products, for organic food, for wood and wood products by the FSC (Forest Stewardship Council) (Stockholm Region) or of certifications (Swedwatch). Monitoring of the related requirements was described as resource-intensive and difficult, also due to a lack of data on conditions and processes further down the supply chain outside Sweden, and thus is not done systematically (NAPP; Stockholm Region; Swedwatch; TCO). Swedwatch highlighted that contract performance clauses cannot be seen as a proxy for human rights due diligence. Where monitoring is done, it is ensured by audits, a task partly outsourced to specialised private auditors or auditing companies due to the complexity of the tasks and specific knowledge needed. Award criteria in this context are used to, for example, ensure transparency and to encourage progress towards SRPP. Another method applied where subcontracting is used and/or where supply chains play a role is the inclusion of criteria defining certain qualifications for the providers, such as when producers have certain policies and procedures – in the sense of minimum floors – in place to ensure compliance with human rights. This is also done to influence the markets by setting high(er) standards in relation to the goods and services procured, with the intention for them to become in the future the norm for all producers who want to sell their goods and offer their services in Sweden, the Nordic countries, and/or the EU (Stockholm Region).

Contract performance clauses are also used to support labour market and social inclusion of long-term unemployed persons (SALAR). In this context, local authorities have to mobilise additional staff to do the identification of eligible persons and match them to specific programmes, as the local offices of the National Agency for Unemployment have closed their local offices, a process currently being reversed. An ongoing problem in this context is the definition of criteria which would favour the participation of (in particular young and older) long-term unemployed persons or those with a migrant background from a specific municipality or region, as these types of criteria are not allowed under EU public procurement laws (SALAR).

Reserved contracts are mainly an instrument used to either help increase the labour market and social inclusion of long-term unemployed persons and/or persons with disabilities (NAPP; SALAR) or a tool to, more generally, increase the participation of SMEs – including non-governmental organisations and social economy enterprises – in public tenders (NAPP). They are also used for pilot projects (TCO).

The light regime for social and health services was transposed only in 2017. A main purpose was to increase the possibility of using social clauses in these sectors, too, in line with the list of criteria set out in Article 76(2) of the Directive, i.e. quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, and the involvement and empowerment of users and innovation (NAPP).

Subcontracting was identified by all interviewees as a particularly challenging issue. It is often plagued by mishandling in enterprises (Stockholm Region; Swedwatch; TCO), not least in high-risk sectors such as construction, cleaning, transport, fruit distribution, textiles, ICT and medical devices/surgical

instruments.

When asked about the opportunities for the use of SRPP, in the context of the current EU legal framework as transposed into Swedish legislation, all interview partners agreed that the regulatory framework in place in Sweden generally allows for the use and promotion of SRPP, mainly based on the use of social clauses in selection criteria, award criteria and/or contract performance clauses.

The trade unions welcome the mandatory nature of the use of labour clauses in public contracts based on Article 18(2) to help ensure fair working and pay conditions and compliance with collective agreements (TCO). Most of them are sectoral (and thus 'standardised' for a given economic sector). The service procured, thus the 'subject matter' of the public contract, determines the applicable collective agreement. There is thus no competition between different collective agreements within an enterprise and no uncertainty about which collective agreement is to be relevant, referred to and applied (TCO). A persistent challenge, however, is the insufficient use of social clauses selection criteria, award criteria and/or contract performance clauses (TCO) and the lack of knowledge of many local trade union divisions and local trade union representatives regarding which social clauses are actually being used.

The current revision of the national procurement strategy aims at facilitating the participation of SMEs in public tenders. This also covers non-governmental organisations and social economy enterprises, not least by means of specific forms of a public-private partnership with value-based not-for-profit organisations (*idéburet offentligt partnerskap*) – including in the fields of health care, health promotion, social care, education activities, support to access the labour market for disadvantaged and/or vulnerable persons, and activities intended to increase people's integration and inclusion in society and to combat segregation and isolation and reserved markets.

Looking at the limitations for the use of SRPP, the general impression expressed by all interview partners was that the regulatory frameworks in place do not hinder the realisation of SRPP. Some of the interviewees, however, mentioned points for improvement closely linked to them, mainly relevant when it comes to subcontracting, supply chain management, and a more extensive use of SRPP to help ensure labour and human rights across the globe.

Nearly all interviewees highlighted that the procuring bodies often are cautious with the use of social clauses across the full range of SRPP when they don't know for sure which requirements included in the tender – both with regard to contract award criteria, but also to contract performance criteria – can be considered as still proportionate (NAPP). There is also the fear of mistakes, the risk of appeals to Court by those enterprises which have not won a public tender, and the aim of the procuring bodies to avoid the delay of the publication of public tenders, particularly when goods or services – including in the field of health, social and education services – need to be urgently procured to respond to social and societal needs (NAPP; SALAR). As Sweden applies high transparency requirements, allowing the losing bidder to request all relevant information about the winning bid and the other tenders submitted, and has a high number of appeals compared to other EU/European countries, the procuring bodies have great interest in applying the rules correctly which leads to a more cautious use of SRPP criteria and options (SALAR). The above-mentioned challenges and realities in turn underline the need for clear guidance, regular training, and a continuous exchange of existing practices and of promising examples of how the potential of SRPP can be best used.

If used more strategically, public procurement in general and social clauses in particular could be better used to achieve societal goals and to pursue the Sustainable Development Goals (SDGs) (Stockholm Region; Swedwatch).

An impression mentioned by two interview partners (Stockholm Region; Swedwatch) was that more attention and resources should be dedicated to addressing the existing challenges in supply chains

and for the supply chain management in public contracts. One possible measure to do so is the promotion of existing good practices to show procuring bodies that more ambitious requests further down the global supply chain can be realised and that there is no reason to be afraid of doing so.

Another need identified is to better use the provisions to ensure due diligence to prevent infringements or abuses of human rights and to reduce environmental harm (Stockholm Region; Swedwatch). Although neither the EU law nor the Swedish public procurement legislation directly hinders procuring bodies from applying SRPP requirements, it does not effectively promote responsible supply chains and human rights due diligence. Experience tells us that if more contracting authorities are to implement such supply chain criteria, legal requirements are probably needed. Swedwatch thus would like to see human rights due diligence made an obligatory requirement in contract performance clauses, also to create more transparency on the employment, working and pay conditions of workers outside Sweden further down in the supply chain. The 8 ILO Core Labour Conventions do not cover the content or expectations of human rights due diligence. From this point of view, the current Directive is outdated and needs to be revised (Stockholm Region; Swedwatch). Another area to improve in the regulatory framework could be clarifications regarding the possibility and grounds to exclude suppliers. If it was possible to exclude suppliers not performing human rights due diligence at the pre-procurement state, workload could be reduced for the procuring bodies and the responsibility to ensure compliance with human rights requirements and the 8 ILO Core Labour Conventions would shift to the suppliers (Stockholm Region).

The NAPP mentioned a legal hindrance in the form of the General Data Protection Regulation (GDPR), if and where personal data of those benefitting from the provision of goods or the delivery of services procured by means of labour market inclusion programmes are concerned. The GDPR provision largely prevents the procuring bodies from carrying out more stringent monitoring of success rates and the mid- and long-term impact of relevant contract performance criteria, for example, in (not seldom also reserved) contracts aiming at the improved employment of disadvantaged and/or vulnerable persons, including long-term unemployed and persons with disabilities.

All interviewees considered that the existing provisions in the Swedish public procurement law make it possible in practice to promote the labour market inclusion of vulnerable groups, in particular of long-term unemployed (young and old) persons and of persons with disabilities, not least by means of reserved contracts. This instrument also opens a door for the participation of social economy enterprises/not-for-profit organisations in public procurement. They did not see any legal barriers or regulatory difficulties in pursuing the above-mentioned objectives of employment and social policy. The possibility to promote a 'not-for-profit logic' by better involving social economy enterprises/not-for-profit organisations in public procurement by means of reserved contracts was seen positively (Stockholm Region).

When looking at the adequacy of the current EU legal framework for public procurement to promote SRPP, the general impression is that it allows the use of social clauses and of all mechanisms or provisions to advance SRPP. The representatives of NAPP and SALAR saw all of the main persisting challenges as being linked in one way or another to how the EU law and/or Swedish legislation on public procurement are being implemented, i.e. interpreted and applied by the public authorities tendering out goods and services. The representatives of the Swedish Region, of Swedwatch, and of TCO also highlighted still existing problems with the regulatory frameworks themselves, i.e. pointed to issues or aspects which are insufficiently regulated or not covered.

## 1.5. Concluding considerations including on a possible revision of the Directive

Another area of legal uncertainty that was mentioned is the extent to which contracting authorities can take into account **local policy objectives** in procurement. Legal uncertainty on some aspects of the Directive and a lack of positive case studies addressing legal doubts, such as in relation to collective agreements, are creating a chilling effect on the use of SRPP (interview with ETUC).

'One of the biggest challenges when implementing SRPP is the **difficulty of defining and measuring social value** in the procurement process. [...] In many Member States, even if social value policies and strategies exist, the communication gap between policymakers and procurers hinders the translation of those strategies into more specific social procurement goals. Procurers often lack the perspective of the beneficiaries: they simply buy a service or product using a prescriptive tender, rather than concentrating on the desired outcomes. [...] Practically speaking, the main challenge in measuring social value is the lack of practice, capacity and tools to gather data, evaluate outcomes and measure impact. Available measurement methods and tools may also be inappropriate, since social value may be unique in each procurement case, depending on the service or product and the stakeholders affected' (Varga, E., 2021). This aspect was raised in two interviews. Experiences from Germany and other Member States seem to confirm a focus on inputs, i.e. on what resources are likely needed to deliver a service or to produce a product, but not on the desired social and societal outcome and impacts on those employed to deliver the service or to produce the product to be procured (interview with SSE). The civil servant that was interviewed from the European Commission believes that it is important to work in order to raise awareness with respect to understanding the impact of procurement. Continuing to work in terms of impact which is linked only with price - which is a very short-term impact - would only lead to a complete inefficient use of public spending (interview with DG GROW).

To conclude, it is apparent that the different opinions among the stakeholders interviewed are sometimes due to a very different vision of the role of public procurement. The policy choice that was made when the 2014 Directive was adopted is that public procurement should always focus on '**what to buy**', including the social aspects of what is being purchased, and not on '**from whom to buy**'. The link with the subject matter is a clear example of this choice. Trade unions and other social actors are instead of the opinion that public procurement should be one tool to shape the market towards sustainable development and responsible consumption, by rewarding responsible economic operators and excluding or making more difficult the participation of economic operators that are not. The use of social considerations in award criteria or in contract performance conditions to employ persons with disabilities or disadvantaged workers also has to be linked with the subject matter of the contract. This means in practice that disabled or disadvantaged workers can be employed by a contractor only for the duration of the execution of the public contract. Of course, the contractor at the end of the public contract can decide to employ these workers on a permanent basis. However, the Directive does not offer incentives for the stable employment of these workers, who find themselves in a vulnerable situation.

### *Possible revision of the Directive*

The stakeholders interviewed are divided on the question whether the Directive should be revised or not and, especially, when it should be revised.

Many stakeholders consider that a revision of the Directive would be appropriate (interviews with ETUC, EPSU, UNI-Europa, and SSE), at least at a certain point (interviews with the legal expert and ICLEI). By contrast, EU-level employer organisations believe that the Directive should not be reopened.



BusinessEurope representatives stated that they have identified where the problems lie in the application and implementation of the Directive and this is where the efforts should go (interview with BusinessEurope). SMEUnited also does not see the need to change anything in the Directive at the present time. If something has to change, this has to do with the implementation of the Directive at national level and in the behaviour of procurers. If procurers are not politically supported to do more than the minimum, such as using SRPP, it is no surprise that they don't use SRPP (interview with SMEUnited).

Among those that are in favour of reopening the Directive, at least at a certain point, some are aware that the reopening of the Directive might be challenging at the present time (interview with EPSU).

Applying in practice legislative texts on public procurement, which are complex and technical, requires extensive programmes to build or update the professional capacity of public buyers across the EU. Funding and time are necessary to develop both the professionalisation of public buyers and the capacity of the market to respond to more advanced tendering procedures.

This is one of the main reasons why the College of Commissioners does not intend to modify the public procurement Directives, at least until 2024, being this is the last year of the mandate of the current Commission. Moreover, the civil servant interviewed urged caution in considering a revision of the Directives, as until now the state of implementation of the Directives is limited. From the Single Market Scoreboard, it can be easily seen that many basic aspects of public procurement are not taken into consideration in many Member States. In a dozen EU Member States, from 60 % to 80 % of tenders are still awarded solely on the lowest price or cost. This figure is very significant. The rules could be made much more sophisticated, but if there is no technical capacity and intention to enforce the rules, the provisions will have limited application or might remain a dead letter. The Commission is aware that there is great interest in considering a revision of the Directive, namely in terms of the green and, to a lesser extent, the social aspects. However, it is doubtful that making the provisions on strategic aspects compulsory would lead to the use of tools that require greater understanding and technical skills. Another factor to be taken into account is that the number of bidders is decreasing in many EU Member States, as it can be seen in the Single Market Scoreboard. The Commission hasn't carried out a precise analysis of the reasons for this, which are likely to be sought outside procurement policy. In the EU, there has been an overall reduction in competition, there have been two economic crises in a row, and the COVID-19 pandemic. If public procurement rules become more complex, the risk is that there will be even fewer bidders participating in public tendering (interview with DG GROW).

Meanwhile, there are actions that the Commission, Member States and contracting authorities could put in place before considering a revision of the Directive. Stakeholders have also an important role to play to support a better implementation of the Directive at national level. This will be discussed in Chapter 4.

According to DG GROW's civil servant, the most important work to be done is on capacity building, by providing very precise and structured training courses, to different levels. One of the barriers to strategic procurement is in the top management of any type of contracting authorities, which has less willingness to promote strategic procurement and awareness of it. The Commission is working on this (see Section 2.5).

## 1.6. Non-legislative measures that are important for socially responsible public procurement

There is general consensus that even the most favourable legal framework to SRPP alone would not be enough to guarantee a correct implementation of the social provisions of the Directive.

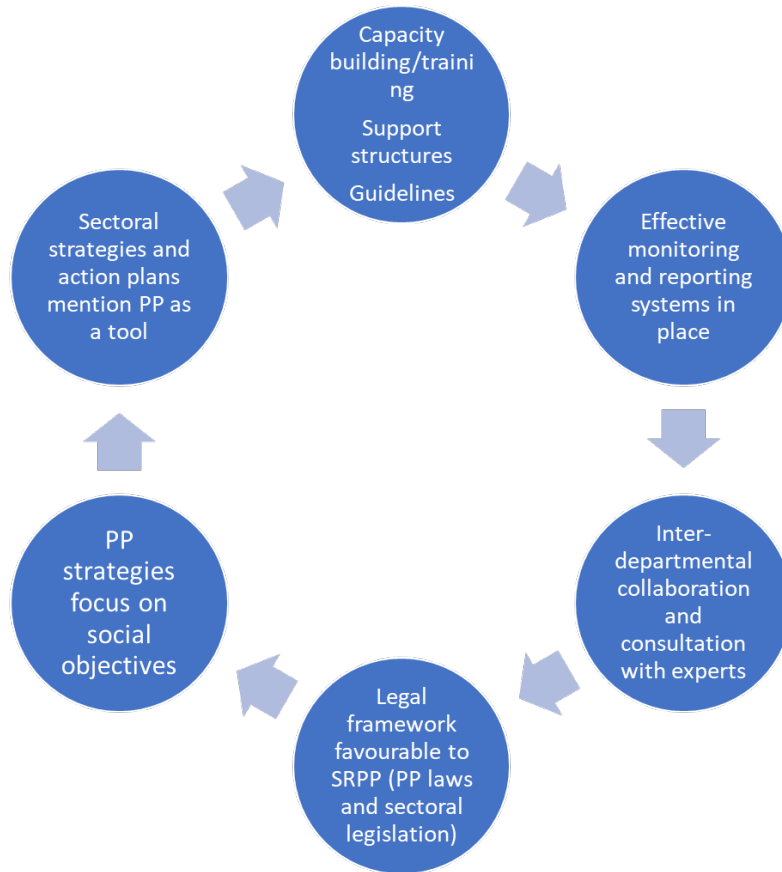
UN Women and other studies (EASME, European Commission, 2019) underline the fact that legislation is important but remains insufficient if not coupled with adequate policy frameworks, strategies and capacity-building programmes. EIGE's study on gender-responsive public procurement (GRPP) found that six preconditions have the potential to deliver the best application of GRPP (EIGE, 2022c, pp. 17-18).

The authors of this study consider that the same pre-conditions, with a slight readaptation, are relevant for a favourable implementation of SRPP, as shown in Figure 8.

1. The existence of a national legal framework favourable to SRPP: a national law that includes to a large extent the opportunities provided by the public procurement Directive to achieve social goals while purchasing works, services and supplies, accompanied by sectoral laws that mention public procurement as a tool to achieve a specific policy goal, for example the promotion of gender equality, the social economy, SMEs, the circular economy, sustainable development, etc.
2. The existence of national, regional and local public procurement strategies that promote SRPP, often in the context of strategic procurement (green, social and innovation procurement).
3. The existence of sectoral strategies and/or action plans that explicitly mention public procurement as a tool to advance policy objectives in a determined area (e.g. strategies or action plans on gender equality, for the development of the social economy or the circular economy, etc.)
4. The existence of capacity building programmes, training courses, support structures or helpdesks, and guidelines, to raise awareness and build the capacity of public buyers and potential bidders, including social economy actors, to correctly implement SRPP.
5. The presence of effective monitoring and reporting systems that monitor the implementation of social considerations for each contract and then in an aggregated way for each contracting authority.
6. Existing collaboration between public procurement offices and departments responsible for employment, social and gender equality policies, as well as ongoing consultations and dialogues with independent experts, stakeholders (including NGOs, social economy actors, user groups, social partners and other authorities), potential bidders and groups of potential users of the products/services/works to be procured (before launching calls, to assess a certain contract / policy etc.)

It is worth noting that sometimes these preconditions are in place at regional or local levels (for example, in big cities), but a comprehensive framework at national level is lacking. This shows that SRPP is far from being mainstreamed across whole countries and at all governance levels.

Figure 8: The six-preconditions that support SRPP



Source: Authors' own re-elaboration from EIGE.

### 1.6.1. Good practice examples

As it will be illustrated in Section 3.5, **Spain** has a very comprehensive legal framework favourable to SRPP, which is not limited to the transposition law, but is coupled with other sectoral legislation, strategies and action plans in other policy areas that support SRPP. An example is the recently adopted Law on waste and contaminated land for a circular economy<sup>30</sup>.

This law seeks to reduce waste production and regulates waste treatment, based on a waste hierarchy principle and with the circular economy in mind. It regulates two taxes, on certain plastics and on landfill and incineration. It requires a declaration on transfers and new construction work as to whether or not potentially polluting activities have been carried out. It includes for the first time in Spanish legislation limitations on single-use plastics, new taxes on plastic use and landfills, and an increase in the responsibility of waste producers.

This law contains a provision (Nineteenth additional provision on reserved contracts in the management of textile waste) which requires public administrations to tender and award through reserved contracts at least 50 % of the awarding amount in relation to the obligations of collection,

<sup>30</sup> Law 7/2022 of 8 April 2022 on waste and contaminated soils for a circular economy, in Spanish Ley 7/2022, de 8 de abril, de residuos y suelos contaminados para una economía circular, «BOE» núm. 85, de 09/04/2022, Available at: <https://www.boe.es/eli/es/l/2022/04/08/7/con>.



transport and treatment of textile waste and furniture and furnishings. If this is not the case, the public administration and the contracting body must duly justify it in the file and it may be subject to special appeal or to the appeals established in matters of public procurement.

In **France**, the [Law for Real Equality](#) (Law no. 2014-873 of 4 August 2014, Article 16 and Article 31) creates an obligation for local authorities to take action to promote gender equality within all their policies. Budgetary decisions require a **gender audit**; and companies may be excluded from participation in tenders if they do not respect their legal obligations to respect gender equality issues in public procurement.

In **Belgium**, the City of Brussels has further developed the objective of gender responsive public procurement in its 4th Action Plan for Equality between Women and Men, notably by providing training on gender issues for procurement officers and producing a more accessible *vade mecum* for the central purchasing office of the City of Brussels: [www.bruxelles.be/plan-egalite-femmes-hommes](http://www.bruxelles.be/plan-egalite-femmes-hommes).

From 2016 onwards, **Slovenia's** Ministry of Public Administration has published guidelines for public procurement procedures that propose additional points in the evaluation phase for tenderers that include specific social aspects in their bids. Guidelines for public procurement have been published or are under development on the following topics: architectural and engineering solutions; construction; IT solutions; cleaning services; and food.

In the **Czech Republic**, education, training and competence building in SRPP has been carried out mostly by the team of the project 'Promoting the Implementation and Development of Socially Responsible Public Procurement' at Ministry for Employment and Social Affairs, which:

- organises workshops within the Public Investment Academy;
- organises SRPP Academies (winter, spring, and summer schools);
- organises other capacity-building events (ISO 20400:2017, seminars, conference on construction issues);
- runs the website [www.sovz.cz](http://www.sovz.cz), organises e-learning on SRPP;
- has created a general methodology on sustainable (socially responsible) public procurement;
- publishes articles on SRPP (Public Procurement Magazine, Public Procurement in Practice Magazine, Public Administration Magazine, Waste Forum Magazine, Modern Community Magazine);
- issues a monthly newsletter on SRPP;
- organises an annual conference on SRPP in Prague;
- provides procurers with guidance and counselling;
- conducts research, collects and publishes best practices;
- identifies best practices and awards the champions of SRPP in the Czech Republic;
- organises seminars for the staff of procurers, who are willing to start using SRPP; and
- supports international networking in order to share knowledge on SRPP within EU.

In **France**, CRESS Mayotte is the regional chamber for the social economy and solidarity. With financial support from the French state and the European Social Fund (ESF), it created a programme for socially responsible procurement. The programme is led by a 'social clauses facilitator' whose role is to:

- support public buyers in the identification of contracts suitable for social clauses and in the drafting of specifications;
- inform bidding companies and assist contracted companies in the implementation of social clauses;
- act as a relay between the companies and local integration structures (training and social centres, work integration social enterprises (WISEs), associations, etc.);
- monitor the implementation of social clauses;
- monitor the integration path of beneficiaries; and
- promote local development by involving the local community in Mayotte.

## 2. SETTING THE SCENE: OPPORTUNITIES OFFERED BY THE EU PUBLIC PROCUREMENT LEGAL FRAMEWORK TO ACHIEVE SOCIAL AND EMPLOYMENT GOALS

### KEY FINDINGS

- The public procurement cycle follows three stages: pre-procurement, procurement and post-procurement. At each stage, Directive 2014/24/EU on public procurement provides for instruments that can be used for SRPP, to achieve social and employment goals.
- Pre-procurement represents perhaps the most important stage for implementation of SRPP, as contracting authorities define the specific features of the supplies, services or work they want to buy, including if the tender has social aspects. Important instruments are pre-market consultations, to scope out market capacity to deliver social outcomes, the different types of procedures that can be chosen, division into lots and the possibility to use reserved contracts. Division into lots and reservations allow a wide range of bidders, including SMEs and social economy enterprises. If a contract concerns social services or other services to people, the contracting authority may lay down tender requirements to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of services, specific needs of different categories of users, including disadvantaged and vulnerable groups, involvement and empowerment of users, and innovation.
- During the procurement stage, contracting authorities can apply certain exclusion grounds, selection criteria and in some cases, technical specifications, that include social aspects. Relevant exclusion grounds for SRPP include the exclusion for people trafficking/child labour, for non-payment of tax or social security, and non-compliance with applicable social or labour law or collective agreements. Selection criteria can include requiring bidders to show specific skills, previous experience and the technical capacity to implement social aspects of the contract. Technical specifications can include accessibility requirements and gender aspects. In this phase, the contracting authority also has to decide whether to include social considerations in the award criteria or during the performance of the contract (contract performance conditions).
- In the post-procurement stage, if a contracting authority has decided to use social considerations in contract performance conditions, it should ensure monitoring, reporting and enforcement of the commitments made by bidders in their offers during the execution of the contract. If the contract involves subcontracting, the contracting authority must ensure the respect of social and labour law by subcontractors and in supply chains. Monitoring and reporting of social aspects of public contracts are very important for SRPP, including in an aggregate way (at the level of each contracting authority, including at the regional and national level).
- For the first time in the social domain and in line with what has happened with green procurement, some recent sectoral legislation is cross-referencing public procurement, such as the Directive on adequate minimum wages and the Directive on pay transparency.

Public procurement and concessions procedures are currently regulated at the EU level by Directive 2014/24/EU on public procurement; Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services; and Directive 2014/23/EU on the award of concession contracts. For simplicity, the study refers only to Directive 2014/24/EU on public procurement, which is the most relevant to promoting social goals.

The legal framework put in place by Directive 2014/24/EU on public procurement<sup>31</sup> (hereinafter, 'the Directive') enables governments to use the 'power of the purse' to advance social, environmental and innovation goals while purchasing goods, services and works. The 2004 Directive on public procurement already provided some opportunities to achieve social goals by the means of public purchases. However, these opportunities have been enhanced by the 2014 Directive.

The public procurement cycle follows three stages: pre-procurement, procurement and post-procurement. Sections 2.1, 2.2 and 2.3 describe for each procurement stage the opportunities that exist for achieving social and employment goals<sup>32</sup>. Finally, Section 2.4 will present the most recent and significant EU policy initiatives that support SRPP.

## 2.1. Pre-procurement stage

During the pre-procurement stage, contracting authorities must undertake some preparatory actions, before launching a tender. This involves defining the subject matter of the contract, deciding whether or not to carry out a preliminary market consultation to better define the tender documents, choosing the most appropriate procedure for the tender in question, deciding if it is worth dividing the contract into different lots or reserving a contract, and if to apply the light regime for social, health and other personal services.

Contracting authorities are free to determine the **subject matter** of the tenders. During this stage, they need to reflect on whom the ultimate beneficiaries of a contract are. They should carry out a needs assessment and may consider if the ultimate beneficiaries include both women and men and people in vulnerable situations. If the answer is affirmative, they can take into consideration whether women and men and people in vulnerable situations have different needs in relation to the service, goods or works to be purchased. The subject matter of the contract might explicitly refer to these different needs. In case the contract has a clear social or gender dimension, they can decide to make it explicit in the title or the description of the tender. The use of inclusive, accessible and gender-sensitive language in the tender documents has the effect of drawing the attention of potential bidders to the social and gender aspects of a tender.

Before launching a procedure, contracting authorities can launch a **preliminary market consultation** (Article 40 of Directive 2014/24/EU). This has a twofold objective: to better define the tender by engaging in a dialogue with independent experts, potential bidders, authorities, NGOs, social partners and samples of final users; and to inform the market about an upcoming tender. Consultations can take the form of market engagement events, questionnaires and direct contact. However, it should be ensured that these practices do not have the effect of distorting competition. To this aim, contracting authorities should ensure that any information which an economic operator receives in the setting of a preliminary market consultation is shared with other participants. During this stage, contracting authorities can consult about the social aspects of a tender, receive feedback, better define users' needs, scope out the capacity of the market to respond to such a tender, and explain the documents. If a contracting authority wants to ensure maximum participation or enhance access to public procurement to SMEs or social enterprises, they might facilitate different types of businesses to meet, which might result in the formation of consortia or their participation as subcontractors.

<sup>31</sup> Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

<sup>32</sup> Essential references for the legal analysis of Directive 2014/24/EU have been: Tiel, P., de Francquen, V., de Meulebroeke, L., de Bueger, C., Rolland, G., 2019, Matrix of the social clauses of Directive 2014/24/EU, Study prepared for DG GROW; Semple, A. et al, 2021, Deliverable D2.1, Paper assessing the EU public procurement framework from a gender perspective, Study prepared for EIGE; Social Platform, 2015, Public procurement for social progress.

During this phase, a contracting authority also has to **choose the procedure** it intends to use: open procedure, restricted procedure, competitive procedure with negotiation, competitive dialogue, innovation partnerships or design contest. The first two types of procedures are the most commonly used in tenders above the EU thresholds and are quite rigid and prescriptive. By contrast, the competitive dialogue and innovation partnerships have the potential of better defining the needs and the offers in a more collaborative way between the contracting authority and economic operators, something that can be very suitable to contracts with a social aim.

The **competitive dialogue** procedure allows bidders to propose different solutions that respond to a defined need, which are then refined in consultation with the contracting authority. **Innovation partnerships** (Article 31) 'can be used when the contracting authority has identified the need for an innovative product, service or works that cannot be met by anything already available on the market. Such innovation partnerships shall aim at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works. Recital 37 stresses that this procedure can be used in order to foster research and innovation, including social innovation. Such innovative products, works and services could help to address major societal challenges while improving the efficiency and quality of public services'. [...] In practice, 'the contracting authority must assess whether the need is already met on the market. If not, an innovation partnership may be established. From this step, a long-term innovation partnership can be established for the development and subsequent purchase of (social) innovative products, services or works delivered at agreed performance levels and costs and, when appropriate, with several partners.' (Tiel, et al. 2019, p. 5).

In the pre-procurement phase, contracting authorities need to assess if it is advantageous to divide the contract into lots. **Division of contracts into lots** (Article 46) is recommended whenever the contracting authority wants to facilitate the participation in public procurement of small and medium-sized enterprises, social economy enterprises and civil society organisations. If a contracting authority decides not to divide a contract into lots, it must provide the reasons for this decision. By contrast, when it decides on separate lots, it must 'indicate in the contract notice or in the invitation to confirm interest whether tenders may be submitted for one, for several or for all of the lots. Plus, if contracting authorities decide to limit the number of lots that may be awarded to one tenderer, they have to state the maximum number of lots per tenderer in the contract notice or in the invitation to confirm interest.' (Tiel, et al., 2019, p. 12). In the transposition phase, Member States were free to go further and render division into lots obligatory.

**Division into lots can be combined with reservations.** Contracting authorities should assess if there is a case for reserving one or several lots for performance by an organisation employing persons with disabilities or disadvantaged workers (Article 20) or by a social enterprise (Article 77). The combined use of separate lots with reservations offers a great opportunity for the participation in tenders of social economy organisations and civil society organisations fulfilling certain criteria.

The Directive provides for two types of **reservations**. Reservations happen, for overriding reasons of public policies' general interest, when a contracting authority decides to limit the competition to certain types of economic operators which meet specified criteria. The first type of reservation is provided by Article 20. This provision aims to foster participation in procurement contracts for sheltered workshops and economic operators whose mission is the **social and professional integration of workers with disabilities<sup>33</sup> or 'disadvantaged workers'**. Performance of such

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<sup>33</sup> It is important to highlight that Directive 2014/24/EU uses the term 'disabled worker' instead of the commonly accepted term 'with disabilities'. In this study, the term 'worker with disabilities' will be used.

contracts may also occur in the context of sheltered employment programmes. This reservation is applicable to workshops, economic operators and programmes whose workforce is composed at least of 30 % disabled or disadvantaged workers. The transposition of this provision was not compulsory. A similar provision existed in the 2004 Directive. The scope of the new provision has been extended: the threshold fell from 50 % to 30 % and disadvantaged workers have been added alongside disabled workers.

The second type of reservation, of which transposition was optional, is in Article 77, which is part of the 'light regime', which will be described in the next paragraph. Article 77 allows contracting authorities to **reserve contracts for certain specified types of social, health, educational and cultural services** (services which are covered by the so-called 'light regime') to organisations which have a public service mission and which meet conditions regarding their governance. Organisations covered by this reservation may include social economy enterprises, employee-led mutuals and charities. This reservation has a limited duration of three years. This means that an economic operator which has been awarded a three-year reserved contract by a contracting authority cannot participate in a new tender for a reserved contract *for the same service* launched by the same contracting authority. In other words, the contractor of a reserved contract can participate in a tendering procedure launched by the same contracting authority and for the same service, only if the open procedure is used. If the contracting authority chooses to use again a reservation, the former contractor cannot participate in such tender. Instead, the contractor can participate in tendering procedures which use reservations by the same contracting authority, if they refer to *another service*.

The 2014 Directive introduced what is known as the **'light regime' for social, health and social care, education and training, community and cultural services**, and other services listed in Annex XIV of the same Directive. The light regime (Articles 74–77) is a 'particular procurement regime dedicated to public contracts for social and other specific services when they are equal to or greater than EUR 750,000.' (Tiel, et al., 2019, p. 29). A higher threshold (EUR 750,000 instead of EUR 140,000 which is the standard threshold for all services) and less rigid rules apply than those applicable to all other service contracts. 'Article 75 softens the obligation of advertising for the public procurements for these services. However, public authorities still have to comply with advertising of those public procurements.' (Tiel, et al., 2019, p. 30).

The light regime is the acknowledgement in law that 'services to the person, such as social services, health services, educational services, are endowed with particular characteristics such as limited cross-border interest, distinctive goals, can address users in a vulnerable situation and openly contribute to social cohesion and inclusion, as well as to the enjoyment of fundamental rights.' (Tiel, et al., 2019, p. 29). Social Platform welcomed the light regime as follows: 'This Directive finally recognises that social, health and other services provided directly to the person have objectives, types of users and characteristics different to other services. These services contribute to social cohesion and inclusion, promote the enjoyment of human rights, and they address everybody - particularly those most in need. Simpler rules tailored to the nature of these services, are the first big achievement for this sector. The increased emphasis on quality rather than price in the criteria used by Member States and contracting authorities to award these contracts is especially welcome.' (Social Platform, 2015, p. 20).

It is important to highlight that 'Recital 114, last paragraph, stresses that this particular procurement regime does not prevent Member States or public authorities from providing or organising such services without referring to public procurement, regardless of the value. In this case, Recital 114 gives examples of those possibilities, such as the mere financing of services or the unlimited granting of licences and authorisations to all economic operators. This latter case must however ensure sufficient advertising and compliance with the principles of transparency and non-discrimination.' (Tiel, et al., p.



29; see also Social Platform, 2015, p. 7)<sup>34</sup>.

The transposition of the light regime, with the exception of the reservation under Article 77, was compulsory. Member States remain competent to determine award rules for public contracts for these services when the value is lower than EUR 750,000. During the transposition phase, Member States were required to put in place national rules applying to light regime contracts, while ensuring compliance with general principles of procurement (transparency and equal treatment of economic operators). While defining the national rules, Member States had to ensure that contracting authorities could take into account the specific characteristics of such services to the person. In other words, Member States had to 'ensure that, when awarding, contracting authorities are able to meet the following requirements: quality, continuity, accessibility, affordability, availability and comprehensiveness of services, specific needs of different categories of users, including disadvantaged and vulnerable groups, involvement and empowerment of users, and innovation.' (Tiel, et al., 2019, p. 32). Social Platform recommended as follows: 'For social and health services, quality is essential for the service to achieve its goal of meeting a need. As opposed to other *network* services of general or public interest (such as water provision), they are not provided by a normal supplier/consumer relationship; rather, they are supplied by an *asymmetric* one due to the vulnerability of the service user and the personal nature of the service. In addition, investing in quality social services – in particular preventive services – often reduces long-term care needs, thereby reducing long-term spending. If Member States prefer to keep the lowest cost criterion for social, health and other specific services provided directly to the person, they should make it mandatory for contracting authorities to include criteria that relate to the quality of the service in the technical specifications.' (Social Platform, 2015, p. 21).

Another important aspect in the recognition of the specific features of these services in the light regime is that Member States had the discretionary power to establish that contract awards would only be made on the basis of the best price–quality ratio, which includes qualitative, environmental and/or social criteria linked to the subject matter of the public contract in question [(cf. Art. 67(2) of the Directive)].

Specifically, 'For GRPP (gender-responsive public procurement), light regime contracts may allow a more collaborative approach to developing tender requirements and engaging with bidders, for example where a service is co-designed with one or more social enterprises or charities. This can help to ensure that gender elements are fully reflected in the subject matter and structure of the contract, e.g. that health services for women are delivered in a way which meets their needs. As many of the sectors covered by the light regime predominantly employ women, there is also an opportunity to set criteria relating to pay and working conditions which would improve the gender pay gap and work–life balance.' (EIGE, 2022c, pp. 46-47). For example, 'it is possible to exclude cost considerations from the award criteria in light-regime contracts, so in a contract for care services the overall cost of the service could be set by the contracting authority, taking account of the need to ensure adequate rates of pay.' (EIGE, 2022c, p. 46).

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<sup>34</sup> In reality, very few Member States have in place alternative systems for the award of contracts for social services, which are fully compliant with the EU principles of transparency and non-discrimination. This is why public procurement is predominantly used in the field of social services.

## 2.2. Procurement stage

At the tender stage, contracting authorities can include social criteria to a certain extent in exclusion grounds and selection criteria. When they decide not to award a contract on the basis of price or cost only, but on the basis of the best price–quality ratio, they can include social criteria, alongside criteria linked to quality, and environmental, social and innovation considerations, in addition to price. The type of criteria which can be applied at each procurement stage is regulated by the Directive.

Very importantly for the focus of this study, the 2014 Directive included a **mandatory horizontal social clause** [Article 18(2)]. This provision requires Member States to ensure compliance with applicable environmental, social and labour laws in the performance of public contracts. The article refers to obligations established by EU law, national law, collective agreements and the eight core ILO conventions listed in Annex X of the Directive. 'The obligation to comply with existing law already existed under the 2004 Directive through its recitals.' (Tiel, et al., 2019, p. 3). As known, recitals are not legally binding but can be used as an interpretative tool. Thus, the merit of Article 18(2) is that it has made explicit and has emphasised the obligation to comply with applicable legislation in the fields of environmental, social and labour law. 'Recitals 39 and 40 confirm that the obligation of compliance with social provisions exists at all relevant stages of the procurement procedure.' (Tiel, et al., 2019, p. 3).

Recital 37 states that 'Article 18(2) does not prevent the application of terms and conditions of employment which are more favourable to workers.' (Tiel, et al., 2019, p. 3). 'The application of the laws encompassed by the mandatory social clause should apply for the duration of a contract's performance. However, this should in no way prevent the application of terms and conditions of employment that are more favourable to workers (recital 37).' (Social Platform, 2015, p. 13).

Article 18(2) is strictly linked with the provisions of the Directive that lay down the rules for award of contracts, exclusion grounds and on abnormally low tenders. Contracting authorities may decide not to award a contract on the grounds that the tender does not comply with the obligations referred to in the horizontal social clause [Article 56(1)]. They may exclude or may be required by Member States to exclude an economic operator in case of violation of applicable legislation referred to in the horizontal social clause [Article 57(4)]. Furthermore, they must reject a tender in case the tender is abnormally low because it does not comply with obligations referred to in Article 18(2) [Article 69(3)]. Social Platform commented: 'Reference to Article 18(2) should be made in the technical specifications (Article 42). Cross-references in award of contracts (Article 56), exclusion grounds (Articles 57 and 59), abnormally low tenders (Article 69) and subcontracting (Article 71) are also highly recommended.' (Social Platform, 2015, p. 13).

'The Directive details the grounds on which an economic operator can or must be excluded even where they satisfy the eligibility criteria (Article 57).' (Tiel, et al., 2019, p. 17). 'The purpose of **exclusion grounds** is to determine whether an operator is allowed to participate in the procurement procedure or to be awarded the contract.' (EIGE, 2022c, p. 55). This provision 'organises mandatory and discretionary exclusions relating to social and labour law.' (Tiel, et al., 2019, p. 17). Mandatory exclusion is when 'a contracting authority has established that the economic operator has been the subject of a conviction by final judgment for child labour and other forms of trafficking in human beings' (Tiel, et al., 2019, p. 18); or when a contracting authority is 'aware that the economic operator is in breach of its obligations relating to the payment of social security contributions and where this has been established by a judicial or administrative decision having final and binding effect.' [...] When 'the contracting authorities can demonstrate that the economic operator has not paid its taxes or social security contributions but where no legally binding decision has been taken, it has discretionary power to exclude the tender. [...] It can be suggested that non-payment of taxes and social security

contributions may still constitute grave misconduct under Article 57(4)c, which is also a ground for discretionary exclusion. Recital 39 makes it clear that non-compliance with collective agreements could be considered grave misconduct on the part of the economic operator concerned.' (Tiel, et al., 2019, pp. 18-19). In the transposition phase, for all the discretionary exclusion grounds, Member States have the possibility to require contracting authorities to exclude economic operators from participation.

**Selection criteria** may address financial and economic standing, technical ability (including experience) and professional skills and qualifications (Article 58). Social aspects could be included in selection criteria in two ways: first, by 'taking account of specific skills, experience and technical capacity to implement social aspects of the contract' (EIGE, 2022c, p. 57); second, by 'not erecting barriers to participation of 'non-traditional' economic operators, which may include SMEs, women-owned businesses and social economy enterprises' (EIGE, 2022c, p. 57). 'Selection criteria should be tailored to the specific contract and proportionate to the requirements. However, many authorities apply a generic approach to selection and are reluctant to introduce new criteria.' (EIGE, 2022c, p. 57).

**Technical specifications** set the mandatory requirements for the goods, services or works being purchased (Article 42).' (EIGE, 2022c, p. 58). They 'must be linked to the subject matter of the contract and proportionate to its value and its objective. [...] When the goods, services or works to be purchased are to be used by natural persons, the technical specifications have to be drafted by taking into account accessibility criteria for persons with disabilities and design for all users. When mandatory accessibility requirements have been adopted by a legal act of the European Union, such technical specifications must refer to them. This provision contains a novelty in terms of the obligation, rather than an unenforced objective, to take disability-friendly technical specifications into account by the contracting authority except in duly justified cases. (Tiel, et al., 2019, p. 8).

It is important to note that this provision does not explicitly set out the possibility for contracting authorities to include requirements to address social characteristics (except for accessibility requirements), which can be included in award criteria and contract performance clauses. It is possible to require that the team which performs the contract has specific qualifications, expertise and experience related to the social aspects of the contract (for example, expertise in gender equality or in equal opportunities specifically for disadvantaged groups or those facing intersectional disadvantage).

**Award criteria** define the outcome of a tendering procedure (Article 67). Award criteria should address aspects which go beyond the minimum requirements set in the technical specifications and which add value from the perspective of the contracting authority. 'If the Best Price–Quality Ratio (BPQR)<sup>35</sup> is used, social considerations can be included among the different award criteria to be weighed, together with the price or cost and other criteria such as social, quality, environmental considerations' (Tiel, et al., 2019, p. 21) and innovative characteristics. In addition, award criteria must also include the economic assessment of the tender (ETUC, n.a., p.15). 'Those other criteria must be linked to the subject matter of the public contract in question. [...] This provision does not allow contracting authorities to use social award criteria that are not linked to the subject matter of the public contract (such as criteria and conditions relating to general corporate policy or a requirement to have a certain corporate social

<sup>35</sup> 'In Directive 2014/24/EU, the term best price-quality ratio replaces the term MEAT (most economically advantageous tender). The notion of most economically advantageous tender is used in the new Directive as an overriding notion referring to what the contracting authority considers as the best solution among those offered. According to Art 67, price or cost is a mandatory element that has to be assessed by contracting authorities. On top of that, contracting authorities may include a best price-quality ratio, which involves additional qualitative criteria such as those listed in Art 67.211. In short, contracting authorities can decide to award a contract on the basis of: (a) Price only; or (b) Cost only based on a cost effectiveness approach, which involves the use of life cycle cost calculation; or (c) Price or cost effectiveness combined with qualitative criteria, including social, environmental and innovation criteria. In such cases, the contracting authority shall specify the relative weighting which it gives to each of the criteria.' Source: ETUC, New EU framework on public procurement. ETUC key points for the transposition, p. 15, Available at: [https://www.etuc.org/sites/default/files/publication/files/ces-brochure\\_transpo\\_edited\\_03.pdf](https://www.etuc.org/sites/default/files/publication/files/ces-brochure_transpo_edited_03.pdf).

responsibility policy in place).' (Tiel, et al., 2019, pp. 20-21).

The Buying Social guide from the European Commission mentions 'a requirement that bidders have a general corporate social responsibility policy, rather than specific requirements for how they carry out the contract' as an example of approaches which would not be linked with the subject matter of a contract. But then it states: 'In some cases, a corporate social responsibility policy may serve as (partial) evidence in relation to a specific requirement. For example, if your contract includes conditions to protect whistle-blowers along the supply chain, bidders may point to their general whistle-blowing policy as well as any specific measures to be put in place for the contract.' (EC, 2021d, p. 21). 'There is some doubt about the interpretation of the subject matter link due to limited case-law from the EU Court of Justice. In some cases, a general policy or practice may serve as evidence in relation to a more specific criterion, but it is the application to the individual contract that matters.' (EIGE, 2022c, p. 41).

'The fact that contracting authorities may now take into consideration the specific production process in the context of the award criteria allows them to lay down social-related award criteria. The social considerations can include factors such as job creation, decent work, democratic ownership, social and professional inclusion of persons with disabilities and disadvantaged persons.' (Tiel, et al., 2019, p. 21). Award criteria can also include quality, accessibility and design for all, and the qualifications and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract. For example, it is possible to define award criteria related to specific qualifications and experience of the staff performing the contract in relation to the social aspects of the tender.

**Contract performance conditions** (Article 70) are relevant for the procurement and post-procurement stage. As their compliance is verified during the execution of the contract, they will be explained in Section 2.3.

In technical specifications, award criteria and contract performance clauses, all criteria, including social criteria, must be linked to the subject matter of the contract. The link to the **subject matter** means that criteria cannot relate to general corporate policies or practices of the bidding company, but must be specific to the goods, services or works being purchased.

### 2.3. Post-procurement stage

In the post-procurement phase, the stages or mechanisms that are relevant for SRPP are contract performance conditions, subcontracting, monitoring and reporting.

Article 70 of the Directive regulates **contract performance conditions**. Contracting authorities are allowed to set additional conditions for performance of contracts, provided that they are linked to the subject matter. They are additional to the conditions of performance already specified in the call for competition or in the procurement documents. Their use is discretionary for contracting authorities, but is generally widespread, likely because this instrument was already provided for in the 2004 Directive. The new Directive enlarges the scope to include social, economic, innovation or employment aspects.

In practice, contract performance conditions could include all factors involved in the specific process of production, provision or commercialisation of the subject matter of the contract. Examples can be found in recitals: social integration of disadvantaged persons or members of vulnerable groups, compliance with fundamental ILO Conventions, recruitment of disadvantaged persons, employment of long-term job seekers, implementation of training measures for unemployed or young persons, and accessibility for persons with disabilities (Recitals 92, 93, 94 and 99). They can also 'be intended to favour the implementation of measures for the promotion of equality of women and men at work, the

increased participation of women in the labour market and the reconciliation of work and private life' (Recital 98). By contrast, they exclude requirements that refer to general corporate policies, such as corporate social responsibility.

'This article is important for the enforcement of social and labour rights in the performance of contracts, as it allows contracting authorities to go beyond the standards set by binding legislation. Compliance with contract performance clauses is verified at the execution stage, not during the tender's assessment.' (Tiel, et al., 2019, p. 24). This is an essential factor to be considered. Those conditions are included in the tender documents at the procurement stage and, usually, bidders are required to submit self-declarations or declarations of commitment that they will perform such clauses during the execution of the contract, if successful. From this, it follows that if the inclusion of contract performance clauses in a tender is not coupled with appropriate measures to ensure the monitoring of their correct implementation, they will be ineffective. Thus, when adding conditions, it is recommended that contracting authorities clearly allocate responsibility for implementation, monitoring and reporting, and the consequences for non-compliance.

The Directive lays down specific rules in relation to **subcontracting** (Article 71). This provision 'imposes on competent national authorities the obligation to ensure that subcontractors comply with the obligations referred to in Article 18(2), the so-called mandatory horizontal social clause. The possibility of subcontracting is meant to facilitate the involvement of SMEs, including social economy enterprises, and civil society organisations in the public procurement market. The practice of subcontracting may, however, lead to abuses, particularly since it could result in using subcontractors which do not comply with social and labour legislation. In order to ensure some transparency in the subcontracting chain (Recital 105), Article 71 provides that contracting authorities may ask or may be required by a Member State to ask the tenderer to deliver information' (Tiel, et al., 2019, p. 26) regarding subcontracting (the share of the contract that will be subcontracted and the proposed subcontractors).

Article 71 sets out clear links, not only with the mandatory horizontal social clause, but also with exclusion grounds. 'Contracting authorities are allowed to verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 57. Where the verification has shown that there are compulsory grounds for exclusion, the contracting authority shall require that the economic operator replaces the subcontractor. The contracting authority may also require or be required by a Member State to require that the economic operator replaces the subcontractor where the verification has shown that there are non-compulsory grounds for exclusion.' (Tiel, et al., 2019, p. 26).

It is clear that Member States have had wide discretion during the transposition phase in deciding the degree of 'intensity' of the above-mentioned obligations.

**Monitoring** the execution of a contract is an important role. Article 84 of the Directive provides for the obligation on contracting authorities to draw up a written report for every contract or framework agreement covered by the Directive. It is interesting to note that there is no obligation to report on strategic aspects of contracts, including social ones. This is a clear omission that can be detected in the Directive, particularly if it is considered that, according to Article 83, the Commission may require Member States to provide information, every three years 'on the practical implementation of national strategic procurement policies'.

Across the EU, contracting authorities have developed various strategies for monitoring public contracts. 'Monitoring may be carried out by the contractor itself (including in relation to any of its subcontractors), the public body or, in some cases, third-party audits or inspections are held (e.g. to confirm compliance with equal pay, working conditions or whistleblowing provisions).' (EIGE, 2022c, p.



73). Monitoring committees with representatives of different parties and independent experts can also be set up. Monitoring methods include periodic review meetings and reporting including by means of electronic forms, inspections and third-party audits. Monitoring should be linked with payment procedures and penalties. Results from monitoring activities should also inform decisions about the renewal or extension of contracts.

Active engagement of contract managers, as well as of the relevant civil servants in charge of employment, social and gender equality policies, is needed to ensure follow-up on commitments of a social nature made as part of the tender. This can be difficult where the management of the contract takes place at some distance to the procurement (e.g. where central frameworks are used) and where SRPP is not well communicated or understood. The aggregated results of monitoring activities can be used by a contracting authority to inform future tenders and strategies.

## 2.4. Sectoral EU legislation supporting SRPP

In recent years, the European Commission initiated sectoral legislation which includes provisions on public procurement. This section will analyse some EU laws that are relevant to enhancing the social impact of public procurement.

The **Directive on Adequate Minimum Wages in the European Union** was adopted in October 2022 and it is now being transposed by Member States<sup>36</sup>. It acknowledges the challenges in ensuring the respect of collective agreements in public procurement and concessions. Recital 31 lays down: 'The effective implementation of minimum wage protection set out by legal provisions or provided for in collective agreements is essential in the awarding and the performance of public procurement and concession contracts. Non-respect for collective agreements providing for minimum wage protection may indeed occur in the execution of such contracts or in the sub-contracting chain thereafter, resulting in workers being paid less than the wage level agreed in the sectoral collective agreements'.

Article 9 of the Directive on adequate minimum wages in the EU requires Member States to 'take *appropriate measures* to ensure that, in the awarding and performance of public procurement or concession contracts, economic operators and their subcontractors comply with the applicable obligations regarding wages, as well as the right to organise and collective bargaining on wage setting, in accordance with EU law, national law, collective agreements and international social and labour law provisions, including' the relevant ILO Conventions listed in the Public Procurement Directives, which have been ratified by all Member States: 'ILO Freedom of Association and the Protection of the Right to Organise Convention No 87 (1948) and the ILO Right to Organise and Collective Bargaining Convention No 98 (1949)'. Recital 31 clarifies that the 'appropriate measures' can include 'the possibility to introduce contract performance conditions, and ensure that economic operators apply to their workers the wages provided for in collective agreements for the relevant sector and geographical area'.

It is important to stress that Article 9 does not generate new obligations compared to the Public Procurement Directives (in particular, those provided in the so-called 'horizontal social clause' of these Directives, namely: Article 18(2) of Directive 2014/24/EU on public procurement; Article 30(3) of Directive 2014/23/EU on concession contracts; and Article 36(2) of Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.

As shown in the Impact Assessment accompanying the Commission proposal for the Directive, non-compliance appears to be prevalent in some countries, as reported by social partners during the

<sup>36</sup> Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union (OJ L 275 p. 33–47), Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2022%3A275%3ATOC&uri=uriserv%3AOJ.L..2022.275.01.0033.01.ENG>.



preparation of the minimum wage Directive. 'The lack of compliance can lead to unfair competition, as the reduced labour costs of non-compliant businesses can distort competition. This risk also exists in the context of public procurement procedures where non-compliant bidders could benefit from lower wage costs. Workers' organisations have expressed their concerns that public contracts may be awarded to companies that do not comply with the applicable collective agreements and legal frameworks' (European Commission, 2020d, p. 17).

Therefore, the Commission has included Article 9 in its proposal with a view to improve compliance and strengthen the enforcement of the social clause. The Commission believes that the inclusion of Article 9 in the Directive will strengthen the enforcement of its obligations as Member States are requested to take appropriate measures, including the possibility of introducing contract performance conditions. The modalities for implementing this provision are left to the Member States' discretion, in line with national practice and traditions, and fully respecting social partners' autonomy (source: written contribution from DG Employment).

It is useful to note that in the EU there are 'six Member States where minimum wage protection is provided by collective agreements: Austria, Cyprus, Denmark, Finland, Italy and Sweden. Of these countries, Cyprus also has statutory minimum wages covering some low-wage occupations. The other 21 Member States have statutory national minimum wages, that is, statutory minimum wages that apply universally in the country (as opposed to applying only to some occupations, as in Cyprus). In all Member States with statutory national minimum wages, collective agreements set wages above the statutory minimum wages in a number of sectors.' (European Commission, 2020d, p. 2). Taking this into account, in the countries with statutory minimum wages, compliance with the horizontal social clauses of the Public Procurement Directives and the relevant provisions of the minimum wages Directive implies compliance with wages set by collective agreements and with statutory minimum wages.

The Commission's Impact Assessment reports that 'stakeholders were generally supportive of most of the initiative's objectives. Specifically, the workers' organisations considered that statutory minimum wages are not always adequate while several employers' organisations agreed on the importance of adequate minimum wages. Similarly, there was a general agreement among Member States representatives that ensuring adequate minimum wage levels and coverage for all forms of work can contribute to the achievement of upward social convergence and to the fight against poverty, including in-work poverty. [...] However, views on the need of EU action differed and employer organisations and Nordic unions did not agree that an EU action in this area would be needed.' (European Commission, 2020d, p. 3).

The recently adopted **Directive on pay transparency** includes a provision on equal pay in public contracts and concessions (Article 24)<sup>37</sup>. The provision, first of all, clarifies that the horizontal social clause of the Directives on public procurement covers the obligations relating to the principle of equal pay. This Directive goes a bit further than the Directive on minimum wages. In fact, it establishes that 'Member States shall consider requiring contracting authorities to introduce, as appropriate, penalties and termination conditions ensuring compliance with the principle of equal pay in the performance of public contracts and concessions.' In addition, in relation to exclusion grounds, 'contracting authorities may exclude or may be required by Member States to exclude any economic operator from participation in a public procurement procedure where they can demonstrate by any appropriate

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<sup>37</sup> Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (Text with EEA relevance), (OJ L 132, 17.5.2023, pp. 21–44), Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2023%3A132%3ATOC&uri=uriserv%3AOJ.L\\_.2023.132.01.0021.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2023%3A132%3ATOC&uri=uriserv%3AOJ.L_.2023.132.01.0021.01.ENG).

means an infringement of the obligations related either to a failure to comply with pay transparency obligations or a pay gap of more than 5 % in any category of workers which is not justified by the employer on the basis of objective, gender-neutral criteria.' Recital 57 adds that: 'Contracting authorities should also be able to take into account non-compliance with the principle of equal pay by the bidder or one of the bidder's subcontractors when considering the application of exclusion grounds or when taking a decision not to award a contract to the tenderer submitting the most economically advantageous tender.'

The **Common Provisions Regulations on EU funds** set out enabling conditions, meaning pre-conditions that Member States have to put in place prior to the disbursement of EU funds (Article 15)<sup>38</sup>. One of the horizontal enabling conditions defined in Annex III, which are applicable to all specific objectives of the Regulation, is the condition on 'Effective monitoring mechanisms of the public procurement market', which sets out the criteria for monitoring mechanisms that have to be in place concerning all procedures under national procurement legislation. These include the participation of SMEs as direct bidders. However, the enabling conditions on public procurement concern the monitoring mechanisms of basic information, in line with the obligations defined in Articles 83, 84, 99 and 100 of the Directive on public procurement, which are not relevant for SRPP.

## 2.5. EU procurement policy framework

### 2.5.1. EU policy initiatives

Since the adoption of the Directive in 2014, the European Commission has complemented the EU legislative framework with the adoption of EU policy initiatives, both in the field of public procurement policies and other policy areas, which can support strategic procurement. This section of the study gathers information on the initiatives that are significant for achieving social objectives by means of procurement. Some EU sectoral policy initiatives have mentioned SRPP as a tool to support inclusion and job opportunities. These initiatives include the Action Plan to Implement the European Pillar of Social Rights, the Social Economy Action Plan, the Gender Equality Strategy 2020–2025 and the Circular Economy Action Plan.

The **European Pillar of Social Rights Action Plan** mentions public procurement as one of the 'sectoral EU policies and regulatory frameworks regarding services of general interest,' [...] 'which need to further support Member States' interventions and contribute to enhancing access to and accessibility of essential goods and services.' (European Commission, 2021c, p. 27). To this aim, the Commission committed in the action plan to present guidance notices on socially responsible public procurement, alongside innovation procurement. It also encouraged 'national, regional and local authorities to increase the uptake of socially responsible criteria in public procurement and to promote their use, in line with the Commission's guidance notices' (European Commission, 2021c, p. 28).

The **Social Economy Action Plan** (SEAP) recognises that 'in recent years, some local and regional authorities and cities have realised the power of strategic public procurement to meet societal challenges and needs and drive systemic change. However, most public tenders are still awarded based only on the price criterion and socially responsible public procurement is still far less known and developed than green public procurement.' (European Commission, 2021e, p. 10). To address this

<sup>38</sup> Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, (OJ L 231, 30.6.2021, p. 159–706), Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R1060>.

situation, the European Commission made provision for the following actions: (a) Organise workshops in Member States to 'raise awareness, foster the exchange of good practices and train both public procurement officials and social economy entities on how to use public procurements and concessions procedures to achieve social policy objectives'; (b) 'Launch a new initiative under the Single Market Programme in 2022 supporting the creation of local and regional partnerships between social economy entities and mainstream businesses, enabling a 'buy social' business-to-business market'; (c) 'Enhance the use of social clauses in the Commission's own tendering procedures whenever possible'; and (d) 'Call on Member States and other competent public authorities to monitor the use of SRPP in their territory in cooperation with social economy actors' (European Commission, 2021e, p. 10).

Equality between men and women is a fundamental value of the EU, enshrined in the Treaties. Gender equality is also an objective of EU policies and, therefore, is a key component of the strategic frameworks that guide EU action over the next years. In this regard, gender equality and equal opportunities among men and women are enshrined as principles of the European Pillar of Social Rights (principles 02 and 03). In line with this, the **Gender Equality Strategy 2020–2025** acknowledges the SRPP's key role in promoting gender equality. To unlock this potential, the European Commission has pledged to provide guidance to integrate gender equality and the fight against discrimination as a core part of its efforts to make socially responsible public procurement work (European Commission, 2020c, p. 17). Indeed, the use of public procurement to achieve gender equality goals is an example of gender mainstreaming, which requires integrating a gender perspective into every aspect of policy interventions.

As part of the **European care strategy**, the Communication from the Commission on the European care strategy highlights that 'social economy actors bring an added value to the provision of high-quality care services due to their person-centred approach and the reinvestment of profits into the enterprise's mission and in local communities'. To this aim, it recalls the potential of SRPP in boosting social economy contributions to high-quality standards and in promoting fair working conditions in care (European Commission, 2022).

The **European Action Plan on the Circular Economy** explicitly focuses on green public procurement, by recognising the possible synergies between the social economy and the circular economy and the need to foster them through cross-cutting policy measures. It indirectly supports sustainable procurement and SRPP. Facilitating the participation of social economy enterprises and citizens in circular procurement is crucial to achieving this objective (European Commission, 2020b).

On a global scale, the alignment of EU strategic objectives with the **2030 Agenda for Sustainable Development** means a commitment to the implementation of the Sustainable Development Goals (SDGs) at the heart of its policy efforts, including **SDG goal 12 'Responsible consumption and production'**, which includes a target on promoting public procurement practices that are sustainable, in accordance with national policies and priorities (Target 12.7). Public procurement in general and SRPP specifically can be used to promote responsible consumption and production (e.g. by means of the mandatory social clause, monitoring the working conditions alongside the supply chain, and the use of reserved contracts and social considerations in award criteria and contract performance clauses).

In its Communication *Making public procurement work in and for Europe* and the accompanying Recommendation, the European Commission identified six priority areas, where clear and concrete action can lead to substantial benefits in procurement outcomes. Three of these priority areas are relevant for this study: ensuring a wider uptake of strategic public procurement, enhancing the professionalisation of public buyers, and promoting access to procurement for SMEs (in most cases, social economy enterprises are SMEs) (European Commission, 2017a and 2017b).

### 2.5.2. Capacity building initiatives

In addition to developing EU policy initiatives, in recent years, the European Commission has launched several **capacity-building initiatives on SRPP**. In May 2021, the European Commission published the updated version of the [Buying Social](#) guide, which presents the wide range of opportunities for socially responsible procurement under the 2014 Procurement Directives (European Commission, 2021d).

The first capacity-building project on SRPP was [Buying for Social Impact](#), which covered 15 Member States and had two main aims: to promote public buyers' use of social considerations in procurement and to increase the capacity of social economy enterprises to participate in procurement. It also produced a collection of good practices: [Buying for Social Impact – good practice from around the EU](#) (EASME, European Commission, 2019b). Later, the **#WeBuySocialEU** project developed the collection of [71 Good Practice Cases on SRPP](#) (EASME, European Commission, 2020), carried out a communications campaign on SRPP (#WeBuySocialEU was the hashtag used) and produced [guidance](#) on frequently asked questions on SRPP.

In 2022, the European Commission enlarged the scope of the [Green Public Procurement \(GPP\) Helpdesk](#), which has existed for more than a decade, from green procurement 'to sustainable procurement, a process by which public authorities seek to achieve the appropriate balance between the three pillars of sustainable development – economic, social and environmental – when procuring goods, services or works.' (AEIDL's webpage)<sup>39</sup>. Many public authorities in the EU are implementing green public procurement as part of a broader approach to sustainability in their purchasing, which also addresses economic and social aspects. The Helpdesk serves to support the implementation of GPP by answering queries, providing regular news via the GPP News Alert about the latest developments in GPP, documenting and disseminating first-hand experiences through the series of GPP in Practice Examples, hosting informative webinars on GPP, and maintaining a website on GPP (on the Europa portal). Although not explicit in its name, the Helpdesk also covers the social aspects of procurement. Several good practice examples presented integrate both green and social criteria or social criteria alone. Webinars were organised on the use of innovation partnerships in the social sector, the contribution of the social economy to circular procurement, and how to use the appropriate social clauses in tendering procedures. Queries on legal issues can be sent to the Helpdesk in English, French and German, which also concern the social aspects of procurement<sup>40</sup>. Also in 2022, DG GROW organised a series of webinars on SRPP which are available on their Youtube channel<sup>41</sup>.

In 2023, the European Commission launched the **Big Buyers Working Together** (BBWT) [project](#) to support collaboration between public buyers with strong purchasing power and promote the wider use of strategic public procurement for innovative and sustainable solutions<sup>42</sup>. The third edition of the project is currently running. The two previous editions were the Big Buyers Initiative and Big Buyers for Climate and Environment. The new edition of the Big Buyers project will soon set up 10 Communities of Practice (CoPs), out of which two concern SRPP. In the previous pilots of this project, there were no working groups on social aspects. A needs assessment was launched to identify the needs of public buyers, their desired discussion topics, and the type of actions that could be implemented, including the definition of CoPs. In the needs assessment carried out, the Commission has seen great interest in

<sup>39</sup> See AEIDL's webpage for a description of the project: <https://www.aeidl.eu/project/spp-helpdesk/>.

<sup>40</sup> The GPP Helpdesk is available at: <https://ec.europa.eu/environment/gpp/helpdesk.htm#:~:text=GPP%20Helpdesk,%20Tel%3A%20%2B49,761%20368%20920.%20E-mail%3A%20gpp-helpdesk%40iclei.org>.

<sup>41</sup> DG GROW Youtube channel is accessible at: <https://www.youtube.com/user/EUenterprise>. The webinars on SRPP can be found by including in the search #WeBuySocialEU.

<sup>42</sup> The Big Buyers project is available at: [https://commission.europa.eu/funding-tenders/tools-public-buyers/social-procurement\\_en](https://commission.europa.eu/funding-tenders/tools-public-buyers/social-procurement_en).

social issues (interview with DG GROW).

'Cities, central purchasing bodies and other major public buyers can maximise their market power and impact by working together and pooling their resources.' (DG GROW's website)<sup>43</sup>. For example, members can 'exchange best practices with peers from across the EU, carry out joint market engagement and share market intelligence' (DG GROW's website), identify and discuss the latest guidance and technical developments, and develop joint procurement criteria and strategies.

Accordingly, this BBWT edition will help drive market demand for innovative and sustainable products and services in Europe. Each CoP will define its own objectives to effectively address sector-specific opportunities and challenges. 'BBWT convenes public purchasing organisations such as local and regional governments, central purchasing bodies and other public agencies. Market actors (e.g. producers and suppliers) and industry associations will be invited to join various sessions and events, depending on the focus and needs of the respective CoP' (DG GROW's website).

In 2023, the European Commission launched another [project](#) on **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 27 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. It is very important it to set the conditions for public administrations to talk to each other, because they fail to do so. This means that many opportunities are missed and that there is no real transfer of knowledge. Procurement is a hyper fragmented reality, to the point that, in some Member States, the exact number of contracting authorities is not known (interview with DG GROW).

From the webinars the Commission organised to disseminate the Buying social guide, the webinars of the GPP Helpdesk and the procurement dialogues to promote strategic procurement, the Commission can see that there is interest among contracting authorities in SRPP (interview with DG GROW).

Another notable capacity-building initiative that is worth mentioning is the **project on how to promote gender equality by means of public procurement** (this is called gender-responsive public procurement, GRPP) in the EU, which was commissioned by the European Institute for Gender Equality (EIGE) in 2021<sup>44</sup>. This project investigated for the first time in the EU the state of play of GRPP in the 27 Member States and in the procurement processes launched by the European institutions. It also developed and tested a [toolkit](#) that supports policy makers and contracting authorities in the development and implementation of policies that support GRPP and in the design and implementation of procurement procedures that integrate gender aspects (EIGE, 2022c). OECD is also working on GRPP and published a policy paper on it (OECD, 2021).

As part of its measures to upskill contracting authorities, the European Commission designed the [ProcurCompEU](#), a tool to support the professionalisation of public procurement. By defining 30 key competences, it provides a common reference for public procurement professionals in the EU and

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<sup>43</sup> The description of the Big Buyers Working Together project is available at this link: <https://public-buyers-community.ec.europa.eu/about/big-buyers-working-together>.

<sup>44</sup> The EIGE project on GRPP can be found at: <https://eige.europa.eu/gender-mainstreaming/methods-tools/gender-responsive-public-procurement>.



beyond. It recognises and supports public procurement as a strategic function that delivers public investment for sustainable growth.

The European Innovation Council and SMEs Executive Agency (EISMEA), in collaboration with DG GROW, recently published two calls for tenders aimed at increasing the awareness of and the professionalisation of public buyers in strategic procurement. The first one specifically focuses on SRPP and has the objective of organising training of contracting authorities in the countries that were not in the scope of the Buying for Social Impact project, as well as implementing an EU-wide communications campaign on SRPP. Another lot of this tender regarded a study to investigate the existing frameworks and scope regarding measuring methodologies, policies and practices in regard to social impact in public procurement across EU Member States. These two contracts have been awarded in August 2023.

The second tender, published in the summer of 2023, is aimed at providing specialised training to (i) public buyers' staff and to (ii) decision makers at both technical and political levels to build knowledge and capacity for execution of strategic procurement (with special emphasis on innovation at all levels of the public organisation). Training course will be organised on the use of innovation procurement to achieve social and environmental goals. Part of the training will be addressed to decision makers (online courses of the duration of two hours), as decision makers and top management of public administrations often have resistance towards strategic procurement, including SRPP (interview with DG GROW). Another lot of the same tender has the objective of improving the administrative capacity of the staff of central purchasing bodies, to facilitate the access to procurement for SMEs and to promote the use of strategic procurement.

#### *Relevant European Parliament resolutions*

The European Parliament resolution on the public procurement strategy package 'welcomes the fact that many Member States have made provisions for the use of quality criteria (including the best price–quality ratio)', but at the same time there is concern 'about the excessive use of the lowest price as the primary award criterion in a number of Member States with disregard for quality, sustainability and social inclusion. Therefore, the European Parliament calls on the Commission and the Member States to analyse and report on the reasons behind this situation and to propose suitable solutions where necessary.' [...] It notes that 'contracting authorities can pursue green, innovative or social goals not only through award criteria, but also through well-thought-out specifications.' [...] It also calls on the Commission to guarantee that the obligation for Member States 'to ensure that contractors and subcontractors fully comply with' Article 18(2) of Directive 2014/24/EU (horizontal social clause) is fulfilled by Member States in the transposition and application of the Directive and to 'facilitate the exchange of best practices in this area.' (European Parliament, 2018)<sup>45</sup>.

In its resolution on a strong social Europe for Just Transitions, the European Parliament 'calls on the Commission to revise the European public procurement directive in order to establish preferential treatment for companies complying with collective bargaining agreements; it also calls on the Commission to strengthen the social clause and exclude from tenders companies which have engaged in criminal activities or union busting or have refused to participate in collective bargaining.' (European Parliament, 2020)<sup>46</sup>.

Finally, in its resolution on the Social Economy Action Plan, the European Parliament points out that 'the inclusion of environmental and social requirements in tenders can be essential to the development

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<sup>45</sup> European Parliament resolution of 4 October 2018 on the public procurement strategy package (2017/2278(INI)), Available at: [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0378\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0378_EN.html).

<sup>46</sup> European Parliament resolution of 17 December 2020 on a strong social Europe for Just Transitions (2020/2084(INI)), Available at: [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0371\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0371_EN.html).



of the social economy sector.' [...] 'It encourages the Member States to systematically adopt strategies aimed at developing SRPP. It considers that the transposition of the Public Procurement Directive must be coupled with initiatives to increase knowledge about the relationship between public spending and its contribution to achieving the UN Sustainable Development Goals and to building the capacity of public procurement officers and social economy entities. It encourages public procurement officers to carry out pre-market consultations before drawing up tender documents with a view to better understanding what social economy entities can offer and how they can meet tender requirements.' [...] 'It reminds the Member States that European Social Fund Plus (ESF+) funding can be used by public procurement authorities to fund the 'social clause facilitators', i.e. professionals in charge of promoting and supporting the implementation of social clauses at the local level, and to advise public authorities on the drafting of tender specifications that are accessible to the social economy.' (European Parliament, 2022)<sup>47</sup>.

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<sup>47</sup> European Parliament resolution of 6 July 2022 on the EU action plan for the social economy (2021/2179(INI)), Available at: [https://www.europarl.europa.eu/doceo/document/TA-9-2022-0288\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0288_EN.html).

### 3. HOW MEMBER STATES ARE IMPLEMENTING SOCIALLY RESPONSIBLE PUBLIC PROCUREMENT

This Chapter provides an overview of how the provisions of the Directive relevant to SRPP were transposed into national legislation (Section 3.1). Section 3.2 gives an in-depth examination of the transposition and implementation of SRPP in Belgium, Czech Republic, Italy, Spain and Sweden. Finally, it illustrates a German good practice of regional legislation aimed at enhancing the enforcement of collective agreements by the means of public procurement.

#### KEY FINDINGS

- The study covers the transposition of Directive 2014/24/EU in 17 Member States. Most of the provisions of the Directive that allow the achievement of social goals by means of public procurement are not mandatory, meaning that Member States had a degree of flexibility when transposing it into national law. As a result, transposition was not homogeneous.
- Overall, the Directive has triggered change across the EU, although national public procurement traditions are still influential.
- The transposition of the horizontal social clause was mandatory. This is the provision whose transposition has been the most problematic or which was not fully transposed in line with the Directive in 3 Member States out of the 17 analysed.
- The transposition of the provision on reserved contracts for the professional and social inclusion of workers with disabilities and disadvantaged workers was not mandatory. All the 17 Member States studied transposed it. In five Member States, it was not fully transposed in line with the Directive, with respect to the threshold of workers with disabilities or disadvantaged workers which should be employed by the economic operator (the EU legislator sets the percentage of at least 30 %). The transposition of the legal possibility of reserving contracts for social, health and other services for people was not transposed in four countries out of those analysed.
- In the transposition of the provision on award criteria, and in particular the possibility to limit the use of the lowest price or cost, some Member States such as Croatia, Czechia, France, Greece, Italy, the Netherlands and Poland, introduced some interesting elements for this purpose.
- Most countries among those analysed, except for Romania, transposed the possibility to include social considerations in contract performance conditions in line with the Directive. Examples of social considerations used by Member States include the employment of workers belonging to vulnerable groups, social integration, combating discrimination, promoting gender equality, the employment stability of the staff employed and the application of national and territorial collective agreements in the sector covered by tenders.
- In the transposition of the light regime which shall govern the award of social and other services above the EU threshold, a greater variety can be observed. Most countries among the Member States analysed transposed the provision in line with the Directive. France and Latvia provided for the possibility of using the light regime for the award of social services of a value equal to or above the threshold. Italy, Romania and Spain set out that these contracts shall not be awarded solely on the basis of price or cost.
- Among the countries analysed in depth, Spain, Italy, Sweden and Belgium have the most advanced legal framework, while Czechia has a transposition law that is less favourable to SRPP. Great variations exist across the five countries in how SRPP is implemented.

### 3.1. How Member States transposed the social provisions of the Directive

This section provides a comparative overview summarising the common trends in the transposition of the public procurement Directive, as well as where specific national legislation differs from the others or stands out for specific reasons. The analysis is not exhaustive for each article of the Directive examined. The Member States covered are 15: Croatia, Czechia, Denmark, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, The Netherlands, Poland, Romania, Slovakia, and Sweden<sup>48</sup>. Examples of transposition are given.

As a general remark, it can be anticipated that most of the provisions of the Directive that allow for the achievement of social goals while purchasing goods, works and services are not compulsory, which means that Member States had a lot of flexibility while transposing the Directive into national law. As a result, transposition was not homogeneous. At the same time, it is important to acknowledge that overall, the Directive has triggered change across the EU, although national public procurement traditions are still influential.

#### 3.1.1. Transposition of the mandatory horizontal social clause [Article 18(2)]

As explained in Section 2.2, the transposition of Article 18(2), laying down the so-called 'horizontal social clause', was mandatory, meaning that Member States had the obligation to take 'appropriate measures' to ensure the application of this provision.

Overall, from the analysis conducted during this study and in the context of the Buying for Social Impact project, it emerges that the horizontal social clause is the provision whose transposition has been the most problematic or which - in some Member States - has not been transposed in line with the Directive.

Firstly, some specific examples of transposition by some Member States complying with Article 18(2) are highlighted.

In **Germany**, in performing a public contract, economic operators must comply with all legal obligations applicable to them. The provision, nevertheless, **specifically highlights the obligation of economic operators** to pay taxes, other fees and contributions to social security; to observe labour law obligations concerning regulations on health and safety at work; and the obligation to grant at least the minimum level of working conditions as stated in the Minimum Wage Act or such tariff agreements that fulfil the demands of the Directive 96/71/EC – amended by Directive 2018/957/EU – concerning the posting of workers in the framework of the provision of services. **No specific mention is made of environmental obligations** (Mussnug, F., 2019).

In **Denmark**, the Report of the Committee on Danish Procurement Law<sup>49</sup> stated that **it is up to relevant authorities (and not the contracting authorities)** to ensure that economic operators comply with the obligations contained in Article 18(2) of the Directive. However, the provisions set out in this article

<sup>48</sup> The comparative legal analysis included in Section 3.1 is based on the legal analyses conducted in the Buying for Social Impact project in Czechia (Gromnica, A.), Croatia (Serđarušić, I.), Denmark (Boe Kjeldsen, U.), France (Kalfleche, G.), Germany (Mussnug, F.), Greece (Marini, F.), Hungary (Tátrai, T.), Ireland (McEvoy, E.), Italy (Rossi, S.), Latvia (Gaigule-Sāvēja, K.), The Netherlands (Bugter, B.), Poland (Wyszyńska, M.), Romania (Baciu, I.), Slovakia (Valcuhoa, J.), and Sweden (Sylvan, M.). The BSI project produced analyses of the transposition of the social provisions of the Directive in the above mentioned 15 countries in 2019. In the present study, the legal analyses concerning Italy (Rossi, S.), Sweden (Maucher, M.) and Czechia (Gromnica, A.) are the only ones that have been updated for this study. The legal analyses concerning Belgium (Bodson, J.-L.) and Spain (Almansa, A.) are contained in Sections 3.2.1 (Belgium) and 3.2.4 (Spain). The added value of this section is that it provides a comparative analysis, which was not existing until now.

<sup>49</sup> December 2014, Report of the Committee on Danish Procurement Law, page 548, Available at: <https://www.kfst.dk/media/2278/rapport-fra-udvalg-om-dansk-udbudslovgivning-december-2014.pdf>.

are spread across different sections of national legislation (Boe Kjeldsen, U., 2019).

In **Greece**, transposition mentions that **compliance with principles of procurement is to be audited and certified** by bodies supervising performance of public contracts and by the competent public authorities and agencies acting within the limits of their responsibility and competence. These authorities will prioritize economic operators performing public contracts for inspection. Failure to comply with the procurement principles will be assessed as grave professional misconduct and may potentially lead to the operators being excluded from future tenders (Marini, F., 2019).

In **France**, sustainable development objectives in the economic, social and environmental objectives shall be taken into account when determining the nature and extent of the needs to be met by the contract (Kalfèche, G., 2019).

In **Croatia**, the relevant provision adds a specific mention of compliance with **obligations of payment of the agreed wage** (Serdarušić, I., 2019).

In **Ireland**, a provision spells out that **compliance** in the performance of the public contract **falls on the economic operator**. On the other hand, contracting authorities shall ensure that the legal and procedural obligations are actually performed (McEvoy, E., 2019).

In **Italy**, the transposition closely follows the provision as spelled out in the Directive (Rossi, S., 2019).

In the **Netherlands**, contracting authorities shall indicate the body where information on applicable tax, environmental, employment and work condition obligations shall be obtained. The contracting authorities may require tenderers to prove full compliance with them. However, this provision is not explicitly linked with the performance stage of the contract (Bugter, B., 2019).

In **Romania**, **contracting authorities shall indicate** in the tender documentation the **mandatory obligations applicable** or the competent institutions from where such information may be obtained. In addition, contracting authorities shall request economic operators to state their compliance with obligations upon the elaboration of tenders (Baciu, I., 2019).

In **Sweden**, national legislation is focused on **labour law obligations** (Sylvan, M., 2019). In the transposition process of Article 18(2) into Swedish law, no provisions as to environmental and other social obligations were added (Maucher, M. 2023).

In **Slovakia**, **compliance** with the obligations mentioned in Article 18(2) is **touched upon regarding exclusion grounds**, whereby participation in procedures is restricted to economic operators that have not 'within the three years preceding the contract notice, seriously breached environmental, social or labour law obligations under special regulations, for which they have been legally sanctioned by a contracting authority and a contracting entity' (Valcuhova, J., 2019).

Below some observations are provided concerning the countries in which transposition was found to be not in line with Article 18(2).

In the **Czech Republic**, the horizontal social clause is not transposed as such in national legislation. The duty of the bidder to comply with environmental and social conditions is mainly covered by special legislation and has very little to do with tender procedures. Article 89 of Act. No. 134/2016 indicates that contracting authorities may make a reference in procedures to the entity or administrative body from which the economic operator may obtain information on the duties linked to 'the protection of employees and working conditions, environmental protection, taxes, fees or other similar pecuniary performances that are applicable at the place where the services or works are to be provided and that are related to these services or works'. In addition, the same article **spells out the obligation of economic operators to take such information into account** when drafting their tenders and state

this fact in the tender.

The Article allows the procurers to make reference to the respective public authority, which may clarify the conditions or public duties (including environmental protection, employment issues and labour conditions) for the bidders. This cooperation might help to mitigate the risks of breach of the duties stipulated by the legislation and might be of use where innovative approaches are used, including a new sustainability requirement, or might be especially helpful for bidders from abroad (Gromnica, A., 2019).

Since 2021 there is an amendment in force to Article 89, which makes it mandatory for the contracting authorities, to use environmental, social and innovation considerations in their tenders. The updated provision, however, is still not very much in line with the horizontal social clause. The corresponding Czech provision does not even mention the ILO Conventions included in Annex X of the Directive (Gromnica, A., 2023). Lack of proper regulation in this field might result in lack of interest by the procurers in the actual conditions in their supply chain. Since there are no measures on how to guarantee compliance with all necessary provisions and duties, procurers have to make use of other instruments at their disposal, such as contract performance conditions provided for in Article 70 of the Directive (Gromnica, A., 2019).

However, Article 48(3) of the Public Procurement Act provides that 'The contracting authority shall exclude a participant from the procurement procedure if the participant has failed to provide proof of the payment of the requested security or has failed to ensure the security for the entire duration of the award period.'

In **Latvia**, Article 18(2) of the Directive is not directly transposed. However, **compliance** with obligations spelled out in this article **is ensured through the provisions linked to the exclusion of economic operators from public procurement procedures**. These include the event of tax avoidance and social insurance debts (over EUR 150), the employment of workers without a legal work permit or without the entitlement to legally reside in the EU, or the employment of people without a written contract. **No reference** is made to **environmental obligations**.

In the context of abnormally low tenders, the contracting authority shall request clarification regarding the price or costs offered in particular with relation to 'compliance with the obligations specified in the regulatory enactments and collective agreements in the fields of environmental, social and labour law and labour protection' (Gaigule-Šāvēja, K., 2019).

In **Poland**, Article 18(2) of the Directive is not directly transposed. However, **compliance** with (part of) the obligations spelled out in this article **is ensured through the provisions linked to the description of the contract**, where the contracting authority defines requirements concerning employment by a contractor or subcontractor, on the basis of employment contracts, and therefore avoids unlawful application of civil-law contracts instead of employment contracts. The spirit of Article 18(2) of the Directive **also appears in the provisions linked to the exclusion of economic operators from public procurement procedures**. Polish law determines that economic operators shall be excluded if they breach obligations related to the payment of taxes or social security or health insurance contributions. Contracting authorities may also exclude economic operators that have committed serious professional misconduct in terms of failure to perform a contract or of improper performance.

**Obligations also emerge in the context of abnormally low tenders**, where the contracting authority shall request explanation and evidence regarding labour costs (whose value assumed for the purpose of setting the price shall not be lower than the minimum wage), compliance with labour law and social security legislation, environment protection law and subcontracting (Wyszyńska, M., 2019).

### 3.1.2. Transposition of the legal possibility to reserve contracts (Article 20)

The transposition of the legal possibility to reserve contracts was optional. What can be observed is that there are some deviations from Article 20 in the transposition by some Member States, namely concerning the threshold of workers with disabilities or disadvantaged workers which should be employed by the economic operator (the EU legislator sets the percentage of at least 30 %).

In the **Czech Republic**, contracting authorities have the possibility to reserve contracts, 'to an economic operator operating a sheltered workshop where at least 50 % of its total number of employees are disabled workers under the employment law' (Act. No. 134/2016). Thus, the possibility to reserve contracts exists only in the context of sheltered workshops (this seems to imply that it does not apply to social enterprises) and only for persons with disabilities. Moreover, as mentioned in Section 1.4, a law on social enterprises is lacking in the Czech Republic, which has made the application of the provision on reserved contracts difficult. The situation might change, as there is a law on social enterprises, which also covers reserved contracts, pending (Gromnica, A., 2023).

The transposition of the Czech Republic reflects what was foreseen by the 2004 Directive on public procurement. The same can be affirmed about the transposition by Greece, France and Croatia, with variations (Gromnica, Marini, Kalflèche, Serdarušić, 2019).

In **Greece**, this legal possibility to reserve contracts applies to three specified Greek legal forms (sheltered production workshops regulated by Law No. 2646/1998, Social Cooperatives Ltd known as 'KoiSPEs' regulated by Article 12 of Law No. 2716/1999 and Integration Social Cooperative Enterprises known as 'KoinSEPs Entaxis' of letter 'a' of paragraph 2 of Article 2 of the pre-existing Law No. 4019/2011 on Social Economy) and any economic operator whose main statutory aim is the social and professional integration of disabled or disadvantaged persons, and whose personnel is comprised, at least to 30 %, of disabled or disadvantaged workers. Depending on the type of Greek legal form made use of, the percentage of disabled and disadvantaged workers varies between 30 % and 50 % (Marini, F., 2019, pp. 6-8).

In **France**, it applies to sheltered workshops and economic operators employing **at least 50 % of persons with disabilities and disadvantaged persons** (Kalflèche, G., 2019).

In **Croatia**, the threshold is a **minimum of 51 % of the employees** of workshops, economic operators and programmes who must be persons with disabilities or disadvantaged workers. Economic operators must prove their status by enrolling in the appropriate register. Economic operators may exceptionally award up to 20 % of the value of the reserved contract to subcontractors who do not meet prescribed conditions (Serdarušić, 2019).

The percentage of at least 30 % of the 'target groups', as defined in the Directive, can be found in countries such as Germany, Denmark, Hungary, Ireland, Italy, Latvia, the Netherlands, Poland and Sweden.

In **Latvia**, the provision concerns **only persons with disabilities** (Gaigule-Šāvēja, K., 2019).

In **Hungary**, the right to reserved procedures may be granted to sheltered workshops or 'developmental employers'; the **threshold in both cases is established at 30 %**. A **disadvantaged worker is defined as** a person who (a) has not been in a relationship of employment or other legal relationship aimed at the performance of work over the previous six months, or (b) has not completed secondary school or obtained job qualifications (at the level of ISCED 3), or (c) is above the age of 50, or (d) is an adult who is the only responsible for one or more dependents, or (e) works in a sector or profession of a Member State, in which the gender imbalance is greater than 25 % of the average imbalance characteristic of all the economic sectors of this Member State, and they belong to this



underrepresented gender group, or (f) belong to an ethnic group in a Member State that needs to have their vocational or language training or professional experience reinforced in order to improve the chances of finding employment in a secure workplace (Tátrai, T., 2019).

In **Italy**, the threshold is established at **30 % of employees being persons with disabilities or disadvantaged workers. Disadvantaged persons are defined as** 'former patients of psychiatric hospitals, including judicial ones, subjects undergoing psychiatric treatment, drug addicts, alcoholics, minors of working age in situations of family difficulty, persons detained or interned in prisons, convicted persons and the incarcerated admitted to alternative measures to detention who are allowed to work outside the prison' [Article 61(4) of the 2023 Code, which makes reference to Article 4 of Law no. 381 of 4 November 1991 on social cooperatives<sup>50</sup>]. (Rossi, S., 2023).

In **Poland**, at least **30 %** of the employees of the tenderer should belong to '**socially marginalised groups**'. These include, but are not limited to, persons with disabilities, unemployed persons, persons deprived of liberty or released from prison, persons with mental disorders, homeless people, refugees, persons under 30 or over 50 who are unemployed, and members of disadvantaged minorities (Wyszyńska, M., 2019).

In **Sweden**, the threshold is established at **30 % of total employees being persons with disabilities or persons who are unable to enter the labour market** (Sylvan, M., 2019). Reserved contracts allow the possibility of transposing exclusive participation in procedure and performance of contracts for sheltered workshops, for economic operators active in social and professional integration of disabled or disadvantaged persons and for sheltered employment programmes. The conditions defined for an exclusive participation concern both the tendering process and the contract performance. A public contract procured under reserved contracts can be annulled if the supplier fails to fulfil the condition of at least 30 % employment of persons with disabilities at any time during the duration of the contract (Maucher, M., 2023).

In **Slovakia**, the right to reserved participation applies to **registered** social integration enterprises, sheltered workshops, **persons with disabilities who operate or carry out self-employment at a sheltered workshop**. The threshold is established at a minimum of 30 % of employees being persons with disabilities or disadvantaged persons (Valcuhova, J., 2019).

A peculiar case is the one of **Romania**, where the possibility to reserve contracts may apply to authorised sheltered units on the protection and the promotion of the rights of the persons with disabilities and/or social enterprises for insertion. No reference is made to other vulnerable groups and their share among total employees (Baciu, I., 2019).

### 3.1.3. Transposition of the legal possibility to reserve contracts for social, health and education services (Article 77)

The transposition of Article 77 of the Directive was not compulsory. For example, this provision was **not transposed in the Czech Republic, Germany, Hungary and Slovakia**. In Denmark, Croatia, Ireland, Italy and the Netherlands, the transposition closely follows the Directive.

Some peculiarities can be observed when looking at how it was transposed in some countries. For example, some countries, such as Greece and Latvia, require that the economic operator is registered as belonging to the social economy, according to the national definitions.

<sup>50</sup> Law no. 381 of 8 November 1991, 'Regulation of social cooperatives', in Italian 'Legge 381 dell'8 novembre 1991, Disciplina delle cooperative sociali', Available at: [https://www.bosettiegatti.eu/info/norme/statali/1991\\_0381.htm#04](https://www.bosettiegatti.eu/info/norme/statali/1991_0381.htm#04).

In **Greece**, the transposition law requires that to benefit from this reservation, an economic operator (a) **must be registered with the Social Entrepreneurship Registry** of the Ministry of Labour, Social Insurance and Social Solidarity, (b) **have the statutory purpose** of the socioeconomic integration of persons with disabilities or disadvantaged workers, and (c) **have more than 30 % of their employees** belonging to one of the two categories. In addition to this, such organisations must fulfil the four conditions in paragraph 2 of the Directive. It is interesting to observe that what is stipulated in letter (c) testifies that there has been a confusion by the Greek legislator between reserved contracts for social and other personal services and reservations under Article 20 of the Directive (Marini, F., 2019).

In **Latvia**, the national provision (Article 16, subparagraph 2 and hereafter) lays down the need for tenderers **to have been granted the status of a social undertaking** according to the Social Enterprise Law. The second and third conditions spelt out in Article 77, subparagraph 2 of the Directive have not been transposed. However, the Social Enterprise Law states the need for tenderers to reinvest profits to achieve [social] objectives, but does not make reference to participatory requirements, either as regards to the distribution of profits or the structure of management or ownership (Gaigule-Šāvēja, K., 2019).

In **France**, **reservation applies to the enterprises of the social and solidarity economy**, as defined in Article 1 of Law No 2014-856 of 31 July 2014 on the social and solidarity economy or equivalent structures, when their aim is related to the provision of services under the light regime. Contrary to the mainstream interpretation of the transposition of Article 77, the national provision states that an organisation that has been awarded a contract under this format 'cannot benefit from an attribution to the same Title [**that is, to all services covered by the title and not just the same type of service**]' for the next three years' (Kalflèche, G., 2019).

In **Poland**, the national provision (Article 138p) introduces some changes to the original wording of Article 77 of the Directive. In terms of the first condition, it spells out that 'the objective of their activity is the fulfilment of public service tasks linked to the delivery of these services **and the social and professional integration of persons referred to in Article 22.2**' [see section on reserved contracts for a detail on such groups]. In addition, the second condition is worded in the following manner: '2) they do not operate for the purpose of making profit, they use all their profits to achieve their statutory objectives, and they do not share their profits among their shareholders and employees', in other words they have the obligation to reinvest profits to perform the mission of social enterprises (Wyszyńska, M., 2019).

In **Romania**, the national provision indicates specific examples of the type of economic operators to which reservation may apply: 'not-for-profit organizations, social enterprises or sheltered units, accredited as social service providers or public social service providers'. Moreover, the condition on profit reinvestment makes reference to '**all profits**' rather than '**profits**' (Baciu, I., 2019).

In **Sweden**, references to profit distribution or redistribution and the participatory considerations relating to them are missing in the national provision (Sylvan, M., 2019). The majority of the social economy enterprises active in the welfare sector submit bids for public contracts in the framework of these rules (Maucher, M., 2023).

#### 3.1.4. [Transposition of the use of the lowest price only and of Best Price Quality Ratio \(award criteria\) \[Article 67\(2\)\]](#)

As stipulated in Article 67(2) on award criteria, 'Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts.'

It can be observed that **France** permitted the lowest price only for highly standardised products (Kalfèche, G.), **Italy** for works of a value below EUR 5,382,000 [Article 50(4) of 2023 Code on Public Contracts] and for highly standardised supplies and services (Rossi, S., 2019), while **The Netherlands** set the obligation to justify its use (Bugter, B., 2019). The **Czech Republic** determined that it must not be used in competitive dialogues and in tenders for specified services (Gromnica, A., 2019). **Croatia** established that the weight of price should not be higher than 90 % (Serđarušić, I., 2019). **Poland** establishes conditions to apply the lowest price only or weighting given to prices greater than 60 %. Contracting authorities shall, in these cases, specify quality standards relating to all essential characteristics of the subject of the contract and evidence in an annex to the procedure record how the costs over the life cycle are accounted for (Wyszyńska, M., 2019).

Some Member States specified the use of Best Price Quality Ratio (BPQR). For example, **Croatia** set out that the social considerations listed for the assessment of BPQR include 'job creation, decent work, democratic ownership, social and professional inclusion of persons with disabilities and disadvantaged persons, integration of disadvantaged groups in the democratic process of the enterprise and accessibility of the service (particularly for those living in remote areas)' (Serđarušić, I., 2019, p. 20).

**Germany** laid down that the most economically advantageous tender **must** be determined according to the best price–quality ratio. Apart from the price or costs, to determine this, qualitative, environmental or social aspects **may** also be taken into account (Mussnug, F., 2019).

**Italy established that** BPQR **must** be used for contracts relating to social and hospital catering, welfare and school services, as well as labour-intensive services; and for contracts relating to the assignment of engineering and architecture services and other services of a technical and intellectual nature for an amount equal to or greater than EUR 140,000 [Article 108(2) 2023 Code] (Rossi, S., 2023).

**Greece** developed the **social aspects that can be considered as criteria** to assess the BPQR (work and social integration of vulnerable groups, combating discrimination and promotion of gender equality) (Marini, F., 2019).

In **Sweden**, the Best Price–Quality Ratio (BPQR) is one of three methods to award contracts, alongside price or cost and the cost-effectiveness approach, as long as the social clauses are linked to subject matter. Social considerations can include factors such as job creation, decent work, democratic ownership, social and professional inclusion of persons with disabilities and disadvantaged persons, integration of disadvantaged groups in the democratic process of the enterprise, and accessibility of the service (including for those living in rural and remote areas) (Maucher, M., 2023).

### 3.1.5. [Transposition of the possibility to include social considerations in the conditions for the performance of contracts \(Article 70\)](#)

Interestingly, **Romania** did not transpose this provision (Baciu, I., 2019).

Many countries transposed this provision with a very similar wording to that used in the Directive.

Some examples are now provided about the types of social considerations that have been included by some Member States. The most common examples are:

- Employment of workers belonging to vulnerable population groups, in Greece, Hungary, Italy and Poland
- Facilitation of social and/or work integration, in Greece and Hungary (Tátrai, T., 2019)
- Combating discrimination, in Greece and Hungary

- Promoting gender equality, in Greece, France, Italy, and Spain
- The life cycle of a product or building, in France
- The employment stability of the staff employed, as well as the application of national and territorial collective agreements in the sector, in Italy.

In **Italy** and **Slovakia**, no reference is made to the necessary link with the subject matter of the contract. In Italy, this has been corrected in the revised code from 2023 (Rossi, S., 2023). In Sweden, there is no reference to **innovation** or **employment considerations** (Sylvan, M., 2019).

### 3.1.6. Transposition of the light regime (Articles 74 to 76)

In the transposition of the light regime by Member States, a greater variety can be observed, although Article 74 of the Directive provides that social and other services above the threshold **shall** be awarded according to the rules set out in the light regime.

While most countries (Denmark, Germany, Croatia, Hungary, Ireland, the Netherlands, Poland and Romania) make the application of the light regime mandatory above the threshold, **Latvia** provides that the light regime **may** be applied for procedures related to social services equal or above the threshold (Gaigule-Šāvēja, K., 2019). **France** gives contracting authorities **the possibility** to use the light regime in procedures related to social and other services, either above or below the threshold (Kalflèche, G., 2019).

**Greece** made it mandatory for services **below and above the threshold** (Marini, F., 2019).

Article 76 of the Directive gives Member States 'discretionary power to determine the rules that take into account the specificities of such services to the person and to provide that contract awards would only be made on the basis of the best price–quality ratio, which includes qualitative, environmental and/or social criteria linked to the subject matter of the public contract in question.' (Tiel, et a., 2019, p. 32).

However, very few Member States took advantages of this possibility. The **Italian** legislation **spells out the obligation to ensure the quality, continuity ... of services procured**. In addition, it also indicates that the **best value for money rule** shall be applied (Rossi, S., 2019).

Polish national legislation sets out the **obligation** (not the possibility) for contracting authorities to 'select the most advantageous tender which offers the most advantageous ratio of the price or cost to other criteria, in particular the quality and sustainability of social services, the continuity or accessibility of a given service or the criterion of the degree to which specific needs of the service user are addressed' (Wyszyńska, M., 2019).

In **Romania**, national legislation determines that the only the award criteria applicable for services under the light regime shall be 'the best price–quality ratio or the best cost–quality ratio ... taking into consideration the quality and the sustainability characteristics of the social services' (Baciu, I., 2019).

In **Sweden**, the chapter transposing the light regime in Swedish law entails provisions that are similar to those for regular services over the thresholds. This includes the provisions on exclusion and the award of contract, including abnormally low tenders. The rules which entitle contracting authorities to allow suppliers to rectify flaws in their bids under specific conditions, also applies to procurement of social services and other specific services. Annex 2 is relevant in view of the light regime for social, health and education services, and contains a list of social and other specific services. As of 1 January 2022, the threshold for direct awards for social services is SKR 7,800,000 (approximately EUR 654,250) (Maucher, M., 2023).

The following section, Section 3.2, presents an in-depth focus on the implementation of SRPP in five countries: Belgium, the Czech Republic, Italy, Spain and Sweden. It then provides a case study of good practice from German regional legislation (from the Federal State of Berlin) that set minimum wage requirements for workers under public contracts above the national statutory minimum wage. This has inspired interesting developments in other German regions and at the federal level and is continuing to do so.

## 3.2. Country case studies

### 3.2.1. Belgium<sup>51</sup>

#### *Background*

Belgium is a federal state. With regards to public procurement, the Federal Authority has the competency to lay down general rules. The Regions may provide for additional measures<sup>52</sup>.

At the federal level, the circular of 16 May 2014, 'Integration of sustainable development, including social clauses and measures favouring small and medium-sized enterprises, in public contracts awarded by federal contracting authorities', lays down the strategic and operational framework for the sustainability of federal public procurement<sup>53</sup>.

#### *Legal framework*

The Law of 17 June 2016 transposed Directive 24/2014/EU. This law came into force with the Royal Decree (R.D.) of 22 June 2017<sup>54</sup>. With this law, the Belgian legislator faithfully transposed the directives relating to social considerations characterised as 'mandatory transposition', without any additional legal initiative.

A number of the objectives pursued by the European legislator through the 2014 directives have been followed by the Belgian legislator, including the fight against social dumping, more extensive application of social and environmental clauses, increasing the participation of SMEs and attention to innovation.

The **respect for environmental, social and labour law** (the horizontal social clause) is enshrined in Article 7 of the Public Contracts Act from 2016 and has been established as a general principle for the award of public contracts (at all stages, in particular during the award and performance of a public contract). Failure to comply with the obligations concerned will often have the effect of distorting competition, particularly in the event of a serious breach.

In Article 7 of the Public Contracts Act, the Belgian legislator requires economic operators and their subcontractors to respect applicable obligations in the fields of environmental, social and labour law established by European law, national law, collective agreements or international collective agreements

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<sup>51</sup> Jean-Luc Bodson is the author of Section 3.2.1 on Belgium.

<sup>52</sup> Belgium, 2021, Second monitoring report to the European Commission on public procurement and concessions (in French Deuxième Rapport de contrôle concernant les marchés publics et les concessions), p. 1., Available at: <https://ec.europa.eu/docsroom/documents/47757/attachments/1/translations/fr/renditions/native>.

<sup>53</sup> Service public fédéral Chancellerie du Premier Ministre, Service Public Fédéral Personnel et Organisation, Service Public Fédéral Sécurité sociale, Service Public Fédéral de Programmation Intégration Sociale, Lutte contre la pauvreté et économie sociale et Institut fédéral pour le développement durable, 16 mai 2014, Circulaire. Intégration du développement durable, en ce compris les clauses sociales et les mesures favorisant les petites et moyennes entreprises, dans le cadre de marchés publics passés par les autorités adjudicatrices fédérales, Available at: [https://www.ejustice.just.fgov.be/cgi/article\\_body.pl?language=fr&pub\\_date=2014-05-21&numac=2014021063&caller=list](https://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&pub_date=2014-05-21&numac=2014021063&caller=list).

<sup>54</sup> Royal Decree amending the Royal Decree of 14 January 2013 establishing the general rules for the performance of public contracts and public works concessions and setting the date of entry into force of the Act of 16 February 2017 amending the Act of 17 June 2013 on the grounds, information and remedies in respect of public contracts and certain works, supply and service contracts (22 JUNE 2017).

or by international provisions of environmental, social and labour law listed in Annex II of the Public Contracts Act.

Consequently, both contracting authorities and economic operators must have regard to the Belgian regulatory arsenal relating to the right to non-discrimination when awarding public contracts. At the federal level, this involves in particular:

- The Law of 10 May 2007 to combat certain forms of discrimination (known as the 'Anti-discrimination Act'), which transposes Directive 2000/78/EC<sup>109</sup>.
- The Law of 10 May 2007 designed to combat discrimination between women and men (known as the 'gender law').
- The Act of 30 July 1981 to suppress certain acts inspired by racism or xenophobia (known as the 'anti-racism law'), as amended by the law of 10 May 2007 to transpose Directive 2000/43/EC.
- The Act of 23 March 1995 to suppress the denial, minimisation, justification or approval of the genocide committed by the German National Socialist regime during the Second World War (known as the 'Holocaust Denial Act').

Under the terms of Article 7, a breach of a social obligation at the performance stage is treated as a breach of the terms of the contract. The penalty may take the form of termination of the contract and other measures and the successful tenderer may be excluded from participation in the contracting authority's contracts for a period of three years.

The same Act allows the contracting authority to exclude 'at any stage of the award procedure ... a candidate or tenderer ... where the contracting authority can demonstrate, by any appropriate means, that the candidate or tenderer has failed to fulfil obligations in the fields of ... social and employment law' (Article 69). Moreover, Article 66(1)(2) allows a contract not to be awarded to a tenderer whose bid does not comply with the above-mentioned obligations.

Lastly, as part of the procedure for checking abnormally low offers (Articles 35 and 36 of Royal Decree), there is also an obligation to comply with social legislation and, consequently, an obligation on the tenderer to justify its prices, which must not reveal a breach of its social obligations.

During the performance of a contract, specific clauses requiring economic operators to report regularly on compliance with their social obligations during performance of the contract may be included in the contract. A 'non-discrimination clause' may also be included in the specifications, whereby, for example, the economic operator selected undertakes to comply with non-discrimination law. Such a clause may cover the contractor and all subcontractors.

It is interesting that the Belgian legislator has chosen to **facilitate the participation of SMEs** (and indirectly of social economy enterprises) in public procurement. Article 58 of the Law of 17/06/2016 and Articles 49, 50 and 67 of the Royal Decree of 18/04/2017 set the obligation to divide contracts over EUR 144,000 into lots). The benefits of this measure are not only better access to procurement for SMEs, but also better quality control, more efficient management of budget resources and faster execution. At the same time, dividing contracts into lots requires extensive coordination of the various lots and greater dilution of contractors' responsibilities.

Policy measures to **combat discrimination** and **promote gender equality, equal opportunities and social inclusion** in public procurement are implemented through ethical and social clauses. The contracting authority must determine, on a case-by-case basis, which social and ethical aspects should be included in the award of a public contract, depending on the subject of the contract and its objectives.



The use of social considerations in the technical specifications, award criteria and contract performance clauses faithfully reflects what is provided for in the Directive, respectively in Articles 53, 81 and 87 of the Public Contracts Act. The explanatory memorandum to the Public Contracts Act gives as examples 'the implementation of measures designed to promote equality of men and women at work, greater participation of women in the labour market and the reconciliation of professional and private life' as well as 'the promotion of the integration of disadvantaged persons or persons belonging to vulnerable groups by means of conditions concerning the employment of the long-term unemployed or the implementation of training measures for the unemployed or young people'. These performance clauses must be linked to the performance of the contract and not to the general policies of the winning company.

Selection criteria can also be used to promote equality and non-discrimination, for example, a contracting authority can check that the tenderer has the necessary technical infrastructure and skills to meet the accessibility needs of people with disabilities. The provision on reserved contracts is transposed by Article 15 of the Law of 17/06/2016, which reproduces the text of the Directive very faithfully. The term 'disadvantaged' is not defined in the law.

#### *Federal Government*

The Federal Government pays particular attention to the issue of **social dumping**, the practice where employers use cheaper labour than what is usually available where they produce or sell products, for example, by producing in areas with low wages or employing workers who are poorly paid, such as migrants. A body coordinating the social inspection services (Service d'Information et de Recherche Sociale) is responsible for combating social dumping. Anti-dumping social clauses are a transparent way of announcing the government's determination to control any slippage in this area. A federal guide has also been published to help buyers<sup>55</sup>. The rules to combat social dumping have been significantly strengthened. These measures were drawn up in consultation with the social partners and the Public Procurement Commission.

In the hectic years associated with the preparation of the public procurement directives and their transposition, a remarkable effort was put in place to improve working conditions in public cleaning contracts, as these contracts are usually awarded to the cheapest company. An interesting example relating to the collaboration between a trade union and the Vrije Universiteit te Brussel is provided below, which, while not recent, is an example of good practice for other contracting authorities (see Box 4).

The Federal Government has also drawn up two Charters containing proposed commitments for federal and regional contracting authorities on diversity and inclusion (2022) and access for SMEs to public contracts (2018)<sup>56</sup>. In the ICT sector, the Federal Institute for Sustainable Development is considering coordination with other European countries in 2021 to minimise ethical risks in the IT supply chain.

In terms of gender equality, the law of 12 January 2007 stipulates that all public procurement contracts must take the equality of men and women and gender mainstreaming into account<sup>57</sup>. The Institute for Gender Equality has drawn up a checklist for determining whether a public procurement contract

<sup>55</sup> Federal Public Service Policy and Support (Belgium). 2018. Guide: Lutte contre le dumping social dans les marchés publics et les contrats de concession relevant des secteurs spéciaux, Available at: [https://bosa.belgium.be/sites/default/files/content/documents/social\\_dumping\\_speciale\\_sectoren\\_fr\\_def.pdf](https://bosa.belgium.be/sites/default/files/content/documents/social_dumping_speciale_sectoren_fr_def.pdf).

<sup>56</sup> Federal Public Service Economy (Belgium), 2018, SME Access to Public Procurement Charter (in French, Service Public Fédéral, Charte 'Accès des PME aux marchés publics', Available at: <https://economie.fgov.be/fr/publications/charte-acces-des-pme-aux>.

<sup>57</sup> Article 3, 3°, of the law of 12 January 2007 aimed at monitoring the application of the resolutions of the World Conference on Women held in Beijing in September 1995 and integrating the gender dimension into all federal policies.

contains these dimensions<sup>58</sup>. Moreover, a number of awareness-raising initiatives on gender mainstreaming have been carried out and training courses have been organised.

Information on social labels is available for different product groups for public supply contracts in the guide to sustainable federal purchasing.

#### *The procurement system at the regional level*

##### *Flanders*

The Flemish Public Procurement Plan (Vlaams Plan Overheidsopdrachten) was approved in January 2016 and includes the following measures:

- Taking concrete action to promote a circular economy through circular and bio-based purchasing.
- Providing and applying sustainability criteria and guidelines.
- Integrating the concept of life-cycle costing.
- Paying attention to respect for international labour standards and human rights throughout supply chains.
- Combating social dumping.
- Capitalising on dialogue with the market and exploiting market potential to enable more sustainable purchasing.
- International cooperation and collaboration across levels of power: networking, knowledge sharing, and influence on international markets.

#### Box 1: Good practice from Flanders: The City of Ghent and non-discrimination clauses in public contracts

##### **The City of Ghent and non-discrimination clauses in public contracts**

The City of Ghent was the first municipality to systematically include a non-discrimination clause in the specifications of all its public contracts. Under this clause, the selected economic operator undertakes to not tolerate any form of discrimination within its own organisation or on the part of any of its subcontractors and to take active measures to prevent discrimination. If, during the performance of the public contract, the City nevertheless finds evidence of discrimination, it may require the successful tenderer to take additional measures. If necessary, it may impose a fine or even terminate the contract. It may also report the failure to comply to the Inter-federal Centre for Equal Opportunities (UNIA) and/or the Department of the Inspectorate of Social Legislation.

The City of Ghent has also decided to include a non-discrimination clause in specifications for public contracts requiring a large workforce. This clause requires candidates for public contracts to carry out a self-assessment (or a 'Quick Scan') of their legal obligations in terms of non-discrimination and their non-discrimination policy. These self-assessments do not form part of the award procedure but are intended to encourage the concerned economic operators to develop or strengthen their policies for preventing discrimination. Subsequently, the economic operator selected must provide proof of the responses provided during its self-assessment, otherwise it will be subject to corrective

<sup>58</sup> The Gender Equality Checklist developed by the Institute for Gender Equality is available at: [https://igvm-iefh.belgium.be/fr/publications/la\\_checklist\\_dimension\\_de\\_genre](https://igvm-iefh.belgium.be/fr/publications/la_checklist_dimension_de_genre).

measures or even penalties.

A similar initiative was set up by the College of General Civil Servants of the Flemish administration in 2014. This established a non-discrimination clause which is divided into two parts. The first part aims to exclude from the public procurement procedure any operator who has been definitively convicted of discrimination, harassment, violence or sexual harassment in the workplace. The second part concerns the sanctioning of similar actions which occurred during the performance of the public contract.

Source: City of Ghent, <https://persruimte.stad.gent/145680-stad-gent-zet-haar->

### *Wallonia*

The Walloon strategic framework for sustainable public procurement is set out in the Sustainable Public Procurement 2017–2019 Action Plan<sup>59</sup>. Its ambition is to achieve 100 % responsible public purchasing by 2020. The third priority of the Plan is to develop environmental, social and ethical clauses for supply, service and works contracts.

In addition to the two circulars already requiring the inclusion of social clauses in Walloon public contracts (Circular of 21 July 2016 for building works contracts<sup>8</sup> and of 7 September 2017 for road and ZAE development contracts), Wallonia also adopted, on 2 May 2019, a decree aimed at requiring the inclusion of social, ethical and environmental clauses in public contracts by the Walloon Region. The aim of the decree is to make the granting of regional subsidies subject to compliance with certain social, environmental and ethical (anti-dumping) clauses in public works contracts.

The Walloon Public Service also offers practical tools to ensure fair competition and combat social dumping. An initial 'anti-social-dumping' toolkit became operational in June 2016. It was developed by IGRETEC (L'intercommunale de développement de Charleroi). In addition, the Circular of 30 March 2017 on the insertion of clauses to promote fair competition and combat social dumping in public contracts requires the use of these Walloon tools in all public works contracts by all Walloon contracting authorities at regional level.

Other initiatives in Wallonia:

- **The Network of Social Clause Facilitators** is a platform for guidance on social clauses linked to employment policy included in public construction and road works contracts in Wallonia, bringing together all the stakeholders: contracting authorities and federations of traditional and social enterprises in the construction sector. This social clause scheme was introduced in Wallonia in 2015. It was revised on 9 December 2020, proposing solutions, approved by all the stakeholders who are members of the Network, to the difficulties encountered by each of the players – traditional companies, social economy integration companies, contracting authorities and project developers – in facilitating the social clause.
- **The network of responsible public purchasers in Wallonia**, created in 2018, is aimed at regional and local public purchasers. The network provides access to thematic workshops to develop sustainable public purchasing on topics including supplier exchanges, field visits and best practices of other entities.
- **The 'responsible public purchasing' Helpdesk**, created in 2018, offers a support service that provides assistance to agents at the Service Public de Wallonie (SPW), public interest

<sup>59</sup> Service Public Wallonie, Plan d'actions. Achats Publics responsables. 2017–2019, Available at: [https://developpementdurable.wallonie.be/sites/dd/files/2017-10/plan\\_apr\\_complet.pdf](https://developpementdurable.wallonie.be/sites/dd/files/2017-10/plan_apr_complet.pdf).

organisations [Organismes d'Intérêt Public] (OIP), provinces and communes wanting to draft responsible specifications: (a) for the inclusion of environmental, social or ethical clauses in the special specifications, and (b) for analysing the bids received according to the same criteria.

- **The Walloon Award for the Most Responsible Public Procurement** is intended to reward and honour contracting authorities that have adopted a responsible public procurement approach, and thus inspire other public organisations to do the same.
- **The Charter for Responsible Public Procurement:** Wallonia has been committed for several years to promoting more economically, socially, ethically and environmentally responsible procurement, notably by adopting the second Responsible Public Procurement Action Plan in 2017.

Below two good practice examples from Wallonia are presented. The first one describes the process that Wallonia developed for monitoring public work contracts covered by the obligation to include social clauses, as well as those that voluntarily include these same social clauses, which is briefly described below (view Box 2)<sup>60</sup>.

Box 2: Good practice from Wallonia: Monitoring of work contracts that include social clauses

### **Monitoring of work contracts that include social clauses**

Since 1996, Wallonia has had a long history of using social clauses in public works contracts and is one of the first regions in Europe that developed a system to monitor their use. To do this, in 2012, the Network of Facilitators of Social Clauses was created. It brings together the representatives of key stakeholders in public works contracts, such as the Public Procurement Directorate of the Walloon Public Service, the Walloon Housing Company, the Union of Walloon Cities and Municipalities, the Walloon Union of Architects, the Walloon Construction Confederation and SAW-B, the organisation representing social economy enterprises. The Network set up a process for monitoring public contracts covered by the obligation to include social clauses, as well as public works contracts that voluntarily include these same social clauses. At the end of each year, the data is processed, analysed and published in a report by the Walloon Public Service. This report is studied by a steering committee in which the cabinets of the various ministries concerned are represented and can decide to make improvements or adjustments to the scheme and its monitoring system.

There has been a constant and stable increase in the number of work contracts that include these clauses, ranging from 237 in 2016 to 1 494 in 2021. One of the main benefits of this system is that construction companies that often have staff shortages, at least for some specific profiles, with the support of facilitators, are able to find candidates to train, which otherwise would be difficult to find. They are often from a disadvantaged background.

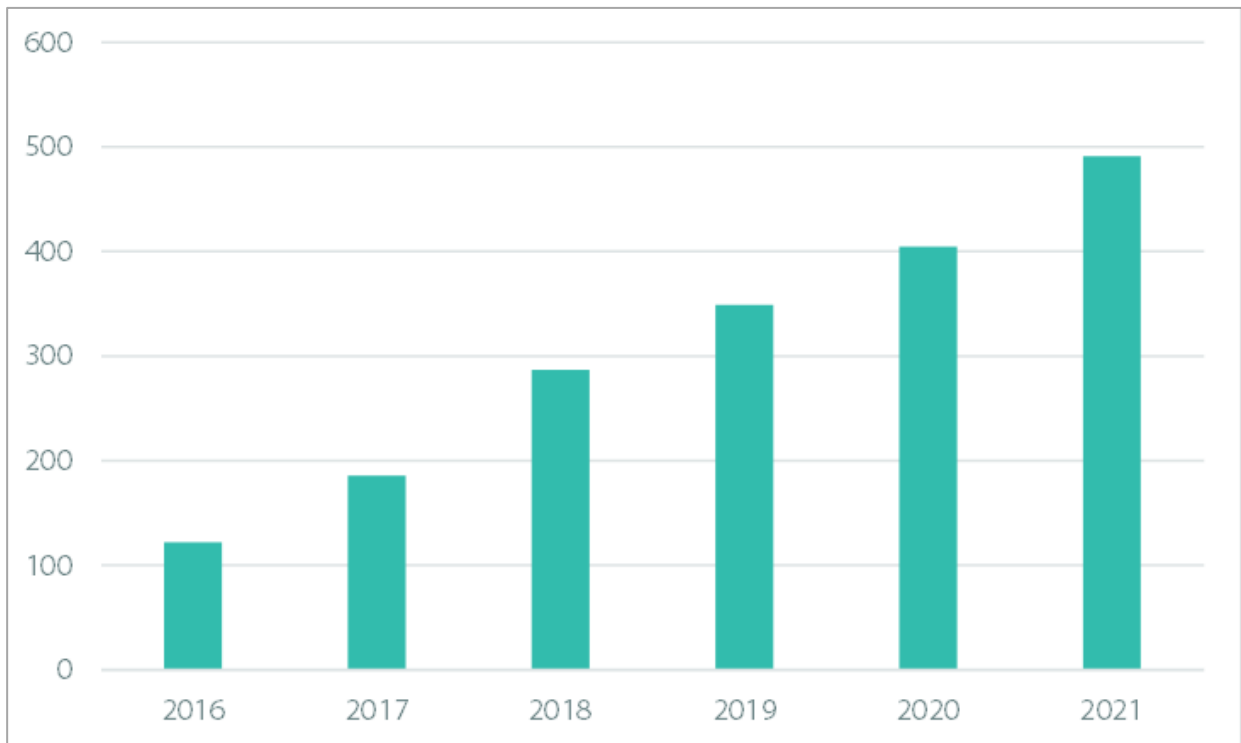
Source: Author's elaboration based on Wallonia Region's annual reports on the implementation of social clauses.

The following graphs show the results of the use of social clauses in works contracts in Wallonia from 2016 to 2021.

<sup>60</sup> This case study has been studied also by the GPP Helpdesk and is available at this link:

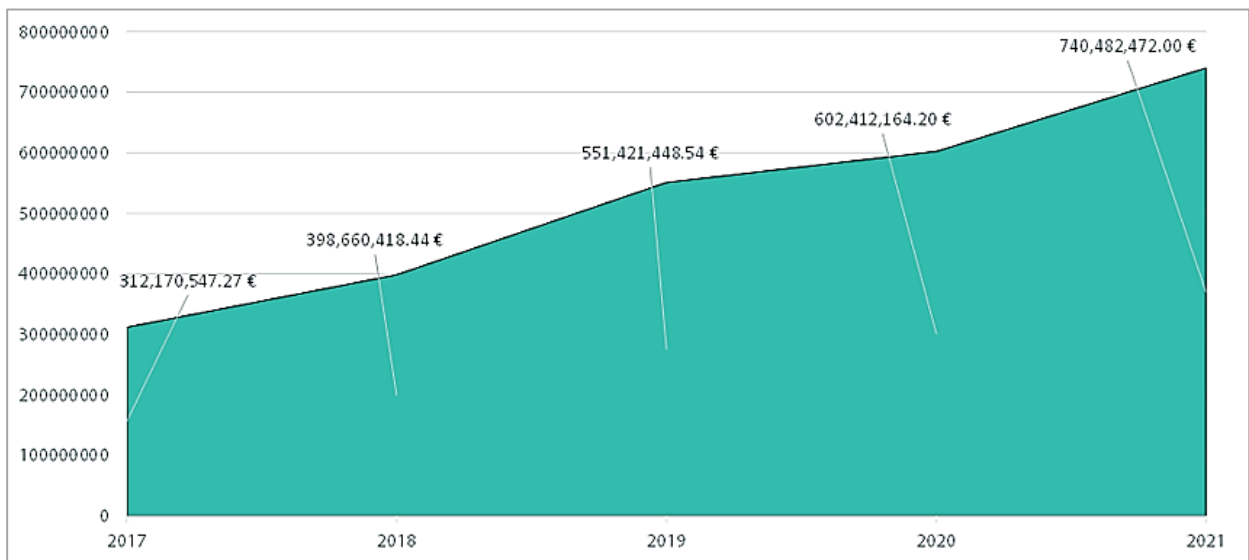
[https://green-business.ec.europa.eu/green-public-procurement/good-practice-library/measuring-impact-social-clauses-public-works-contracts\\_en](https://green-business.ec.europa.eu/green-public-procurement/good-practice-library/measuring-impact-social-clauses-public-works-contracts_en).

Figure 9: Number of works contracts including social clauses from 2016 to 2021



Source: Wallonia Region's annual reports on the implementation of social clauses.

Figure 10: Number of works contracts concluded with work integration social enterprises (WISEs) in Walloon Region from 2016 to 2021



Source: Wallonia Region's annual reports on the implementation of social clauses.

The second good practice example from Wallonia refers to a large contract aimed at improving the energy efficiency of public buildings that includes social considerations (see Box 3).

## Box 3: Good practice from Wallonia: Renowatt

**Renowatt**

The Renowatt project aims to improve the energy efficiency of public buildings in Wallonia. The aim is to provide comprehensive assistance to local authorities to help them renovate to improve the energy efficiency of their buildings. Launched in 2014 in the province of Liège, the Renowatt project was extended to the whole of Wallonia in 2017 and has been renewed until 2026.

From the outset, Renowatt brought all the stakeholders and recognised expertise together to prepare the tender requirements (Cahier Spécial des Charges- CSC): architects, lawyers specialising in public contracts, the construction federation, the social economy federation and trade unions, with the firm intention of making it a socially responsible public contract model.

An excerpt of the model contract reads:

'By means of this contract, the contracting authority wishes to:

- Strengthen social cohesion and sustainable development by promoting training and socio-professional integration, within a demanding social and ethical framework (the social and ethical clauses will be detailed in the CSC);
- Combating social dumping and social fraud;
- Encourage access to 'small and medium-sized enterprises' (within the meaning of Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises and of the Charter on access for SMEs to public contracts issued by the Federal Public Service Economy [publication in January 2018]);
- Promote the Functional and Cooperative Economy, by seeking innovation in the energy renovation of buildings, a sector that is particularly well suited to this.'

Source: CSC BEFIN1 -RWT-2022/32-F02: early 2023.

*Brussels-Capital Region (BCR)*

A Circular of the Government of the Brussels-Capital Region relating to the obligation to include social clauses in regional public contracts was published on 19 July 2018, then repealed and replaced by Circular 26 November 2020<sup>61</sup> of the Government of the Brussels-Capital Region on the obligation to include social clauses in regional public contracts.

A 'social clauses' helpdesk has existed since 2014 within Actiris (Brussels Regional Office for Employment), which provides support to the BCR's public purchasers, public interest organisations and local authorities, as well as to the European Commission's Office for Infrastructure and Logistics in Brussels (OIB) department. It also provides partial reporting on public contracts with social clauses.

The *Second monitoring report to the European Commission on public procurement and concessions* reported that in 2020, there were three public contracts above EU thresholds incorporating social clauses. In 2020, the Brussels government set up a network of social clause facilitators for works contracts in the BCR.

<sup>61</sup> Circulaire du Gouvernement de la Région de Bruxelles-Capitale relative à l'obligation d'insertion de clauses sociales dans les marchés publics régionaux, Available at: [https://etaamb.openjustice.be/fr/circulaire-du-26-novembre-2020\\_n2020016351.html](https://etaamb.openjustice.be/fr/circulaire-du-26-novembre-2020_n2020016351.html).



#### Box 4: Good practice example from Brussels Capital Region: a charter to improve working conditions in cleaning services

##### **A charter to improve working conditions in cleaning services**

In 2015, the Vrije Universiteit te Brussel, in cooperation with the Belgian trade union FGTB, decided to commit itself via a charter to drastically improving the public cleaning market. The charter was signed by rector P. De Knop of the Vrije Universiteit te Brussel on 17 March 2015.

The charter includes the following commitments:

- (a) Particular care must be taken when drawing up the specifications, to ensure that the contract is awarded in a well-organised and well-thought-out manner.
- (b) Social and quality criteria will be included in the specifications.
- (c) As far as possible, full-time working hours that can be reconciled with private life (daytime working) will be encouraged.
- (d) Among the various cleaning offers, the selection will be made rigorously, and not a priori on the basis of the lowest price. Abnormally low prices, in comparison with the prices recommended by the sectoral employers' federation UGBN, will be rejected and reported to the social partners.
- (e) Failure by the subcontractor to comply with the sectoral collective agreements relating to wages and working conditions, or with social legislation in general, will result in the termination of the contract. An exclusion clause to this effect will be added to the commercial maintenance contract.
- (f) Direct and transparent discussions will be held with the consultation bodies when maintenance contracts and/or award conditions are changed.
- (g) The trade union rights of cleaners will be respected. In particular, the cleaning company's union representatives will have easy access to the buildings and will be able to meet their colleagues, within the framework of network unionism.
- (h) Any problems that may arise with the cleaning company and/or cleaners will be discussed in the consultation bodies.

Source: Authors' elaboration based on the interview with FGTB.

##### *French Community of Belgium*

The Wallonia-Brussels Federation uses Article 15 of the federal law on market reservation.

##### *German Community of Belgium*

Reference texts on the fight against social dumping are available on the internet for contracting authorities of the German-speaking Community<sup>62</sup>.

<sup>62</sup> Belgium, 2021, Second monitoring report to the European Commission on public procurement and concessions, p. 114.

### 3.2.2. Czech Republic<sup>63</sup>

Czech regulation of public procurement is based on the amended Act No. 134/2016 Coll., on Public Procurement. Certain environmental issues are addressed separately, by other laws, such as Act No. 406/2000 Sb., on energy management, as amended, and Act No. 360/2022 Coll. ('low-emission vehicles law'). Apart from that, policy materials are available, which support social or environmental considerations in public procurement (Government Resolution No. 531/2017).

The central government body responsible for public procurement in the Czech Republic is the Ministry for Regional Development. Over time, multiple other central government organisations have supported selected topics relating to the concept of sustainable public procurement (SPP), including employment opportunities for Roma citizens by the Government Office, and the use of environmental criteria and labels in procurement by the Ministry of Environment and the Czech Environmental Information Agency (CENIA). Since 2016, the broad concept of SPP has been supported by the Ministry of Labour and Social Affairs within two consecutive EU-funded projects: Supporting Implementation and Development of Socially Responsible Public Procurement (2016–2020) and Responsible Approach to Public Procurement – Strategic Public Procurement (2020–2023)) ([www.sovz.cz/en](http://www.sovz.cz/en)). This has included addressing small and medium-sized enterprises (SMEs), social economy enterprises (SEEs), environmental issues, employment opportunities and decent labour conditions.

The public procurement review system in the Czech Republic is based on administrative measures and complaints can be addressed to the Office for Protection of Competition. Other institutions are included in the review of procurement, such as the Supreme Audit Office and the National Managing Authorities of EU Funds.

#### *Legal and regulatory framework*

The original version of the relevant national legislation contained almost all the relevant instruments to allow contracting authorities to take social aspects into account in their purchasing practice (apart from special reserved contracts under Article 77 or the direct transposition of Article 18-2). However, unlike in Slovak legislation, it did not impose any kind of obligation or direct support regarding the use of social or environmental criteria.

In 2020 and 2021, two new amendments were adopted, which affected the area of SRPP and green public procurement (GPP). Both were results of the initiative of individual members of Parliament and were not made subject to proper discussions with the relevant central government authorities.

Effective since 1 January 2021, Act. No. 543/2020 Coll. introduced a new principle to the procurement legislation. The new Section 6, paragraph 4 reads: 'The contracting authority shall be obliged to comply with the principles of socially responsible public procurement, environmentally responsible public procurement and innovation within the meaning of this Act when proceeding under this Act, namely when establishing the terms of reference, evaluating tenders and selecting the supplier, provided that this is **possible** given the nature and purpose of the contract. The contracting authority shall duly justify its action'.

This vague obligation applied to all tenders and all contracting authorities. Since 16 July 2023, the wording of the principle was changed to '**appropriate in view of the nature and purpose of the contract**' (as a result of the Act No. 166/2023 Coll., which changed the wording of the section and also excused low-value tenders from such an obligation (up to CZK 2 million (about EUR 83,000) for deliveries and services or CZK 6 million (about EUR 250,000) for works).

<sup>63</sup> Adam Gromnica is the author of Section 3.2.2 on the Czech Republic.

Effective since 1 January 2022, Act. No. 174/2021 Coll. introduced new voluntary instruments (Section 37a) for more sustainable tenders for food and catering:

'Condition for participation in procurement procedure for the supply of foodstuffs ... A contracting authority may, in a procurement procedure for the supply of food, set a condition for participation in the procurement procedure in the form of:

- (a) local or regional food from a short supply chain;
- (b) food complying with the certified quality schemes of Regulation (EU) No 1151/2012 of the European Parliament and of the Council on agricultural product and food quality schemes);  
or
- (c) food produced under an organic farming system'.

Currently, the legislation which should regulate Social Enterprises and affect reserved contracts in the future is pending. Furthermore, implementation of European legislation will affect public procurement processes or legislation in the future (such as the Pay Transparency Directive).

#### Policy and strategy framework

Since 2000, the use of social and environmental criteria in procurement has been supported by government resolutions. These documents do not represent sources of law, and do not set legally binding obligations to the contracting authorities. Moreover, while they support the uptake of social and green criteria, they have not set any goals to be achieved by procurement, not to mention numerical targets. To date, the following government resolutions are applicable:

- Government Resolution No. 75/2017 on the use of the institute of socially responsible public procurement in relation to the employment of convicted persons and persons with a criminal record.
- Government Resolution No. 531/2017 (on the Rules on the Application of the Responsible Approach to Public Procurement and purchases of state and local government). The contracting authorities were invited to use basic rules set by the Resolution: More specifically, state and local government shall follow:
  - Rule No. 1 and '...take into account the following when purchasing goods and services environmental aspects of those goods and services. In doing so, it shall consistently strive in particular to achieve reduction of energy consumption; reduction of water consumption; reduction in the consumption of raw materials; limiting the production of pollutants released into the air, water and soil; limiting the production of waste; reducing the carbon footprint'.
  - Rule No. 2 and '... take into account the following when purchasing goods and services social or wider societal aspects related to the goods purchased, services and works. In doing so, it shall consistently strive, in particular, to: promote the employment of people disadvantaged in the labour market; support training, apprenticeships and retraining; promote decent working conditions and safety at work; promote access for social enterprises and small and medium-sized enterprises, which have an impact on local employment, to public procurement; promote fair supplier relations; and respect the principles of ethical purchasing'.
  - Rule No. 3 describes the public sector as a role model, which should be leading by example.

Resolution No. 531/2017 also anticipated the establishment of an inter-ministerial working group and gave a mandate to the Ministry of Environment and Ministry of Labour and Social Affairs to create guidance materials in their respective areas of interest.

### *Features of the country model*

The Czech Republic does not have a specific model to address socially responsible public procurement. On the one hand, the introduction of the new principle (Section 6, paragraph 4) into the procurement legislation has helped to raise awareness of social and environmental aspects in procurement. On the other hand, many contracting authorities choose to formally comply with the law, instead of identifying real social needs, linking them to their purchasing powers and starting to use social and environmental aspects in procurement effectively. Section 6, paragraph 4 does not seem to be fit for purpose and does not encourage the broader uptake of sustainability criteria in public procurement.

Many contracting authorities have started to put declaratory provisions into their tender documents that mention sustainability but without a clear definition of an actual goal to be achieved, without any strategy or a real understanding of the effects of the clauses used. They seem to be blindly and inefficiently following the new obligation. In many cases, the new obligation has been transformed into a tick-box exercise without having a real impact on efficiently using social criteria in procurement. For example, tenders by the Ministry of Defence contain only general remarks or declarations of SRPP without connecting them to clearly defined goals and efficient instruments relevant for the management of the social or environmental value of the tender.

A competency centre has been created in the Czech Republic (see below). Doing this to support SRPP and using EU funds has helped overcome the lack of initiative and resources from Czechia itself to support the further development of SRPP.

### *Barriers and difficulties in the implementation of SRPP*

Since 2016, a project entitled 'Strategic Public Procurement Policy in the Czech Republic (Effective Investing)' is being implemented by the Ministry of Labour and Social Affairs (MLSV) ([www.sovz.cz](http://www.sovz.cz)). Part of the project is to identify barriers to the implementation of SRPP. In June 2022, 152 procurement professionals responded to the survey prepared by the project, and identified the following barriers:<sup>64</sup>

- Fear of change and of making mistake in one's procurement practice, which might eventually result in punishment (89 %).
- Bureaucratic approach to public procurement (80 %).
- SRPP is considered too burdensome from the administrative point of view (73 %).
- Concerns about price increase (73 %).
- Absence of unanimous interpretation of the law (72 %).

Other concerns cited included the complexity of the concept, the readiness of the market, the lack of a national strategy on SRPP, unclear responsibilities and lack of political support. The top management within the individual contracting authorities were criticized as failing to set goals, create strategies and encourage procurement professionals to think outside the box. It was also recommended that without a 'competence centre' on the national level, which identifies and addresses the barriers, and makes efforts to overcome them, the development of SRPP cannot be effective. Some of these concerns should be addressed by the National Strategy for Public Procurement, which is currently being developed at the Ministry for Regional Development.

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<sup>64</sup> Interim evaluation report – Project Strategic approach to public procurement.

*Lessons learned and recommendations*

Public procurement is still mostly regarded in Czechia as an administrative category and procedural exercise, which contracting authorities have to go through to buy what they need. Public procurement is still not seen as an economic tool to support broader societal goals, or to link to other strategies of the contracting authorities. The national authority in charge of public procurement (the Ministry for Regional Development) has been defending the traditional approach to public procurement and focusing on the process and e-procurement. Direct and official support for a more strategic approach to using purchasing power for social aims is missing.

To drive behavioural change towards acceptance of SRPP, a 'competence centre' is needed, which can keep focus on the issue, by public awareness, supporting those involved, and facilitating networking and peer-learning. It can also create opportunities for capacity building and introduce new topics and tools, as well as by publishing articles, creating guidelines, creating and supporting community of experts and their mutual exchange of experience.

Since 2016, the two EU-funded projects made it possible for the Czech Republic to create a competence centre for SRPP at the Ministry of Labour and Social Affairs (see [www.sovz.cz](http://www.sovz.cz)). This competence centre was not only able to support the SRPP community to form and meet, but also to create guidance and other useful materials for SRPP, organise capacity-building, bring to and develop new topics for the procurement community, and introduce best practice from Czechia and abroad, such as Austrian naBe, British Social Value Concept, Swedish Adda (former SKL Kommentus), Norwegian difi and Italian Consip.

Employees of the competence centre took part in international collaboration within the Procura+ Network and Network of European Competence Centres for Sustainable Public Procurement). This sort of international and European collaboration seems to be important for keeping discussions on SRPP alive. Further development of international or European networks of competence centres for SRPP might be of interest in the future. To date, initiatives have been introduced which have supported international collaboration between contracting authorities (Big Buyers Initiative) and there is an initiative regarding competence centres for innovation ([P2I | European network of competence centres for innovation procurement \(procure2innovate.eu\)](https://www.procure2innovate.eu)).

The concept of SRPP has not really developed in Czechia. It is, however, the exact instrument, which might convince contracting authorities of the importance of SRPP and motivate them to approach their purchasing power more strategically, develop their SRPP strategies and practices, and focus on follow-up. A lack of a systemic and strategic approach on the national level, and also on the institutional level (with no exact goals set to be achieved with the purchasing power), also represents a barrier to the development of SRPP practices.

Box 5: Good practice from Czechia: Focusing on quality and labour conditions in a cleaning service

**Focusing on quality and labour conditions in a cleaning service**

The Ministry of Labour and Social Affairs (MoLSA) tried to focus on the quality of low-price and low-wage services, such as cleaning, linked to the stability of the team and, indirectly, the labour conditions of the workers concerned, especially decent wages. For that reason, MoLSA focused on the disclosure of the bid price and securing the wage-related costs of the bid to ensure that basic standards are being respected. On those grounds, MoLSA was able to identify (and reject) the bidders who were willing to violate labour standards of their workers in the respective tender.

The case shows long-term efforts to improve labour conditions of workers in often problematic business areas (labour-intensive services). It shows a combination of multiple procurement instruments to secure decent labour conditions. Starting with a focus on possible exclusion grounds for social-related reasons, it continues with setting social standards in the form of contract performance conditions and ends up with risk management measures – such as the possibility to replace the provider with a new one. The tender also includes environmental aspects.

Source: <https://www.sovz.cz/en/>.

Box 6: Good practice from Czechia: Charles University awards points for decent wages in cleaning services

**Charles University awards points for decent wages in cleaning services**

Charles University was dissatisfied with their existing cleaning services. They wanted to search for ways to obtain quality performance for their basic aim ('to have one's premises cleaned'), while maintaining decent working conditions for the cleaning staff and striving for environmentally friendly cleaning methods. This led the university to re-evaluate the requirements for their 2021 cleaning services contract. The outcome of the tender indicates that the evaluation criteria were appropriately understood and balanced and it used multiple award criteria to secure decent working conditions for the workers concerned. The contracting authority is among the leaders in SRPP in Czechia. Their strategic approach and innovativeness are being presented to procurement audiences as a good practice example.

In Czechia, the long established practice of awarding tenders only on the criterion of lowest bid and price led to low prices but low-quality deliveries, and also problems with the performance of the contract (given the fact that the prices were kept low at the expense of workers). This particularly applies to tenders whose price is based mostly on the wages of the workers concerned, for example, for security services, cleaning services and public space maintenance services.

Among other things, the contracting authority wanted to focus on labour conditions and decent wages for the workers concerned. They wanted to support bidders who pay their workers decent wages. So they decided to make wages part of the award criteria (40 per cent of the total points to be achieved). Bidders were able to obtain extra points for wages over the standard for a defined worker, paid to their employees assigned to the tender. Environmental aspects of cleaning were also made a part of the award criteria (10 % of the total). The award criteria was: 30 % for bid price, 40 % for wages for cleaning workers, 20 % for documented satisfaction of previous clients, and 10 % for innovation in cleaning services (including environmental aspects).

Source: Authors' elaboration based on the interview with the procurer from Charles University.



### 3.2.3. Italy<sup>65</sup>

#### *Introduction to Italian public procurement regulations*

In the implementation of Directives 23/24/25/2014/EU, two different legal texts, both named Public Contracts Codes, were issued seven years apart. The first was enacted in Legislative Decree No. 50/2016 (hereinafter also referred to as the 2016 Code). The second was enacted by Legislative Decree No. 36/2023<sup>66</sup> (hereinafter also referred to as the 2023 Code). In both cases, a single legislative text implemented the three 2014 directives and regulated both public contracts for works, services, supplies and concessions. The new code entered into force on 1 April 2023 and applies to procedures launched from 1 July 2023. As of 1 July 2023, Legislative Decree No. 50/2016 ceased to have effect with regard to new procedures. It will only continue to apply to ongoing procedures and contracts. As mentioned above, the relevant EU public procurement Directives remained unchanged in the transition between the two codes.

In comparison to the old text, the new code has intervened in two aspects. On the one hand, it rationalised, ordered and simplified the text of the previous Code, which was at times too wordy and disorganised. On the other hand, it intended to bring national legislation fully into line with the European directives, especially on certain points on which the Court of Justice of the European Union and the European Commission had ascertained a conflict between the two texts. The most important example of this was in subcontracting.

The thresholds for the application of the code are those laid down in the European framework. For contracts below the thresholds, a number of fundamental principles apply, aimed at ensuring the transparency of the award procedure, the principle of proportionality, equal treatment of economic operators and non-discrimination, in addition to the so-called principle of rotation of awards, which is a peculiarity of the Italian legislation (Article 49 Code of 2023).

Since the 2016 Code, efforts have been made to strengthen the centralisation and professionalisation of contracting authorities, including through the creation of single central purchasing bodies (Articles 37 and 38 of the 2016 Code). Thus, some central purchasing bodies, among which CONSIP and Invitalia stand out, have the competence to organise the most important public contracts at the national level.

At the regional and local level, contracting authorities are the individual regions, autonomous provinces and municipalities<sup>67</sup>, as well as some single purchasing bodies at the regional level (a very important role, for instance, is played by single purchasing bodies in the health sector). Increasingly important in recent years has been the national anti-corruption authority (ANAC), which performs a regulatory, monitoring, advisory and administrative control function on public procurement<sup>68</sup>.

#### *The regulation of social clauses between the 2016 Code and the 2023 Code*

The 2016 Code has several articles in which social and environmental protection is emphasised. Article 30(3) of the 2016 Code is a direct application of Article 18(2) of Directive 2014/24/EU. The

<sup>65</sup> Stefano Rossi is the author of Section 3.2.3 on Italy.

<sup>66</sup> Legislative Decree 31 March 2023, n. 36, Code of public contracts in implementation Article 1 of Law no. 21 of 2022 June 78 delegating to Government in the field of public contracts, together with the relevant notes. (23A02179) (OJ General Series n.87 of 13-04-2023 - Suppl. Ordinario n. 14), in Italian 'Decreto legislativo 31 marzo 2023, n. 36, Codice dei contratti pubblici in attuazione dell'articolo 1 della legge 21 giugno 2022, n. 78, recante delega al Governo in materia di contratti pubblici, corredato delle relative note. (23A02179) (GU Serie Generale n.87 del 13-04-2023 - Suppl. Ordinario n. 14)', Available at: <https://www.gazzettaufficiale.it/eli/id/2023/04/13/23A02179/sg>.

<sup>67</sup> National and regional laws strongly encourage smaller municipalities to associate among themselves to organise joint procurement and to jointly deliver certain services, such as social services.

<sup>68</sup> ANAC carries out a supervisory activity in the area of public contracts. It also performs a consultative activity by issuing regulatory and pre-litigation opinions, aimed at resolving disputes arising during the course of tender procedures. To assist administrations, it provides contracting authorities with model notices, model specifications, model contracts and other flexible regulatory tools.

mentioned article provides: 'When performing public contracts and concessions, economic operators shall comply with environmental, social and labour obligations established by European and national legislation, collective agreements or international provisions listed in Annex X.'

Article 30(1) states more generally that: 'The award and execution of contracts for works, services, supplies and concessions pursuant to this Code shall guarantee the quality of the services and shall be carried out in compliance with the principles of economy, effectiveness, timeliness and fairness. In awarding contracts and concessions, contracting authorities shall also respect the principles of free competition, non-discrimination, transparency, proportionality and publicity in the manner set out in this code. The principle of economy may be subordinated, insofar as it is expressly permitted by the regulations in force and by this code, to criteria, provided for in the contract notice, inspired by social needs, as well as the protection of health, the environment, the cultural heritage and the promotion of sustainable development, also from the energy point of view'.

Article 95(6), which is dedicated to contract **award criteria**, stipulates that 'the tender documents shall establish the criteria for the award of the tender, relevant to the nature, subject and characteristics of the contract. In particular, the economically most advantageous tender identified on the basis of the best value for money is evaluated on the basis of objective criteria, such as qualitative, environmental or social aspects, related to the subject matter of the contract. These criteria', as far as this research is concerned, 'may include:

- (a) Quality, which includes technical merit, aesthetic and functional characteristics, accessibility for people with disabilities, appropriate design for all users, certifications and attestations regarding safety and health of workers, such as OSHAS 18001, social, environmental, energy consumption and environmental resource characteristics of the work or product, innovative features, marketing and conditions;
- (b) Possession of an EU Ecolabel in relation to the goods or services covered by the contract, to an extent equal to or greater than 30 per cent of the value of the supplies or services covered by the contract;
- (c) The cost of use and maintenance, including the consumption of energy and natural resources, pollutant emissions and overall costs, including external costs and mitigation of climate change impacts, over the entire life cycle of the work, good or service, with the strategic objective of a more efficient use of resources and a circular economy that promotes the environment and employment;
- (d) The offsetting of greenhouse gas emissions associated with the company's activities calculated in accordance with the methods established on the basis of Commission Recommendation No 2013/179/EU of 9 April 2013 on the use of common methodologies to measure and report the life cycle environmental performance of products and organisations [...].

In addition, a specific regulation was devoted to the **social clause concerning the employment stability of workers**, in other words the obligation of the contractor taking over the service to ensure employment levels by hiring the personnel already employed by the outgoing contractor. Article 50, in this regard, states: 'For the awarding of concession contracts and contracts for works and services other than those of an intellectual nature, with particular regard to those relating to labour-intensive contracts, the contract notices, notices and invitations to tender shall include, in compliance with the principles of the European Union, specific social clauses aimed at promoting the employment stability of the staff employed, providing for the application by the successful tenderer, of the sector collective agreements referred to in Article 51 of Legislative Decree No. 81 of 15 June 2015. Labour-intensive services are those in which the cost of labour is at least 50 per cent of the total amount of the contract.'

This is a provision aimed at ensuring the employment stability of workers in the transition from the old

public contract holder to the new one with particular reference to labour-intensive services, i.e. services in which the cost of labour is equal to or greater than 50 per cent of the total contract amount. On the other hand, case law held that no 'social clause' could be envisaged for contracts and concessions for works and services of an intellectual nature. In other cases, the inclusion of the clause remained an option for the contracting authority.

Case law has provided a restrictive interpretation of the scope of the social clause in Article 50. In particular, according to the administrative judge, in applying the social clause 'the obligation to maintain the employment levels of the previous contract must be reconciled with the freedom of the company and with the inherent faculty to organise the service in an efficient and coherent manner with its own productive organisation, in order to achieve cost savings to be exploited for competitive purposes in the contract award procedure' (Council of State, judgment no. 4539/2022).

It is, therefore, concretely left to the economic operator to choose the concrete modalities for the implementation of the clause, including the classification to be attributed to the worker, it being up to the same operator to formulate any 'contractual proposal' in this regard, also through the so-called 'absorption project'.

The social clause does not entail 'any obligation on the part of the undertaking awarded a public contract to employ on an indefinite basis and in an automatic and generalised manner, and under the same conditions, the staff already employed by the previous undertaking or company awarded the contract, but only that the successor contractor safeguard the wage levels of the workers reabsorbed in an appropriate manner'.

The obligation to guarantee the same contractual and economic conditions to workers already employed is therefore neither absolute nor automatic (Council of State, Judgment No. 4539/2022; Council of State, Judgment No. 3297/2021, confirming a well-established pattern of administrative jurisprudence). Concluding on this point, the question arises as to whether the above interpretation of Article 50 is perfectly in line with constitutional principles and those of European law, or whether it does not give too much weight to the principle of freedom of enterprise to the detriment of a broader protection of the right to work.

The 2023 Code broadened the wording of the social clause provision and made its application mandatory. Article 57, whose heading reads 'Social clauses of the contract notice and notices and energy and environmental sustainability criteria', states in its first paragraph: 'For the awarding of works and service contracts other than those of an intellectual nature and for concession contracts, the contract notices, notices and invitations to tender, taking into account the type of intervention, in particular where it concerns the sector of cultural heritage and landscape, and in compliance with the principles of the European Union must contain specific social clauses requesting, as necessary requirements of the tender, measures oriented inter alia to guarantee equal generational, gender and labour inclusion opportunities for disabled or disadvantaged persons, the employment stability of the staff employed as well as the application of national and territorial collective agreements in the sector, taking into account, in relation to the subject matter of the contract or concession and the services to be performed, those stipulated by the associations of employers and employees comparatively more representative at national level and those whose scope of application is closely related to the activity which is the subject matter of the contract or concession carried out by the company, also in a prevalent manner, as well as guaranteeing the same economic and regulatory protection for subcontracted workers as for the contractor's employees and against undeclared work'.

The second paragraph of the aforementioned Article 57 states: 'Contracting authorities and awarding bodies shall contribute to the achievement of the environmental objectives set out in the Action Plan

for the Environmental Sustainability of Consumption in the Public Administration sector through the inclusion, in the design and tender documentation, at least of the technical specifications and contractual clauses contained in the minimum environmental criteria, defined for specific categories of contracts and concessions'.

Concluding on this point, the 2023 Code has thus significantly broadened the scope of the social clause and established the obligation for contracting authorities to include in tender notices, notices and invitations specific 'social clauses', by which measures aimed at ensuring the stability of the personnel employed are requested as necessary requirements of the tender.

The application of social clauses is only excluded for services of an intellectual nature. The article expressly refers to national and territorial collective agreements in the sector and clarifies that the social clauses must guarantee the same economic and regulatory protections for subcontracted workers as for the contractor's employees and protection against illegal employment. The 2023 Code also stipulates in Article 95 that the contracting authority shall exclude an economic operator from participation in the procedure if it establishes the existence of serious infringements of occupational health and safety regulations, as well as environmental, social and labour obligations.

Furthermore, Article 102, the heading of which reads 'Undertakings by the economic operator', states: 'In calls, notices, and invitations to tender, contracting authorities shall, taking into account the service which is the subject of the contract, require economic operators to make the following commitments:

- (a) guarantee the employment stability of the staff employed;
- (b) guarantee the application of the national and territorial collective agreements of the sector, taking into account, in relation to the subject of the contract and the services to be rendered, also in a prevalent manner, those stipulated by the social partners comparatively more representative at national level and those whose scope of application is closely connected with the activity which is the object of the contract or of the concession carried out by the enterprise, also in a prevalent manner, as well as guarantee the same economic and regulatory protections for subcontracted workers as for the contractor's employees and against irregular work;
- (c) guarantee equal generational, gender and labour inclusion opportunities for disabled or disadvantaged persons'.

Paragraph 2 of the aforementioned Article 102 states: 'For the purposes of paragraph 1, the economic operator shall indicate in the tender the manner in which it intends to fulfil those commitments. The contracting authority shall verify the reliability of the commitments made by any appropriate means, including by the methods referred to in Article 110, only in the tender of the successful tenderer'.

Furthermore, the provision is already present in the 2016 Code, according to which the contracting authority **may** decide not to award the contract if it has ascertained that the tender does not comply with the environmental, social and labour obligations laid down in European and national legislation, collective agreements and the provisions set out in Annex X of Directive 2014/24/EU is repeated (Article 107, paragraph 2 of the 2023 Code).

The provision according to which the tender documents establish the criteria for the award of the tender, relevant to the nature, subject and characteristics of the contract, is also taken over. In particular, the economically most advantageous tender, identified on the basis of the best value for money, shall be evaluated on the basis of objective criteria, such as qualitative, environmental or social aspects, related to the subject matter of the contract [Article 108(4) of the 2023 Code].

Moreover, in the economic offer the operator must indicate, under penalty of exclusion, the labour costs and the company charges for compliance with the provisions on health and safety at work, except

in the case of supplies without installation and services of an intellectual nature [Article 108(9) of the 2023 Code].

Quite significantly, the 2023 Code strengthens and implements the regulations on '**corporate reputation**', which refers to people's collective opinion regarding a corporation or enterprise. In particular, the Code establishes a digital performance monitoring system. This system is based on reputational requirements assessed on the basis of qualitative and quantitative, objective and measurable indices, representative of the company's reliability in the phase of execution of the contracts, its respect for legality as well as its sustainability and social responsibility objectives (Article 109).

Another area in which labour protection provisions is found is **subcontracting**. In particular, the main contractor (or subcontractor) is jointly and severally liable with the subcontractor for compliance with the labour protection regulations of the employees of the subcontractors, as well as with the safety obligations under the applicable regulations. The subcontractor, for the services subcontracted, must guarantee the same quality and performance standards as those provided for in the subcontracting contract and provide the workers economic and regulatory treatment not inferior to that which the main contractor would have guaranteed. Moreover, the subcontractor is obliged to apply the same national collective labour agreements as the main contractor, if the subcontracted activities coincide with those characterising the subject matter of the contract or concern work relating to the prevailing categories and are included in the main contractor's object. The contractor shall pay the safety and labour costs, relating to the subcontracted services, to the subcontractors without any discount.

With regard to **reserved contracts**, in transposing the provisions of Article 20 of Directive 24/2014/EU, the 2023 Code (Article 61), taking up and developing the discipline of the 2016 Code (Article 112), establishes that 'contracting authorities may reserve the right to participate in procurement and concession procedures or may reserve their execution to economic operators and social cooperatives and their consortia whose main purpose is the social and professional integration of persons with disabilities or disadvantaged persons, or may reserve their execution in the context of sheltered employment programmes when at least 30 per cent of the workers of the aforementioned economic operators are persons with disabilities or disadvantaged workers.' The aim of this provision is thus to ensure the social and professional integration of persons with disabilities or disadvantaged persons through the instrument of public procurement. The provision makes reference to other national laws that provide a definition of 'persons with disabilities' and 'disadvantaged workers'.

The Code, moreover, establishes that contracting authorities shall provide in the calls for tender, notices and invitations to tender, as technical specifications or award criteria, mechanisms and instruments suitable for realising equal generational, gender and work inclusion opportunities for persons with disabilities or disadvantaged persons. The provision of award criteria to achieve equal generational and gender opportunities and to promote the employment inclusion of persons with disabilities is left to a subsequent detailed regulation (which is now Annex II.3 of the Code on Public Contracts).

The '**light regime**' on the entrusting of social services and those assimilated to them has remained substantially unchanged in the new Code and is in line with the indications of the Directive. The Code expressly specifies that 'services assimilated' to social services are those set out in Annex XIV to the Directive.

A significant provision, which was absent in the 2016 Code, concerns the express right granted to public administrations to apply, for activities with a significant social value, organisational models of 'shared administration', such as co-planning and co-designing, for the performance of which there is no remuneration. This is based on the sharing of the administrative function by the public administration with non-profit entities, provided that the aforementioned non-profit entities contribute to the pursuit of social aims on equal terms, in an effective and transparent manner, and according to the result-based principle (Article 6 of the 2023 Code). The aforementioned provision appears to be consistent with the last paragraph of recital 114 of Directive 24/2014/EU.

Overall, the set of rules described above provides a multifaceted, overall picture of the importance that social considerations play in public procurement in the Italian legislation. In the transition from the old to the new code, a definite consolidation of the strategic use of public contracts is being seen.

This regulatory trend will have to turn into widespread administrative practice. To this end, the increasing recourse to an aggregation of contracting authorities and the centralisation of procurement (so-called joint procurement), in order to increase the professionalism of contracting authorities, may constitute an important element for the implementation of the social aims of public contracts.

Moreover, favouring the adoption of standard notices and model schemes, specifications and uniform administrative forms between contracting authorities may be a valuable instrument to ensure the widespread implementation of SRPP.

#### *Social considerations in Italian administrative practice*

Legal recognition of social clauses is now accompanied by the widespread, practical application of social clauses. For several years, there has been a progressive recognition of the operability of social clauses by contracting authorities and economic operators, including members of temporary business groups and subcontractors.

The application of the social clause is becoming more and more a regular practice confirmed by this research. The restrictive interpretation advocated by the administrative jurisprudence on the scope of Article 50 of the 2016 Code does not seem to have affected contracting authorities in including the social clause in notices and letters of invitation. In this respect, it will be interesting to see the effects of the new, broader wording of the rule by the 2023 Code. The hope is that case law can endorse the application of the social clause in its full literal scope.

In recent years, moreover, some contracting authorities have started to introduce **social criteria among the award criteria** to assess technical offers. Among the award criteria for the attribution of points to the technical offer, in particular, some contracting authorities provided for the absence of litigation on the violation of labour regulations between the economic operator and its employees, the absence of conciliation for the violation of mandatory labour protection regulations, as well as the respect of equal opportunity criteria in the selection of staff. In addition, 'social' certifications on respect for equal opportunities and the absence of discriminatory behaviour towards workers were introduced. Often it is the operators themselves who advertise that they have achieved gender equality certification (see the case of the well-known pasta producer De Cecco<sup>69</sup>).

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<sup>69</sup> The following De Cecco advertisement appeared in major Italian newspapers: 'De Cecco has obtained gender equality certification. For De Cecco, excellence means producing a product of the highest quality, but also an entrepreneurial orientation based on corporate values, which aim to valorise people and their work, while promoting equal opportunities within the company. After being the first pasta manufacturer in the world to achieve SA8000 ethical certification, De Cecco now also obtains Gender Equality certification (PdR 125:2022).'



*The contribution of the National Recovery and Resilience Plan to boost SRPP*

In Italy, in 2021, the implementation of the National Recovery and Resilience Plan (NRRP) has provided an opportunity to further develop SRPP (Decree-Law No. 77 of 31 May 2021, converted into Law No. 108 of 29 July 2021, concerning the 'Governance of the National Recovery and Resilience Plan and Initial Measures to Strengthen Administrative Structures and Accelerate and Streamline Procedures'). The rule set forth in Article 47 introduces, for public procurement financed with funds of the NRRP or of the Complementary National Plan (PNC), specific obligations on contracting authorities and economic operators, to protect gender equality, generational equality, and the labour inclusion of persons with disabilities. These obligations concern both the awarding phase (as requirements for participation in the tendering procedure) and the execution phase of the contract (contract performance conditions, which, if not fulfilled, entail the application of penalties and/or the termination of the contract or, in a specific case, even the exclusion for one year from participating in subsequent tendering procedures).

In short, Article 47 introduced:

- The obligation for contracting authorities to provide, in the contract notices, notices and invitations, specific clauses, linked with the subject-matter of the contract, aimed at including, as technical specifications and award criteria, criteria oriented to promote youth entrepreneurship, the employment of persons with disabilities, gender equality and the recruitment of young people, under 36 years of age, and of women.
- The obligation for economic operators to produce for the tender: (i) if they employ more than 50 employees, a copy of the latest report on the personnel situation drawn up pursuant to Article 46 of Legislative Decree no. 198 of 11 April 2006 (the so-called Equal Opportunities Code); or (ii) if they employ 15 or more employees, a specific report. Both reports shall cover 'the situation of the male and female employees of the economic operator in each of the professions and in relation to the status of recruitment, training, professional promotion, levels, changes in category or qualification, other mobility phenomena, the intervention of the Wage Supplementation Fund, redundancies, early retirements and retirements, and the remuneration actually paid.'
- The obligation for bidders to have fulfilled, at the time of submitting their bids, the obligations provided for by Law No. 68 of 12 March 1999, concerning 'Rules for the right to work of persons with disabilities'.
- The obligation for the contracting authorities to ensure that a quota equal to at least 30 %, of any recruitment necessary for the performance of the contract awarded is for the employment of young people and women.
- The possibility for contracting authorities to derogate from the above mentioned quota or to establish a quota of less than 30 %, by giving adequate and specific reasons, according to the principle 'comply or explain'.

To implement this rule, a whole series of regulatory or administrative provisions has been developed (interview with Invitalia).

### *Recommendations*

- Extend the scope of application of social, environmental, company labour protection and respect for the principle of gender equality both with reference to the goods and services supplied and with reference to company organisation (in the latter case - if necessary - in the new directives explicitly allow the identification of award criteria also in characteristics of the operator's company organisation).
- Broaden the scope of application of the social clause, by expressly specifying certain cases, so as to make the social clause more binding and reduce the power of jurisprudence to interpret the rule restrictively.
- Make it compulsory - among the components of the tender - to present a plan for the absorption of the personnel of the outgoing contractor.
- Further increase the use of aggregation of contracting authorities and the centralisation of procurement: an improvement in the professionalism and increasing specialisation of contracting authorities may favour the implementation of the social aims of public contracts.
- Further encourage the adoption of standard notices and model schemes, model specifications and uniform administrative forms among contracting authorities: this will make it easier to ensure the widespread implementation of the social aims of public contracts.
- Building on the experience of the 14 common indicators identified at European level to measure the achievement of the Recovery and Resilience Facility (RRF) objectives in each of the six pillars of the RRF Facility and, as a consequence, of the six Missions of the NRRP, it would be useful to have additional specific social impact indicators to be applied for all public procurement in the EU, regardless of the source of financing and aiming at the fulfillment of the Sustainable Development Goals of the 2030 Agenda. These indicators should be known by all actors involved (contracting authority, designer, contractor, tester) and applied in all phases of procurement: from planning, to design, execution, and testing (interview with Invitalia).
- At a strategy level, a comprehensive 'social approach' could help in the further development and effective implementation of social clauses in public procurement. At a more operational level, guidelines and toolkits on how to integrate socially responsible elements into tender procedures could facilitate the uptake of SRPP. Such guidelines and toolkits should also be tailored to the specific sector or product category. Finally, the implementation of a structured monitoring system would allow contract authorities to verify and control the actual standards achieved by the economic operators (interview with the Central Purchasing Body of Lazio Region).

## Box 7: Good practices from Italy

**Good practices from Italy**

**The Marche Region**, in its tendering procedure for a service contract (584186-2020) which has as its objective the repair and maintenance service of firefighting systems of buildings for a value of approximately EUR 72 million, included a number of qualitative award criteria: possession of SA8000 2008 or equivalent social and ethical responsibility certification; the percentage of women in top positions (Board of Directors/advisors and managers); and the absence of records of gender discrimination.

In the tendering procedure (672140-2021), also launched by the **Marche Region**, for the supply of sustainable foodstuffs for the entities of the region, the **verification of the working conditions along the supply chains was included among the quality criteria**, with a description of the project, the partner company involved and the preliminary contract attached. The project indicated the mapping of the subcontracting companies subject to the verifications and the references selected for the application of due diligence.

The **Province of Lucca** published a tendering procedure (734166-2022) for works concerning the redevelopment and functional renovation of a football stadium, in which it included several equal opportunities and labour inclusion requirements in public contracts; in particular, the tenderer undertakes, under penalty of exclusion, in the event of contract award, to ensure: (a) a 10 % share of youth employment; and (b) a 10 % share of female employment.

The public administration **Aprica S.p.A. of Brescia**, in its tendering procedure (2023/S 077-232529) for the assignment of cleaning and soil hygiene services and leaf collection services to be performed in the City of Brescia, worth over EUR 2 million, decided to reserve the performance of the service for social cooperatives and their consortia whose main purpose is the social and professional integration of disabled or disadvantaged persons.

Lastly, it is worth mentioning the **Legality Protocols on supply chains** that enable the competent Prefecture, using an Inter-Forces Group, to monitor the entire supply chain of companies, including subcontractors and sub-subcontractors, including on the flow of labour on site during the execution of works.

Source: Author's elaboration based on TED search and on the interview with Invitalia (concerning the last practice).

### 3.2.4. Spain<sup>70</sup>

#### Context

In Spain, socially responsible public procurement (SRPP) is mainly addressed by Law 9/2017, of 8 November, on Public Sector Contracts (Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público, LCSP), which transposed Directives 2014/23/EU and 2014/24/EU, of 26 February 2014. This law has made a complete and comprehensive transposition of the clauses and articles of Directive 2014/24/EU referring to SRPP. In Spain, interest in responsible public procurement and the inclusion and use of social and environmental clauses in public procurement procedures predates the aforementioned Directive 2014/24/EU and the LCSP of 2017.

Directives 2004/17/EC and 2004/18/EC already provided for the possibility of achieving social policy objectives through public procurement procedures. Consequently, and in accordance with this, the

<sup>70</sup> Antonio Almansa Morales is the author of Section 3.2.4 on Spain.

regulations governing public procurement in Spain of 2007 (Law 30/2007, of 30 October, on Public Sector Contracts) and of 2011 (Royal Legislative Decree 3/2011, of 14 November, approving the revised text of the Public Sector Contracts Law) opened the possibility of including in public procurement procedures special conditions for the execution of contracts referring to environmental or social considerations.

In any case, it has been with the 2014 Directive and the current LCSP that there has been a great boost to SRPP. The LCSP is applicable throughout the country's territory, at the national, regional (through the Autonomous Communities) and local levels and for the entire public sector. Given the existing territorial and administrative distribution in Spain, an enormous volume of regulations, instructions and resolutions relevant for SRPP can be found at all these levels.

#### *Legal and regulatory framework*

As previously explained, the main regulation governing public procurement in Spain is Law 9/2017, of 8 November, on Public Sector Contracts (LCSP). In addition to this regulation, there are other sectoral regulations, as well as instructions, decrees, regulations, plans and resolutions of administrative tribunals of contractual appeals that make up the legal framework of public procurement related to SRPP in relation to gender equality, the environment, social inclusion, family reconciliation, working conditions and more. Without referring to the texts relating to the regional and local levels, the following provisions constitute the legal framework relevant for SRPP across the whole territory of Spain:

- Law 9/2017, of 8 November, on Public Sector Contracts, which transposes into Spanish law the European Parliament and Council Directives 2014/23/EU and 2014/24/EU, of 26 February 2014. It includes social and environmental criteria in all public procurement processes, in a cross-cutting and mandatory manner, provided that they are related to the objective of the contract, on the basis that their inclusion provides better value for money in the contractual provision, as well as greater and better efficiency in the use of public funds. Access to public procurement will also be facilitated for small and medium-sized enterprises, as well as for social economy enterprises. This is included in Article 1.3 of Law 9/2017, referred to Object and Purpose, as the statement or principle to inspire the application of the Law. Also found in the text of the law are different ways to implement it, i.e. by mandating the division of contracts into lots, whenever possible, to facilitate access to public procurement for SMEs including social economy enterprises, or by keeping percentages of contracts reserved for special social initiative employment centres and insertion companies.
- Plan for the Promotion of Socially Responsible Public Procurement within the Framework of Law 9/2017, of 8 November, on Public Sector Contracts, which transposes into Spanish law the Directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU, of 26 February 2014, the purpose of which is to promote in an effective and coordinated manner the application of the measures established in Law 9/2017 on socially responsible strategic public procurement by all the entities that form part of the state public sector that contract in accordance with this Law.
- The Spanish Social Economy Strategy 2023–2027 establishes the need to include social clauses, in accordance with the provisions of public procurement regulations and in accordance with the measures adopted in the execution of the Socially Responsible Public Procurement Plan and the National Public Procurement Strategy, which can favour the contracting of social economy companies. In addition, it also establishes lines of action to support initiatives that

allow the integration of groups with difficulties in accessing employment, through the promotion of the social economy.

- The Interministerial Commission for the Incorporation of Social Criteria in Public Procurement, created by Royal Decree 94/2018. The purpose of the Commission is to guarantee the coordination of state public sector entities for the incorporation of social criteria in public procurement in relation to information, accessibility, technical requirements, awarding or execution of contracts, among other aspects, as well as in the application of reserved contracts in state public procurement, regulated in the fourth additional provision of Law 9/2017.
- The Organic Law 3/2007 for Equality between Women and Men. This law refers to public procurement as a tool for administrative action to promote gender equality. Related to responsible public contracting, this regulation includes that public administrations, within the scope of their respective powers, through their contracting bodies and, in relation to the execution of the contracts they enter into, may establish special conditions in order to promote equality between women and men in the labour market, as well as include among its execution conditions measures to promote effective equality between women and men in the labour market, in accordance with the provisions of the public sector contracts legislation.
- National Public Procurement Strategy 2023–2026. This national strategy establishes, as one of its objectives, the possibility of the use of public procurement to support environmental, social and innovation policies.
- Royal Decree-Law 1/2023, of 10 January, on urgent measures in the area of incentives for employment contracts and the improvement of the social protection of artists. Article 32.2 establishes that the adoption of measures agreed within the framework of collective bargaining, which include commitments such as maintaining or increasing employment, converting training or relief contracts into permanent contracts, or improving part-time permanent or discontinuous permanent employment into full-time permanent employment, as well as the positive action measures set out in Article 17.4 of the consolidated text of the Law on the Statute of Workers' Rights of the revised text of the Workers' Statute Law, may be introduced as social or employment-related clauses in accordance with the provisions of Law 9/2017, of 8 November, on Public Sector Contracts, transposing into Spanish law the Directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU, of 26 February 2014.

Green Public Procurement Plan of the General State Administration, its autonomous bodies and Social Security management entities (2018–2025), which considers green public procurement as the process through which authorities procure goods, works and services with a reduced environmental impact during their life cycle, compared to the procurement of other goods, works and services with the same function.

LCSP 9/2017, in relation to SRPP, provides as follows:

- Incorporation in public procurement processes, in a transversal and mandatory manner, of social and environmental criteria, provided that they are related to the objective of the contract. Access to public procurement will also be facilitated for small and medium-sized enterprises and social economy enterprises (Article 1.3).
- Prohibition of contracting with an economic operator that has committed an offence related to matters of labour integration and equal opportunities, social and non-discrimination of persons with disabilities (Article 71.1).

- Division of contracts into lots, whenever possible, to facilitate access to public procurement for SMEs (Article 99.3).
- Breakdown of the cost of wages according to professional category in compliance with the reference labour agreement in contracts where the cost of wages of the persons employed for the execution of the contract forms part of the total contract price (Article 100.2).
- Inclusion in the administrative clauses and specific technical specifications of the social, labour and environmental considerations established as technical capacity, award criteria or special performance conditions (Articles 122.2 and 124).
- Requirement of specific labels as a means of proof that the works, services or supplies to be procured comply with the required social or environmental characteristics (Article 127).
- Award of contracts on the basis of the best value for money on the basis of qualitative criteria, which may include environmental or social aspects, linked to the subject of the contract (Article 145).
- Possibility of inclusion in the tender documents of tie-breaking criteria referring to companies with workforces with a higher percentage of disabled workers than required by the regulations, proposals from work integration companies, proposals submitted by non-profit organisations, bids from entities recognised as Fair Trade Organisations, and proposals submitted by companies that include social and labour measures that favour equal opportunities between women and men (Article 147).
- Inclusion of special conditions for the execution of the contract of a social, ethical and environmental nature (Article 202).
- Minimum percentages of contracts reserved for special social initiative employment centres and insertion companies (Additional Provision 4 [Disposición Adicional DA 4]).
- Formalisation of framework agreements for the contracting of services to facilitate the development of active employment policies (DA 31).
- Possibility of reserving certain contracts for social, cultural and health services to certain organisations whose objective is the fulfilment of a public service mission; the profits are reinvested in order to achieve the organisation's objective; or in case profits are distributed or redistributed, the distribution or redistribution must be made on a participatory basis, the management or ownership structures of the organisation performing the contract are based on employee ownership, or on participatory principles (DA 48).

In addition to LCSP 9/2017, there are numerous regional and local provisions that have also regulated SRPP or have established guides, agreements and instructions for its application with greater details, including for concrete implementation, relating to specific measures and proposals. These include:

- Law 12/2018, of 26 December, on socially responsible public procurement in Extremadura.
- Law 11/2023, of 30 March, on the strategic use of public procurement in the Autonomous Community of Aragon.
- Agreement of 3 May 2018, of the Governing Council, establishing the reservation of public contracts in favour of certain social economy entities and promoting the use of social and environmental clauses in public procurement in the Region of Madrid.



- Agreement of the Governing Council of 3 January 2022 establishing guidelines for the inclusion of social, labour and environmental clauses in the contracting of the Administration of the Autonomous Community of the Balearic Islands and its instrumental public sector.
- Law 3/2016, of 7 April, for the inclusion of certain social clauses in public procurement (Basque Country).

#### *Advantages of the Spanish model*

The current Spanish model of legal frameworks that support SRPP have a number of advantages. As the LCSP is the basis, and covers the three territorial and administrative levels, SRPP is decentralised and there is greater development and deepening and more experiences with the application of SRPP. There is a high awareness in many administrations and institutions, both public and private (NGOs, associations, foundations) regarding the use and implementation of social clauses in public procurement. And there is a good commitment by public authorities, policymakers and administrations to the inclusion of social clauses in public procurement procedures.

The complete and extensive transposition of Directive 24/14 EU into national public procurement law has resulted in comprehensive regulation that establishes an adequate legal framework for the further development, use and implementation of SRPP. The obligation of minimum inclusion of conditions or clauses in contracting procedures, implies that there is no need to justify the use of such clauses. There are numerous guides, models and documents with standard social clauses that facilitate their use when drawing up procurement documents. Finally, a prior positive legal report is required by legal services to approve any public procurement agreement, which helps to ensure that social criteria have been used in public procurement.

#### *Barriers and difficulties in the implementation of SRPP*

In contrast, there are also various challenges encountered in the Spanish model for the use of SRPP. Despite what was described in the previous section in relation to the obligation to include social or environmental clauses or conditions in procurement procedures, this obligation is still very generic and its concrete application depends on each of the administrations when preparing procurement procedures. They may limit themselves to establishing generic conditions that fall short of achieving social objectives, instead of including concrete clauses or conditions. Generic criteria are often included due to the problem of justifying links between the subject of the contract and the clauses or social criteria used, which could lead to the suspension of the contract. Moreover, generic criteria such as requiring the possession of ISO environmental standards do not necessarily mean that in practice social and responsible public procurement has been achieved.

Meanwhile, it is unusual that, prior to the publication of procurement procedures, public administrations exchange knowledge and experiences with other stakeholders in the field, both social actors and contractors, who are aware of what is to be achieved and how it can be achieved through the execution of the contract linked to the attainment of socially responsible objectives. Instead, it is fundamental to promote dialogue so that bidders, public institutions and civil society organisations, trade unions, consumer organisations and all other relevant actors ensure that social criteria are effectively incorporated into public procurement (interview with a Spanish NGO, the Assembly of Cooperation for Peace).

One of the main barriers, or perhaps the main one found in using socially responsible performance conditions is that while they are directly linked to the subject of the contract, as required by the Directive and the LCSP, it is not always easy to achieve them and demonstrate their fulfilment. This has given rise to many challenges, suspensions and annulments of contracts by the Administrative Courts

of Contract Appeals, which has led to public authorities doubting when to use SRPP. This issue has been highlighted by several of our interviewees, as well as by the Triennial Report on Public Procurement in Spain 2018–2020.

As explained, in the interview with the Secretary General of the Provincial Council of León and former Secretary General of the Valladolid City Council: 'The main problem is the requirement of the TARC (Public Procurement Appealing Courts) to certify that each award criterion must provide added value to the services that are the objective of the contract, something almost impossible with many award criteria of a social or environmental nature.'

In addition, as the Comptroller General of the Local Administration of the Malaga Provincial Council points out, 'The doctrine of the Courts, following the one elaborated by the CJEU in relation to award criteria, considers that (the inclusion of social clauses) does not allow bids to be evaluated in terms of performance'. Bidders complain that, following the submission of legal challenges by competitors, all of these conditions can lead to the cancellation and suspension of many contracts for not being able to prove fulfilling the conditions. In the end, many public administrations have decided not to explore the inclusion and use of social or environmental clauses.

Finally, it is difficult to assess the positive impact of SRPP during the execution of the contract, as well as to monitor and control the correct implementation of the socially responsible criteria and conditions required at the time of awarding the contract.

#### *Lessons learned and recommendations*

An assessment of SRPP in the Spanish model leads to the following recommendations and lessons:

- It is advisable to establish an obligation to use a minimum number of performance conditions and a minimum number of specific award criteria linked to socially responsible matters in each contracting procedure, in order to promote and give greater importance to SRPP and make companies that wish to contract with public administrations accept the incorporation of SRPP into their organisation.
- Although there is a complete general regulatory framework regarding the possibility of using SRPP, which has been developed by regional and local administrations, it is recommended to specify the way in which social clauses and performance conditions can be applied in procurement procedures. In order to do this, it would be convenient to facilitate access by bidders to a catalogue of socially responsible conditions, clauses and criteria that have been previously accepted and validated for their use. This will remove legal uncertainty for public authorities and make it easier for them to apply SRPP.
- It is essential to reinforce the training and learning of public decision-makers and procurement officials in the field of SRPP.
- It is recommended to establish easy means to monitor compliance with social issues during the execution of the contract, as well as the impact and relevance of social criteria and conditions in the award of public contracts. Procurement portals should make such information easily available for consultation by any interested party.
- It is advised to facilitate or ease the obligation to directly link socially responsible award criteria or performance conditions to the subject matter of the contract in order to avoid subsequent legal challenges and to make it more difficult to use them (Interview with the Provincial Council of León).

- Finally, it is recommended, prior to the publication of procurement notices, to establish dialogues with stakeholders, including bidders, on SRPP matters that, thanks to their knowledge, facilitate the achievement of the proposed social objectives during the execution of the contract, as well as the monitoring of the contract to verify compliance with the conditions and criteria offered (Interview with the Assembly of Cooperation for Peace, one of the most important and experienced NGOs in Spain in the field of Social Economy).

Box 8: Good practice from Spain: Valladolid City Council's strategy to increase SMEs' participation in public procurement as a multiplier effect in promoting employment, growth and innovation

**Valladolid City Council's strategy to increase SMEs' participation in public procurement as a multiplier effect in promoting employment, growth and innovation**

Valladolid City Council drew up 'Instruction 1/2018, on the promotion of socially responsible public procurement – strategic, honest and sustainable – in the Municipality of Valladolid and local public entities'<sup>71</sup>. This strategy governs all procurement procedures of the administration and encourages the participation of small and medium-sized enterprises (SMEs) in public procurement, with the aim of achieving efficient, transparent, socially responsible and sustainable procurement. In addition, another objective of the strategy is 'socially efficient contracting', because it establishes social clauses, ethical public procurement criteria, sustainability and environmental criteria.

Since 2015, the City of Valladolid has adopted specific measures to promote and facilitate the participation of SMEs in public sector contracts. The city adapted contracts to the capacity of SMEs, allowing them to acquire valuable experience and credibility that could be re-used when competing in other tenders from other contracting authorities. According to municipal data, the awarding of contracts to SMEs is twice the national and European average, reaching 75 % of contracts awarded in 2016 and 2017, and even 81 % in 2018, with 51 % of the total amount of the municipal expense managed through contracts awarded to SMEs.

The commitment of the Valladolid City Council to boost the local economy and support the business fabric of the city has continued in recent years and is demonstrated in the contracting data, with an award of contracts to SMEs that reached 74 % in the year 2019, 82 % in 2020 and 79 % in 2021. Of the contracts awarded to SMEs, 57 % are local and based in the city of Valladolid.

Most of the social economy enterprises are SMEs. Spain's Social Economy Act 5/2011 provides for the implementation of instruments that promote social economy entities, with a special focus on those that support employment in the most disadvantaged sectors and are rooted in their local territories. For this reason, it can be understood that the generation of employment and work is a form of social inclusion and this is where SMEs and the social economy are linked and have been most effective. Thus, this strategy also aims at boosting the participation of social economy enterprises in tendering.

According to the Monitoring Report, dated April 2022, of the Strategic Framework for SME Policy 2030, of the Ministry of Industry, Trade and Tourism, SMEs in Spain make up 99.8 % of all companies.

<sup>71</sup> Ayuntamiento de Valladolid, Instrucción para impulsar la contratación socialmente eficiente: estratégica, íntegra y sostenible en el Ayuntamiento de Valladolid y las entidades de su sector público, Available at: <https://www.valladolid.es/es/ayuntamiento/normativa/instruccion-1-2018-impulsar-contratacion-socialmente-eficaz/ficheros/475710-INSTRUCCIONContrataci%C3%B3n%20eficiente%20y%20estrat%C3%A9gica.docx.pdf>.

Moreover, they generate 65 % of total business employment, so any policy aimed at improving the economy, social or environmental aspects of Spain must give priority consideration to SMEs.

SMEs generate 65.2 % of employment in the EU, a percentage that is very similar to the one they generate in Spain. Unlike large multinationals, SMEs cannot emerge and prosper without strong local roots and links to the population and civil society active in the area in which they are located. This is an added value for communities and for territorial development, generating employment, reinvesting profits in the local economy. It also helps to prevent the exodus of workers, especially younger ones, to large cities due to lack of job opportunities. SMEs contribute to the sustainability of small and medium-sized cities, as well as inclusive development.

If SMEs were to receive a percentage of public procurement, not only in accordance with their number (they represent 99.8 % of all companies in the EU), but also with the added value they generate (62.2 % of EU GDP), this would mean an injection of money into SMEs that would be greater than all the public aid from the EU and all its Member States for the development of SMEs<sup>72</sup>.

The measures envisaged in this Instruction were implemented to encourage the participation of small and medium-sized enterprises, including cooperatives and the self-employed. They cover actions in all phases of the procurement procedure, including the approval and dissemination of the Annual Procurement Plan and the provision of basic training for local SMEs in public procurement. The contract preparation phase is essential to adapt the size of contracts – and thus the requirements related to the economic and technical capacity – to those of SMEs. In the award phase, preference is given to invitations to SMEs for smaller contracts and negotiated contracts without advertising; the extension of the deadline for submitting bids to at least five days over the legal minimum for all contracts; and the use of simple award criteria, mainly based on mathematical evaluation. In terms of execution, the Instruction also guarantees prompt payment (important for smaller companies for their cash flow), and a more favourable form of guarantee, which is the retention of part of the payment of the price to the contractor, normally 5 % (which does not involve prior payment or expense to be incurred).

Of all the measures, perhaps the most effective but most difficult to apply is the division of contracts into lots and limiting participation or the awarding of the contracts from more than one third of the lots going to the same company or related companies.

Moreover, 'all public procurement contracts aim to achieve the following objectives, and calls for tenders will include at least two social objectives to be operationalised through social clauses:

- To promote the integration into employment of persons in a situation (or at risk) of social exclusion and of persons with special difficulties in accessing employment, especially persons with disabilities.
- To eliminate gender inequalities, paying particular attention to wage parity, work-life balance and LGBTI persons and the elimination of sexist measures in aesthetic dress codes.
- To combat unemployment among groups with greater difficulty in accessing the labour market, especially women, young people, persons over 45, and the long-term unemployed.

<sup>72</sup> Ministerio de Industria, Comercio y Turismo, 2021, Strategic SME Policy Framework 2030. 2nd Annual Report 2021, Available at: [https://plataformapyme.es/Publicaciones/Marco%20Estrat%C3%A9gico%20de%20la%20PYME/Informe\\_Seguimiento\\_Anual\\_2021.pdf](https://plataformapyme.es/Publicaciones/Marco%20Estrat%C3%A9gico%20de%20la%20PYME/Informe_Seguimiento_Anual_2021.pdf).

- To ensure respect for basic labour rights throughout the production chain, fair trade and greater transparency and traceability of the entire supply chain.
- In its annual planning, the Municipality designates 8-10 % of the public procurement contracts to be reserved for work integration enterprises and sheltered workshops.<sup>173</sup>

This strategy of the Valladolid City Council has been included as a case study in the European Commission's publication titled 'Making Socially Responsible Public Procurement Work: 71 Good Practice Cases'<sup>74</sup>.

In 2019, Valladolid was one of the winners of the European Enterprise Promotion Awards, for the category 'Improving the Business Environment'<sup>75</sup>. This refers to all the contracting procedures that Valladolid City Council has carried out since 2015 with the implementation of issues relating to social clauses in accordance with the provisions of Directive 2024/14/EU and, especially from 2018 through the development of Instruction 1/2018.

To see an example of how the strategy has influenced the procurement procedures of the city of Valladolid in the area of social services, please read the case study on services for homeless people developed by the GPP Helpdesk. The case study is available at this link:

[https://green-business.ec.europa.eu/green-public-procurement/good-practice-library/provision-comprehensive-care-homeless-people\\_en](https://green-business.ec.europa.eu/green-public-procurement/good-practice-library/provision-comprehensive-care-homeless-people_en).

Source: Ayuntamiento de Valladolid, Instrucción para impulsar la contratación socialmente eficiente: estratégica, íntegra y sostenible en el Ayuntamiento de Valladolid y las entidades de su sector público; EASME, 2020; Ministerio de Industria, Comercio y Turismo, 2021; and European Commission, European Enterprise Promotion Awards 2019.

### 3.2.5. Sweden<sup>76</sup>

#### *Legal framework*

**Swedish legislation that relates to procurement** consists of four laws: the Public Procurement Act (LOU), the Act on Procurement in the Utilities Sector (LUF), the Act on Procurement of Concessions (LUK) and the Defence and Security Procurement Act (LUFS). The Act on System of Choice in the Public Sector (LOV) – see below – can be used as an alternative to procurement in accordance with the LOU for healthcare and social services.

**Transposition of the Directive in Swedish legislation:** The Swedish Act on Public Procurement (*lag om offentlig upphandling 2016:1145*; abbreviated *LOU*; see here for the [English language version](#)) was adopted by the Swedish Parliament on 1 December 2016 and has been in force since 1 January 2017. It is divided into 22 chapters, some of which are of particular relevance when it comes to the promotion of socially responsible public procurement (SRPP), including Chapter 1 (content, scope and definitions), Chapter 4 (covering 'reserved contracts'), Chapter 9 (technical requirements), Chapter 13 (exclusion of suppliers), Chapter 14 (qualifications), Chapter 16 (evaluation of tenders and contract award), Chapter 17 (contract performance) and Chapter 19 (procurement under the thresholds and procurement of services under Appendix 2). Annex 2 is relevant in view of the light regime for social, health and education services, and contains a list of social and other specific services.

<sup>73</sup> EASME, 2020, pp. 220-224.

<sup>74</sup> The individual case study is also available at this link: <https://ec.europa.eu/docsroom/documents/42753/attachments/13/translations/en/renditions/native>.

<sup>75</sup> European Commission, European Enterprise Promotion Awards 2019, Available at: <https://ec.europa.eu/docsroom/documents/43844>.

<sup>76</sup> Mathias Maucher is the author of Section 3.2.5 on Sweden.

On 1 February 2022, **new public procurement rules** – simplified rules for public procurement ([ett förenklat upphandlingsregelverkentered](#)) – entered into force in Sweden in order to simplify the procurement procedures and to give more flexibility to contracting authorities. The new rules apply to procurement below the EU thresholds, procurement of social services and to advertising posts. For social services, the threshold for direct awards is SKR 7,800,000 (approximately EUR 654,250). Most of the recent changes do not introduce new rules but move existing rules to other chapters of the Swedish Act on Public Procurement to achieve greater clarity. The other changes concern the removal of the requirement to use a specific procurement procedure for contracts below the thresholds – allowing the contracting authorities to design their tenders in the way considered most appropriate but still respecting the principles of EU law, a new possibility of direct award of public tenders in the case of judicial reviews (procurements below the relevant threshold), the introduction of a lower limit when a post advertisement is to be carried out, and a higher threshold for defence and security procurement.

How have social considerations been embedded in the Swedish legislation transposing the Directive?

The [Monitoring Report 2021 of Sweden to the European Commission pursuant to Art. 83 of Directive 2014/24/EU](#) defines '**Socially Responsible Public Procurement**' (SRPP) as follows: 'Procurement that takes into account one or several social considerations for advancing social objectives. SRPP covers a wide spectrum of social considerations, such as for example employment opportunities, decent work conditions, compliance with social and labour rights, social inclusion, equal opportunities, and accessibility' (SCA/NAPP, 2021, p. 33).

The **key features for realising or promoting SRPP** have been **fully transposed into Swedish public procurement legislation**. They are presented below, starting with those relevant in the pre-procurement stage<sup>77</sup>, then looking at the tools used in the procurement stage and concluding with instruments used in the post-procurement stage.

**Reserved contracts**, Article 20 of the Directive, as transposed into Swedish legislation, allows for the possibility of exclusive participation in procedures and performance of contracts for sheltered workshops, for economic operators active in social and professional integration of disabled or disadvantaged persons and for sheltered employment programmes. This provision also applies to tendering in the framework of the light regime for social, health and education services. The conditions defined for an exclusive participation concern both the tendering process and the contract performance. A public contract procured under Article 20 can be annulled if the supplier fails to fulfil the condition of at least 30 % employment of persons with disabilities at any time during the duration of the contract<sup>78</sup>. The National Agency for Public Procurement (NAPP) has issued some guidance on this option to promote SRPP. The majority of organisations making use of this provision are work integration social enterprises (WISE)<sup>79</sup>. They are active in different branches of industry, such as second-hand goods, handicrafts and catering. There is also the state-owned sheltered workshop Samhall AB<sup>80</sup>. It is interesting to note that the Swedish legislator has chosen not to use the concept of 'disadvantaged

<sup>77</sup> Cases where tenderers were excluded due to breaches of the Swedish labour and social law, the non-payment of taxes or social security contributions established by an administrative or judicial decision or as a consequence of non-compliance with collective agreements.

<sup>78</sup> The 30 % share does not refer to working force actually performing a public contract procured under Article 20, but only to the total share employed by the supplier.

<sup>79</sup> Apart from employing people with the help of different labour programmes governed by the Swedish Public Employment Service (Arbetsförmedlingen) these organisations, mostly WISE, also get financial support from the local authorities who have a statutory obligation to create opportunities for the disabled and unemployed to enter the labour market.

<sup>80</sup> Samhall AB's core business is to create work for people with functional impairment leading to a reduced working capacity. According to the articles of association of Samhall AB, profits shall be capitalised on a new account to promote the new operations of the company. Samhall AB receives financial aid from the state. The provisions on the awards of public contracts in separate lots have been used by procuring bodies in combination with the possibility to reserve contracts, in order to prevent the big State-owned company Samhall AB from taking the large majority in a reserved contract procedure.



persons'. It is considered to be too vague and also not to be sufficiently clarified by the relevant definitions contained in the Directive. In Sweden, reserved contracts are mainly an instrument used to either help increase the labour market and the social inclusion of long-term unemployed persons and/or persons with disabilities (including in pilot projects) or as a tool to, more generally, increase the participation of small and medium-sized enterprises (SMEs) – including non-governmental organisations and social economy enterprises – in public tenders. As an alternative to reserved contracts, contract performance clauses are used to support labour market and social inclusion of long-term unemployed persons.

The majority of the social economy enterprises active in the welfare sector submit bids for public contracts in the framework of the rules set by the **light regime for social, health and education services**, Articles 74 to 77 of the Directive. Procurement of social services and other specific services are regulated in Chapter 19 of the Swedish Act on Public Procurement. This chapter contains provisions that are similar to those for regular services over the thresholds, including the provisions on exclusion and the award of contracts, including abnormally low tenders. The provision in Chapter 4, Section 9, that gives the contracting authority a very limited possibility to allow suppliers to rectify flaws in their bids, also applies to procurement of social services and other specific services.

Apart from the possibility for a court to decide that a contract that has been awarded in a way that violates the law may endure due to overriding reasons relating to the public interest, there are no provisions that allow the contracting authority to take into account the specificities of the social services. For example, there are no provisions that explicitly ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility and so forth for users. The award criteria which can be used are those stipulated in Chapter 16, Section 1 (Article 67), i.e. best price–quality ratio, cost, or price<sup>81</sup>. New rules have been in force since 1 January 2019, enacted by a unanimous vote in the Swedish Parliament. They allow the contracting authority to procure social services and other special services (without a cross-border interest, see below) under the threshold EUR 750,000 without the need to adhere to the principles in Chapter 4, Section 1, i.e. equal treatment, non-discrimination, and transparency. The procurement, however, has to be announced. If there is a certain cross-border interest, the above-mentioned principles must be applied. Article 77 has also been implemented in Swedish public procurement legislation<sup>82, 83, 84</sup>. However, there are still no special rules taking into account the sensitivity of the services for users in public tenders above the threshold<sup>85</sup>.

<sup>81</sup> There is, however, a special law on freedom of choice for users (lag om valfrihetssystem) in the field of social services and healthcare. This means that the user can choose between a list of suppliers, including the local authority. Freedom of choice is considered to be a part of public procurement. The law on freedom of choice consequently entails many provisions that are extracted from the Swedish Act on Public Procurement.

<sup>82</sup> Chapter 19, Section 6b of the Swedish Public Procurement Act gives a contracting authority the possibility to reserve the right to participate in public procurements for organisations under certain strict conditions enumerated in Appendix 2a. They include supply services of domestic help personnel, supply services of nursing personnel, supply services of medical personnel and preschool education services.

<sup>83</sup> The possibility to provide for reserved contracts for certain services, building on Article 77 of the Directive, should also be distinguished from the exclusion of contracts of civil defense, civil protection etc., provided by non-profit organisations according to Chapter 3, Section 26 of the Swedish Public Procurement Act.

<sup>84</sup> The possibility to provide for reserved contracts for certain services, including social services, building on Article 77 of the Directive, is to be distinguished from reserved contracts (in line with Article 20 of the Directive) regulated in Chapter 4, Section 18 of the Swedish Public Procurement Act.

<sup>85</sup> Since there are no provisions explicitly allowing the contracting authority to take into account the sensitivity of social services for their users, it could be questioned whether Sweden has correctly implemented Article 76 of the Directive. The reason for not having special rules on the procurement of social services and other special services is mainly that in the Parliamentary consultation process preceding the transposition of the Directive, there was a broad consensus that such specific rules would create a more complicated and obscure regulatory system. The considerations which also influenced the revision in place as of 1 January 2019 were inspired by the idea that Sweden should take advantage of the possibility to enact more flexible rules for the procurement of social services in line with the light regime logic for the benefit of non-for-profit organisations and to better respect the needs, expectations, and rights of the users of social services.

Regarding the **transversal/horizontal social clause**, Article 18(2) of the Directive, the terms referred to in the Swedish procurement legislation are the minimum conditions in terms of wages, leave and working hours. The occupational pension is not included in these minimum conditions. Where the contracting authority sees a risk of non-compliance with the minimum labour standards, it is obliged to require from the supplier to abide by these conditions. The requirements in the public tender have to correspond with the levels of conditions in a central collective agreement applied to the whole of Sweden, covering both public and private employers<sup>86</sup>. The contracting authority is obliged to approach the parties of the collective agreement, i.e. the employers' organisation and the trade union/trade union confederation signing it in order to establish the exact conditions, except for situations where the Swedish National Agency for Public Procurement has issued a guide that contains this information. In some sectors there are competing collective agreements. If the contracting authority is unable to get the precise information of the conditions set in a central collective agreement, e.g. if the signatory parties cannot agree on how it should be interpreted, the contracting authority is not obliged to include conditions it cannot establish with certainty in a public tender. In cases where more than one central collective agreement applying to the same employees and the same branch of industry exists, a supplier who fulfils the equivalent conditions in another central collective agreement in this bid is deemed to comply with the requirements of the contracting authority, as a consequence of the principle that all collective agreements are equal.

It is important to note that Sweden has no system to declare collective agreements generally applicable. If a supplier uses posted workers, the bid needs to comply with the terms and conditions that follow from the Posting of Workers Directive<sup>87</sup>. When transposing Article 18(2) of the Directive into the Swedish Act on Public Procurement, only the obligations in the field of labour law have generated provisions. The reason for the lack of any provisions as to environmental and other social obligations is likely due to the fact that it is considered that those obligations are sufficiently implemented through other provisions, such as the possibility to exclude bidders if the tenderer has not complied with environmental, social and labour obligations and the provision on rejecting abnormally low tenders if it is established that the tenderer does not comply with these obligations. The transposition of Article 18(2) also prompted certain challenges as the working conditions and wages, including minimum wages, are determined in collective agreements. They set the regulatory framework for many aspects, not labour law<sup>88</sup>. Swedish labour legislation sets the conditions, e.g. with regard to occupational safety and health, leave and working time<sup>89</sup>. On 1 June 2017, the Swedish procurement legislation was supplemented by provisions stating that certain above-thresholds contracts should contain specific labour conditions<sup>90</sup>. Ongoing discussions on the interpretation of the legal provisions concern three

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<sup>86</sup> The transversal/horizontal social clause is mostly used in the context of contract performance conditions and when stipulating the conditions for subcontracting with the aim of addressing the risks of undercutting labour rights and of safeguarding the relevant employment, working and pay conditions laid out in the applicable collective agreements.

<sup>87</sup> The EU law and the Swedish legislation on the posting of workers should prevent companies from exploiting differences in working and employment conditions between the country of origin of a worker and the country where the work is executed to gain competitive advantages compared to other enterprises and thus to do social dumping. The Swedish rules on the posting of workers are based on rules that are common for the EU and the EEA.

<sup>88</sup> There is no statutory minimum wage in Sweden and no legislation stipulating that wages should actually be paid.

<sup>89</sup> Relevant pieces of labour law are the Employment Protection Act (lagen om anställningsskydd), the Leave Act (semesterlagen), the Working Time Act (arbetstidslagen) and the Co-Determination Act (medbestämmandelagen).

<sup>90</sup> The Swedish Competition Authority in 2016 commissioned a study on potential effects of employment requirements for public procurement: Anxo, D. and Ericson, T., Metoder för att utvärdera sysselsättningskrav vid offentlig upphandling – en översikt [Methods for evaluating employment requirements in public procurements – an overview], Konkurrensverkets uppdragsforskningsrapport 2017:2, February 2017. It states 'that there are currently few evaluations of employment requirements in public procurements. Evaluations often lack impact assessments and there also seems to be a lack of knowledge on how employment requirements should be formulated' (SCA/NAPP 2018:43).

issues<sup>91</sup>.

Specific subparagraphs stipulate the requirement of technical specifications taking into account **accessibility criteria for persons with disabilities and design for all users**<sup>92</sup>. Where mandatory accessibility requirements have been adopted by a legal act of the European Union, the technical specifications in question must refer to them.

Building on Article 67 of the Directive, the **Best Price-Quality Ratio** (BPQR) – referred to as '**Most Economically Advantageous Tender**' (MEAT) in the previous Swedish Public Procurement Act – allows for the inclusion of social considerations as award criteria to be considered, together with the price or cost and other criteria such as social, quality, and environmental considerations as long as the social clauses are linked to the subject matter. It is one of three methods to award contracts, alongside price or cost and the cost-effectiveness approach. In the Swedish context, social considerations can include factors such as job creation, decent work, democratic ownership, social and professional inclusion of persons with disabilities and disadvantaged persons, integration of disadvantaged groups in the democratic process of the enterprise, and accessibility of the service (particularly for those living in rural and remote areas).

Linked to this and labour clauses in public contracts is the **obligation** for procuring bodies **to reject abnormally low tenders** – taking up Article 69 of the Directive – where the tenderer is unable to give a sufficient explanation for the low price or cost offer and where it has been established that the abnormally low price or costs proposed in the bid result from a non-compliance of the supplier of a good or the provider of a service with (international or national) social or labour law provisions.

Chapter 17, Sections 2 and 4 of the Swedish Act on Public Procurement, obliges contracting agencies to ensure that **subcontractors** actually involved in the production of the goods or for the delivery of the services procured comply with a number of obligations<sup>93, 94</sup>. The Swedish legislator has decided not to implement the possibility for a subcontractor to ask to the procuring body to pay directly them for the performance of a public contract, as such an approach is contrary to what is generally applicable, namely that the main supplier is responsible for the completion of the contract and for ensuring that the subcontractors meet the conditions set out in Article 71(1) of the Directive. This was also not done to avoid legal and technical problems and not to complicate the monitoring of the contract

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<sup>91</sup> The three issues are: (1) There is some discussion on whether contracts under the thresholds are also covered by the obligations of Article 18(2). (2) There is some uncertainty regarding which workers and which subcontractors are included. According to the legislator, the requirements may only cover workers and subcontractors that will be engaged in the execution of the contract. (3) As in other countries, e.g. in Germany, there is also an ongoing debate about whether it is in breach of EU law and the principle of proportionality for a contracting authority to require that a private contractor must actually sign a collective agreement. The dominant opinion among Swedish lawyers is that this requirement cannot be included in a public tender.

<sup>92</sup> With the transposition of the Directive into Swedish legislation, a provision in Section 3 contains the obligation to take disability-friendly technical specifications into account by the contracting authority except in duly justified cases. Before, those technical specifications were only defined as a simple goal to be reached.

<sup>93</sup> Contract performance clauses are a key instrument on a standard basis where subcontracting is used and/or where supply chains play a role. Depending on the economic sectors, goods and services and type of risks to be addressed, this is often done by making use of labels, e.g., for fair trade products, for organic food, for wood and wood products by the FSC (Forest Stewardship Council) or of certifications. Certifications are commonly used to address risks linked to human rights among contracting authorities in general. Not only as contract performance clauses but also as award criteria or technical specification. However, social aspects in contract performance clauses to deal with human rights risks go beyond certifications. All 21 regions in Sweden share a Code of Conduct and apply contract performance clauses that stipulate that the suppliers need to have policies and procedures in place to identify, manage and act on risks and impacts in their supply chains. They jointly audit compliance and have the possibility to issue fines or to terminate a contract if the supplier fails to collaborate or correct non-compliance. Monitoring of the related requirements was described as resource-intensive and difficult, also due to lacking data on conditions and processes further down the supply chain outside Sweden, and thus is not systematically happening.

<sup>94</sup> Another method applied where subcontracting is used and/or where supply chains play a role is the inclusion of criteria defining certain qualifications for the providers, e.g., that producers have certain policies and procedures – in the sense of minimum floors – in place to ensure compliance with human rights. This is also done to influence the markets by setting high(er) standards in relation to the goods and services procured with the intention for them to become in the future the norm for all producers who want to sell their goods and offer their services in Sweden, and ideally in the Nordic countries and/or the EU.

performance.

What other regulations, strategies and plans are relevant for the promotion of SRPP?

Efforts to push SRPP in Sweden are framed by the **National Public Procurement Strategy**, adopted in 2016. Its general objective is to make all public procurement efficient and legally certain and take advantage of the competition on the market. It also promotes innovative solutions and takes environmental and social concerns into account. Policy objectives 5 and 6 refer to innovation procurement ('Public procurement that drives innovation and promotes alternative solutions') and green procurement ('Public procurement that is environmentally responsible'). Policy objective 7 states that public procurement should contribute to a socially sustainable society and sets out measures, achievements and challenges in relation to the promotion of SRPP. It is broken down into two qualitative goals measuring the social impact: 1) Working conditions in Sweden (in accordance with Swedish collective agreements) and outside of Sweden in global supply chains (in accordance with the ILO core conventions on human rights, environmental protection and anti-corruption); and 2) Employment opportunities through public procurement with the aim to increase the number of contracting authorities that use employment requirements and labour clauses.

However, no quantitative targets have been defined in terms of SRPP. Whereas the National Public Procurement Strategy is aimed primarily at the central government authorities, it also aims at ensuring that municipalities and county councils, as well as other contracting authorities or contracting entities, adopt programmatic documents to put policy objectives into practice at their level. The National Public Procurement Strategy is currently being revised. A consultation on the changes needed was launched on 31 August 2023. The revision is done on demand by the Swedish government, based on a political assignment formulated for the National Agency for Public Procurement (NAPP). One strategic aim is the improved participation of SMEs in public tenders. The concept of SME also covers non-governmental organisations and social economy enterprises, not least by means of specific forms of a public-private partnership with value-based not-for-profit organisations (*idéburet offentligt partnerskap*) – including in the fields of healthcare, health promotion, social care, education activities, support to access the labour market for disadvantaged and/or vulnerable persons and activities intended to increase people's integration and inclusion in society and to combat segregation and isolation and reserved markets.

Another important tool is **guidance** issued by competent public authorities. We focus on the guidance developed in recent years by the NAPP. This has also partly been done in cooperation with other public bodies or key stakeholders, such as the Swedish Association of Local Authorities and Regions (SALAR).

- The National Agency for Public Procurement offers **guidance and support on socially responsible public procurement** [*Socialt ansvarsfull upphandling*], **social labels** [*Användning av märkning*] and **on labour conditions** [*Arbetsrättsliga villkor*]. This includes support for using SRPP, such as guidelines and SRPP criteria. The focus is on working conditions in Sweden (in accordance with Swedish collective agreements) and outside of Sweden in global supply chains (in accordance with the ILO core conventions on human rights, environmental protection, and anti-corruption) (SCA/NAPP, 2018, p. 44).
- In 2018, the NAPP carried out an **EU-funded project on employment opportunities through public procurement** [*Sysselsättning genom offentlig upphandling*] with the aim of increasing the number of contracting authorities that use employment requirements in procurement (SCA/NAPP, 2018, p. 44). Sources: National Agency For Public Procurement: '[Procurement with the aim of increasing employment](#)'; Project Summary: EC (2020): '[Making Socially Responsible Public Procurement Work: 71 Good Practice Cases](#)'; Case 53: 'Social innovation and employment

through public procurement' ESF transnational project'. For more details, see the good practice section.

- The NAPP has issued some **guidance and offered some capacity-building to address some of the challenges listed above as well as the lack of national models to support aspects of SRPP**: 1) It has developed a national model promoting employment opportunities for disadvantaged groups, such as individuals experiencing difficulties in entering the labour market; 2) it has developed a digital tool for identifying and handling risks in working conditions outside of Sweden in global supply chains (in accordance with the ILO core conventions on human rights, labour rights and environmental protection, and anti-corruption); and 3) it has set up a website with comprehensive support material on how to consider accessibility for persons with disabilities in public procurement.
- The NAPP develops and administers **sustainability criteria that take environmental and social considerations into account when designing public procurement**. The criteria which can contribute to achieving several societal goals within environmental, social and economic sustainability consist of preformulated requirements with associated information and go beyond what is stipulated in the legislation. They can be checked [here](#). The list comprises two criteria in relation to the ILO core conventions and sustainable supply chains, the first defined as core special contract terms, the second as advanced special contract terms. This is to guide contracting authorities and entities which are in certain cases mandated to stipulate labour law requirements if it is necessary, i.e. when there is a risk of unfair working conditions during the performance of the contract. The tool recalls that if the work is performed in countries where Swedish law is not applicable, requirements according to the ILO core conventions must be included in the procurement document.
- The NAPP also shares detailed information (in Swedish) on its webpage for 1) [reserved procurement aimed at supporting the integration of people with disabilities or people who have difficulties entering the labour market](#), i.e. based on Art. 20 Directive 2014/24/EU and for 2) reserved procurement for certain services listed in Annex 2 of Directive 2014/24/EU, i.e. based on Art. 74-77 Directive 2014/24/EU for [reserved procurement for the award of contracts for social and other specific services](#). The first category explains in more detail the conditions to reserve the participation in public tenders for sheltered workshops or for suppliers whose main objective is the social and professional integration of persons with disabilities or persons with difficulties in entering the labour market. The second category deals with reserved procurement for organisations that meet certain requirements, for non-profit organisations and for increased employment. As of 1 January 2023, procurement could already be reserved for organisations that meet certain requirements and can now also be reserved for non-profit organisations. The specific services that can be procured in this way differ to some extent, depending on which option is used.

The [country information on gender mainstreaming for Sweden on the EIGE webpage](#) sets out a legal obligation to undertake gender budgeting for a ministerial budget or the budget of other governmental institutions to work towards the gender equality objectives set by the Swedish government. It thus also sets a framework for SRPP aiming at advancing gender equality for different aspects – also labelled 'gender-responsive public procurement' – such as employment conditions and pay, but also the existence of policies and processes in the enterprises supplying goods and services to promote and ensure gender equality.



There are a number of **other relevant regulatory frameworks supporting the realisation of SRPP**:

- An important field of action is the **posting of workers**. The relevant Swedish rules are the Posting of Workers Act ([Lag 1999:678 om utstationering av arbetstagare](#)) and the Posting of Workers Ordinance ([Förordning 2017:319 om utstationering av arbetstagare](#)). The Swedish Work Environment Authority (*Arbetsmiljöverket*) offers more specific information on a [dedicated section](#) of its webpage.
- The **Discrimination Act** prohibits discrimination in the form of lack of accessibility. This Act is in conjunction with other more detailed rules and is also enshrined in the Planning and Building Act.

Looking at one example of **relevant policy programmes**, there are a number of **labour market policy programmes** administrated by the Swedish Public Employment Service (*Arbetsförmedlingen*) **for the most vulnerable on the labour market**, such as subsidies for employers who employ people with disabilities or people who due to other reasons are unable to enter the labour market<sup>95</sup>.

*Advantages and strengths of the Swedish model*

The **key methods to realise or promote SRPP** have been **fully transposed into Swedish public procurement legislation**.

The **National Public Procurement Strategy** provides an overarching strategic framework including for the promotion of SRPP. It is currently being revised, at the request of the Swedish government and based on a political assignment it formulated for the NAPP.

The **development of guidelines, toolkits and national models** by the NAPP and based on cooperation structures built between the NAPP, the Swedish regions and by the Swedish local authorities in order to better coordinate efforts towards a more comprehensive use of SRPP has been a key factor in good progress in recent years to promote and realise SRPP. In order to address the different capacities of the 290 municipalities and the 21 counties of Sweden, the NAPP has developed a number of guidelines and national models in recent years which can serve as 'blueprints' in a participatory approach involving all relevant stakeholders and, on some occasions, jointly with SALAR. They are already quite ambitious. The NAPP has also facilitated national coordination around social clauses. One of these models is 'Employment through Public Procurement' (see good practice section), which provides additional guidance on the use of public procurement to advance gender equality and gender-responsive public procurement. It was recently updated jointly with SALAR (see again the good practice section).

Another positive development is the **increased provision of training** for the public officers working on the public tenders, on the awarding of the contracts and on the monitoring of compliance with the performance criteria and their effects or impacts.

The 21 Swedish counties, i.e. the regional level, as providers of health care and infrastructure as well as regional development including culture, have set up a **permanent working group** and a **forum for exchange** which can support the collaboration, mutual support and exchange of experience and help dissemination of existing tools to promote SRPP and of promising practices. The coordination is ensured by a national office situated in the Stockholm Region for administrative reasons. Since 2010,

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<sup>95</sup> The regulation that deals with programmes for persons with disabilities which result in reduced working capacity is of special relevance. The specific measures under this regulation are aimed at persons with disabilities who have reduced working capacity and who fulfil the special conditions that apply to each aid or effort (Section 9). The support and efforts that can be mentioned in this context are wage subsidies (Articles 25 to 31), protected work (Articles 32 to 35), development employment (Articles 36 and 36 d) and safety employment (Articles 37 and 37b).



all regions share the same Code of Conduct and contract clauses for responsible supply chains. They audit suppliers' compliance and share the results between themselves to avoid double work. This 'institutionalised cooperation' allows for continued, structured, and moderated exchange on persisting challenges for SRPP and experiences with new tools and guidance, as well as on bad experiences and challenges (see also the good practice described in Box 10).

*Barriers and difficulties in the implementation of SRPP*

The [Monitoring Report 2018 of Sweden to the European Commission pursuant art. 83 of Directive 2014/24/EU](#) lists four **key challenges for promoting SRPP**: '1) lack of capability and experience among contracting authorities, suppliers and decision-makers; 2) lack of guidance and support, for example guidance materials and criteria; 3) lack of a common national model, e-tools, platforms for planning and follow-up, and acceptance by the private sector and suppliers for employment requirements; and 4) lack of methods for measuring results and effects when it comes to the social impact'; this also comprises the lack of procurement data and statistics on social considerations and procurement (SCA/NAPP 2018:43). The [Monitoring Report 2021 of Sweden to the European Commission pursuant art. 83 of Directive 2014/24/EU](#) lists three **key challenges to promote SRPP**: 1) public procurement is not used as a strategic tool to reach social goals, for example to contribute to reasonable conditions of employment or equal opportunities for women, men and children. This includes, among other things, appropriate organisation, that is involved decision-makers, cross-functional working methods, goals set according to the organization's needs, conditions and overall goals; 2) lack of time, competence, and methods and tools for analysis of the social impact; and 3) lack of time and methods for follow-ups, measuring results and effects, including lack of procurement data and statistics on social considerations and procurement (SCA/NAPP, 2021, p. 33). These potential challenges for the realisation of SRPP have been confirmed by the five interviewees in Sweden.

The [Monitoring Report 2018 of Sweden to the European Commission pursuant art. 83 of Directive 2014/24/EU](#) suggests the following four **measures to overcome challenges for the realisation of SRPP** (SCA/NAPP, 2021, p. 33):

- 1) Raising awareness and developing support for the importance of using public procurement as a strategic tool and applying a holistic perspective throughout the procurement process. This point is linked to one of the major problems reported for 2020 for the correct application of the EU-level public procurement rules, namely the legal uncertainty in how to use sustainability criteria in order to promote environmental and social sustainability without violating the principles and rules of the public procurement. It also reflects another deficit reported, the lack of appropriate information and tools to identify and handle risks at the supplier stage of public procurement, e.g. in view of the respect for human rights.
- 2) Development of web-based support on how to aim public procurement towards social goals such as full participation in society for people with disabilities, or equal opportunities for women and men, including, for example, sustainability criteria, guidelines, models and templates, and tools for analysis. This point is linked to a difficulty highlighted, the insufficient knowledge that the needs of all users, including accessibility for persons with disabilities, are mandatory requirements in all procurement above the thresholds.
- 3) More emphasis on measuring, monitoring and follow-up.
- 4) Developing a national model promoting employment opportunities for disadvantaged groups, such as individuals experiencing difficulties in entering the labour market.

The [Monitoring Report 2021 of Sweden to the European Commission pursuant art. 83 of Directive 2014/24/EU](#) also proposes three **measures to overcome the persistent problems for the realisation of SRPP**: 1) promote dialogue between the procuring authorities and the supplier market, throughout the entire procurement process; 2) development of simple guidelines and national models for SRPP; and 3) putting more emphasis on measuring and monitoring (SCA/NAPP, 2018, p. 43). These possible solutions to address the challenges for the realisation of SRPP have been confirmed by the five interviewees in Sweden.

Legal barriers in the form of the General Data Protection Regulation (GDPR) exist concerning personal data of those persons benefiting from the provision of goods, or from the delivery of services procured by means of labour market inclusion programmes. The GDPR provision largely prevents the procuring bodies from more stringent monitoring of success rates and the mid- and long-term impact of relevant contract performance criteria, e.g. in (often reserved) contracts aiming at the improved employment of disadvantaged and/or vulnerable persons, including long-term unemployed and persons with disabilities.

#### *Lessons learned and recommendations*

Various **lessons learned** can be described, based on desk research and the five interviews with five key Swedish stakeholders.

- The potential of SRPP to achieve a range of policy objectives going much beyond the sole purchase of goods and services is still underestimated and overlooked by many policymakers at all levels of decision making. Public procurement is still insufficiently seen by them as a tool to steer social, health, employment and education and training policies. There is also a lack of stringency in using SRPP to improve employment, working and pay conditions in Sweden and abroad, given the fact that much public money, i.e. taxpayers' money, is being spent. Exploitation of workers could then also be reduced, including by the use of appropriate labels in global supply chains. It should also be noted that it is relatively easy to define and request a range of SRPP criteria for the award and performance of public contracts, but quite resource-intensive to follow up on them and to make the social clauses stipulated as contract performance clauses effective. The decision makers at different political levels therefore need to be much more aware of the fact that including SRPP criteria in a public tender is not enough, but that for an impact to be made, there must be provision for the necessary resources and capacities for effective monitoring, reporting and follow-up.
- Unsurprisingly, differences regarding the use of SRPP across the different local, regional, and national authorities persist. They are mostly due to the size of the local and regional authorities, their urban or rural nature, and their varying capacity (number, experience, and training of staff; number of public tenders per year) to use the technically more demanding aspects of SRPP in a legally sound way without risking delays or court battles<sup>96</sup>.
- A practical challenge hindering the full use of the options of SRPP is the lack of sufficient resources, i.e. dedicated budgets, and qualified staff to design the public tenders. This is partly due to insufficient training and knowledge of the procurement officers and other public service workers involved in public tenders, but also relates to the monitoring of public contracts, using the correct methodologies to assess the effects and impacts of social clauses, and working on

<sup>96</sup> The cities of Stockholm, Gothenburg, and Malmö and the three respective regions and counties (in Swedish: Sveriges län) Stockholm, Västra Götaland (Gothenburg) and Skåne Region (Malmö) – bringing together more than half of the population in Sweden – on average are more experienced and advanced. This is also in the use of tools to monitor and report on the use of the various mechanisms or provisions of SRPP and their economic, social, and societal value and impact.

strategic planning for public procurement by involving decision-makers at the local, regional, and national levels. Experience tells us that the full commitment of the political hierarchy in procuring bodies is needed for a successful and long-term shift towards higher priority and more resources for the realisation of SRPP. Improved monitoring also implies cooperation between the procuring bodies and the often-understaffed labour inspectorates, which is a time- and resource-intensive endeavour, as well as the need for more standardised tools and methodologies to measure social and societal impacts.

- There is a need to do strategic thinking and intensive market research, for example, by entering into dialogues with potential sellers of goods and providers of services prior to launching a procurement procedure to evaluate which goods and services in line with SRPP can be procured from the market and to level up the maturity of the procurement market. Also needed is the use of internal and third-party audits.
- The social clauses in public contracts are to be seen as additive to existing legislative and regulatory requirements, including those stipulated in Swedish labour law, which normally sets high-quality standards for the goods and the services tendered out (at least when compared to other EU countries). In the Swedish context, the lack of social clauses in a public contract thus does not imply that no quality criteria are being requested, as many quality criteria are obligatory – based either on Swedish or on EU legislation – and thus have to be observed regardless and to be fulfilled by the enterprise winning the public tender. This is also the case in the sectors of healthcare, social services, and education.
- There are four areas in relation to social clauses for which compliance is obligatory in public tenders: 1) with Swedish labour law, 2) with the ILO Core Labour Norms when work is done abroad, 3) with the applicable Swedish collective agreements for work done in Sweden, and 4) with accessibility requirements for persons with impairments as stipulated in EU directives and Swedish legislation<sup>97</sup>. Regarding the first 'block' of obligatory requirements around employment, working and pay conditions, the NAPP has developed guidance on compliance with collective agreements and with the ILO Core Labour Conventions<sup>98</sup>.
- The procuring bodies often are cautious about the use of social clauses across the full range of the arsenal of SRPP when they do not know for sure which requirements included in the tender – both with regard to contract award criteria and to contract performance criteria – can be considered as still proportionate. There is also the fear of mistakes, the risk of appeals to court by those enterprises which have not won a public tender and the desire of procuring bodies to avoid delays in the publication of public tenders, particularly when goods or services – including in the field of health, social and education services – need to be urgently procured to respond to social and societal needs. As Sweden applies high transparency requirements, allowing the losing bidder to request all relevant information about the winning bid and the other tenders submitted, and has a high level of recourse compared to other EU and European countries, the procuring bodies have a strong interest in applying the rules correctly which

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<sup>97</sup> The follow-up on the actual realisation and impact of the accessibility requirements, however, can be considerably improved, even though the situation is better for accessibility to ICT as a consequence of dedicated EU legislation and to the use of accessibility requirements in public transport for which the regions are responsible, also actually including them in public tenders in 9 of 10 cases.

<sup>98</sup> In October 2022, it also ran a survey asking municipalities, regions, government agencies and public companies – a total of about 700 organisations – to what extent they analyse the risk of unfair working conditions and to what extent they define follow-up requirements for labour law conditions in their public tenders when the production of the goods takes place in Sweden. Almost 9 out of 10 of the regions state that they impose labour law conditions in their procurements to a great extent. This is likely due to the fact that, according to procurement legislation, contracting organisations must set labour law conditions if it is deemed necessary.

leads to the more cautious use of SRPP criteria and options.

- In Sweden, more attention and resources should be dedicated to addressing the existing challenges in supply chains and for supply chain management in public contracts. One possible positive measure is the promotion of existing good practices to show to procuring bodies that more ambitious requests further down the global supply chain can be realised and that there is no reason to be afraid of doing so.
- There seems to be room for better use of the provisions to ensure due diligence to prevent infringements or abuses of human rights and to reduce environmental harm. Although neither EU law nor the Swedish public procurement legislation directly hinders procuring bodies from applying SRPP requirements, it does not effectively promote responsible supply chains and human rights due diligence. One solution could be to make human rights due diligence an obligatory requirement in contract performance clauses, not least to create more transparency in employment, working and pay conditions of workers outside Sweden further down in the supply chain. The ILO Core Labour Conventions do not cover the content or expectations of human rights due diligence, whereas the defence and guarantee of human rights is one of the main motivations for the revision of the Directive.
- The Directive speaks about sustainability and sets out criteria for SRPP to avoid the awarding of public contracts from being challenged in courts. Social aspects seem to be conceptualised in a narrow manner, with too much focus on the national context, but not considering sufficiently the conditions for the production of goods and services abroad due to a lacking supply-chain perspective. More attention could thus be put on measures, provisions and tools to enforce compliance with the social clauses for the production, employment, working and pay conditions happening in other EU Member States and in producing countries with weak implementation of labour laws and human rights along the global supply chain, including by establishing more obligatory requirements<sup>99</sup>.
- Clarification regarding the possibility and grounds for excluding suppliers could also help to improve the regulatory framework in Sweden to realise SRPP. If it were possible to exclude suppliers which did not perform human rights due diligence at the pre-procurement state, the workload could be possibly reduced for the procuring bodies and the responsibility to ensure compliance with human rights requirements and the ILO Core Labour Conventions would shift to the suppliers.

The **recommendations** below have been developed on the basis of desk research and the five interviews with the five key Swedish stakeholders. Note that references to one or more interview partner(s) does not mean that the recommendation is an official request by the organisation interviewed, simply that the points reflected have been mentioned by those interview partner(s). It is recommended that:

- The development, use and regular update of a national public procurement strategy is helpful as it provides an overarching strategic framework for all procuring bodies which also allows for the promotion of SRPP (all interview partners).

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<sup>99</sup> This aspect is also insufficiently dealt with when the EU law was transposed in Swedish legislation. An improvement of the situation could stem from the currently discussed *Directive* on corporate sustainability due diligence (CSDDD) – the EP agreed on 1 June 2023 on its common position – which would require, once adopted, the companies covered to conduct due diligence on, and also to take responsibility for, human rights abuses and environmental harm throughout their global value chains. It could be, once adopted, be aligned with the Directive.

- In order to better address and overcome varying capacities of local and regional authorities and governments, the development of guidelines and national models can positively serve as ambitious blueprints for the realisation of SRPP, in particular if they are done in a participatory manner involving the relevant stakeholders. This also facilitates nation-wide coordination around social clauses.
- The existence of permanent working groups or forums for dialogue between local and regional authorities is beneficial as it can support the dissemination of existing tools to promote SRPP and promising practices. This form of institutionalised cooperation also allows for a continued, structured and moderated exchange on the persisting challenges for SRPP and on experiences with new tools or guidance, as well as on bad experiences and challenges to realising SRPP.
- In order to make more use of SRPP, more personnel are needed, i.e. qualified staff in adequate numbers to design, help implement and monitor the public tenders, as well as more financial resources, i.e. dedicated budgets. This will also allow the better use of the methodologies to assess the effects and impacts of social clauses as well as to work on strategic planning of public procurement, also involving the decision-makers at the local, regional, and national levels (NAPP, SALAR, Stockholm Region, and the Swedish Confederation of Professional Employees, TCO).
- There is a need for more resources to do risk assessments in particular for high-risk economic sectors and to effectively formulate social clauses at the pre-procurement stage and monitor implementation efforts by suppliers during the procurement lifecycle. (Swedwatch).
- There is a need for clear guidance, regular training, and continuous exchange of existing practices and of promising examples of how to best use the potential of SRPP to better address or overcome caution with the use of social clauses, the fear of mistakes and the avoidance of appeals to court by non-successful bidders, but also not to delay public tenders.
- There is a need to increase resources, i.e. dedicated budgets, and to have more qualified staff to design the public tenders, to extend the training and improve the knowledge of the procurement officers and other public service workers involved in public tenders and to put more resources into the planning of the strategic use of public procurement and into instruments and mechanisms to monitor the outcomes and impacts of social clauses in public contracts (NAPP).
- There should be improvement and extension of dialogue between the procuring bodies and the sellers of goods and providers of services prior to launching a procurement procedure to create mid- and long-term changes in the procurement market supportive of SRPP (NAPP; SALAR).
- The Directive speaks about sustainability and sets out criteria for SRPP to avoid challenges of the award of public contracts in the courts; however, social aspects are being conceptualised in a too narrow manner as they mainly focus on the national context, but do not sufficiently take into account the conditions for the production of goods and services abroad. More attention should be paid to measures, provisions, and tools to enforce compliance with the social clauses for all work contracted outside the EU and in developing countries (Stockholm Region).
- Public procurement in general and social clauses in particular should be better used to achieve societal goals and to pursue the Sustainable Development Goals (SDGs) (Stockholm Region; Swedwatch).

- More attention and resources should be dedicated to addressing existing challenges in supply chains and for supply chain management in public contracts. One possible positive action is the promotion of existing good practices to show to procuring bodies that more ambitious requests further down the global supply chain can be realised and that there is no reason to be afraid of doing so (Stockholm Region; Swedwatch).
- There is a need to better use the provisions to ensure due diligence, to prevent infringements or abuses of human rights and to reduce environmental harm (Stockholm Region; Swedwatch). Human rights due diligence should thus be made an obligatory requirement in contract performance clauses, accompanied by transparency obligations with regards to the employment, working and pay conditions of workers outside the EU further down in the supply chain. The ILO Core Labour Conventions do not cover the content or expectations of human rights due diligence. The current Directive is outdated and would need to be revised accordingly (Stockholm Region; Swedwatch).
- Clarifications regarding the possibility and grounds of excluding suppliers would improve the regulatory framework. If it were possible to exclude suppliers not performing human rights due diligence at the pre-procurement state, workload could be potentially reduced for the procuring bodies and the responsibility to ensure compliance with human rights requirements and the ILO Core Labour Conventions would shift to the suppliers (Stockholm Region).
- SMEs are likely to be excluded from the scope of the Due Diligence Directive whereas in order to make progress on SRPP - in particular when it comes to sub-contracting and supply chain management -, similar obligations as set by the Corporate Sustainability Due Diligence Directive (CSDDD) should apply to SMEs as public procurement uses taxpayers' money. This is a precondition to prevent or reduce labour and human rights violations. Another related challenge is that there is a lack of the automatic exchange of data and information about the relevant employment, working and pay conditions of workers outside the EU further down in the supply chain (Swedwatch).
- It has been seen as a challenge for the better or more comprehensive realisation of SRPP that there is a lack of relevant data, tools and resources at the disposal of public authorities tendering for goods or services. Thus, a requirement to report on aspects linked to the more strategic use of public procurement, including on the use and impact of social clauses, could improve the effectiveness of Article 84 of the Directive regarding obligations for the contracting authorities to monitor the execution of a public contract.

Box 9: Good practice from Sweden: Social Innovation and Employment through Public Procurement

**Good practice the National Public Procurement Agency: Social Innovation and Employment Through Public Procurement**

'Employment Through Procurement' was an ESF Transnational Project running from 2017 to 2019 involving six Swedish and three Finnish organisations to develop a national model on how to use employment clauses in tendering procedures and thus to increase the use of employment clauses in public procurement as a tool for job creation. It is linked to the transversal/horizontal clause stipulated in Article 18(2) of the Directive. This model, which is mainly to support municipalities and counties when developing their public tenders, describes how to use procurement as a strategic instrument to create employment for people who are excluded or distant from the labour market. It covers all stages in the procurement process: the preparatory stage, the procurement stage, and the



post-procurement stage. It includes many interesting aspects, e.g. promoting gender equality<sup>100</sup> or encouraging social enterprise participation in procurement through reserved contracts.

As one deliverable, NAPP has also developed a tool that helps calculate the socioeconomic benefits for the actors involved. It can be used in two ways: to calculate the estimated effects of setting employment requirements in procurement even before the procurement is done and to follow up on the effects of a procedure with employment clauses once completed. One tested example is the use of public procurement to support the labour market inclusion of migrant workers backed by different supportive measures. The project intends to increase the employment opportunities for people far from the labour market (especially for migrants who have arrived less than 3 years ago in Sweden), to improve the capacity of contracting authorities to use social employment criteria as award criteria or in contract performance clauses, as well as to monitor the results and eventually to collect statistics to evaluate the procurement procedures during the post-procurement phase.

By the end of the project, the following achievements could be noted: 1) The development of a national model of strategic procurement, consisting of (a) guidelines describing the steps needed to develop strategic procurement and identifying which stakeholders have to be involved, (b) templates and checklists for public authorities and (c) legal advice for contracting authorities; 2) The development of a web-based tool to calculate the socioeconomic benefits of employment clauses; 3) The development of support material about how to promote work-integration social enterprises' participation in public procurement through the implementation of reserved contracts for those far from the labour market; 4) The setting up of an online platform called 'knowledge bank', where all the shared knowledge such as employment clauses, good examples, experience from other EU countries from study visits, success factors and Q&A can be found; 5) The creation of educational materials that can be used in individual organisations or together with other organisations; and 6) The creation of a network for exchange and dissemination on socially responsible public procurement, both at national and international levels, in the EU and with the United Nations. These outcomes are based on regular consultations with employment departments and services, trade unions and enterprises, both across political levels and for different economic sectors.

Source: National Agency For Public Procurement: '[Procurement with the aim of increasing employment](#)'; Project Summary: EC (2020): '[Making Socially Responsible Public Procurement Work: 71 Good Practice Cases](#)'; Case 53: 'Social innovation and employment through public procurement' ESF transnational project'.

Box 10: Good practice from Sweden: Institutionalised coordination structures between counties on green public procurement and on SRPP

### **Good practice from the Stockholm Region: Institutionalised coordination structures between counties on green public procurement and on SRPP**

The 21 Swedish counties, i.e. the regional level, have set up a permanent working group and a forum for exchange which can support the dissemination of existing tools to promote SRPP and of promising practices, coordinated by the Stockholm Region. The focus is on sustainable supply chains with a link to article 71(1) of the Directive. Risk assessments, tools and audit summaries have been developed and shared. This 'institutionalised cooperation' allows for continued, structured and

<sup>100</sup> As part of the project result, there is support material for bonus incentives to promote gender equality through procurement, during contract performance whereby a monetary bonus is given if the supplier employs a person from the under-represented gender at the workplace where the contract is being performed.

moderated exchange on persisting challenges for SRPP and experiences with new tools and guidance, as well as on bad experiences and challenges.

Source: Webpage '[Hållbar upphandling – ett samarbete mellan Sveriges regioner](#)', coordinated by the Stockholm Region and interview with Stockholm Region.

Box 11: Good practice from Sweden: Guide to using public procurement to advance gender equality

**Good practice from the Swedish Association of Local Authorities and Regions: Guide to using public procurement to advance gender equality, underpinned by a checklist** (in Swedish: *Vägledning för jämställd upphandling & Checklista för jämställd upphandling*)

This national model has been developed by the Swedish Association of Local Authorities and Regions (SALAR) and was recently updated in cooperation with NAPP. It is addressed to municipalities, counties, the state, national agencies, and enterprises. The guide explains that a contracting organisation should take social considerations into account if justified by the nature of the procurement object which also includes gender equality requirements, as defined in the National Public Procurement Strategy. The guide shows how organisations can set gender equality requirements in procurement – formulated as part of the award criteria or as contract performance clauses – with regards to suppliers, products, services, and construction contracts, with the aim to offer comparable welfare and a gender-equal distribution of resources to different groups of women and men or girls and boys. It covers the pre-procurement process, the implementation of a public tender and the post-procurement process. The contracting organisation may also have its own policy documents that require a gender equality perspective in the procurement process. This comprises expertise on gender equality issues, the analysis of gender equality requirements (to be formulated as part of the award criteria or as special contract terms), and a dialogue with suppliers on these requirements before launching the procurement process and follow-up activities.

A gender-responsive approach to public procurement in line with the guide above is also applied for the procurement of combat uniforms for women and men in the Swedish army. With a growing proportion of women serving in the Swedish Armed Forces, it is becoming increasingly important for Sweden to require that all articles of clothing included in the uniform system must be suitable for both men and women in all military assignments. Försvarets Materielverk (FMV) is participating in the procurement process. The authority has a clear gender equality mandate in its budget and policy specification and must 'ensure that the products and services that the authority procures are appropriately designed for women and men' where relevant.

Source: interview with SALAR; [Webpage 'Vägledning för jämställd upphandling'](#) on website of SALAR; [Vägledning för jämställd upphandling](#) & [Checklista för jämställd upphandling](#); Article '[Klartecken för nordiska stridsuniformen](#)' on website of NAPP.

Box 12: Good practice from Sweden: Handbook for the training of local trade union representatives on the use of public procurement and SRPP

**Good practice from the Swedish Confederation of Professional Employees (TCO): Handbook for the training of local trade union representatives of TCO on the use of public procurement and SRPP**

TCO has developed a handbook for the training of their local trade union representatives on the use of public procurement and SRPP. The handbook underlines the importance of public procurement for trade unions and contains advice for trade union representatives regarding the rules governing

the procurement process and public tenders under the framework of the Act on System of Choice in the Public Sector (LOV). It describes for the elected trade union representatives the different routes to trade union influence, the starting points for trade union demands and requirements in relation to employment, working and pay conditions. It is linked to the transversal/horizontal clause in Article 18(2) of the Directive. This handbook aims to support effective monitoring in a decentralised system of collective bargaining and labour relations – on the enterprise level – which requires considerable time, resources, special qualifications, and the experience of the local trade union representatives to be able to promote the use of social clauses and to ensure the intended impacts. TCO and its affiliated trade union organisations work to address these challenges: 1) by offering training to local trade union representatives, also for their exchanges and negotiations with the local employers, 2) by developing a handbook for them and 3) by setting up an internal network of local trade union representatives working on public procurement.

Source: interview with TCO; handbook which is an internal document of TCO and not accessible to the public.

Box 13: Good practice from Sweden: Healthier Procurement: Improvements to working conditions for surgical instrument manufacture in Pakistan

**Good practice from Swedwatch: Swedwatch Report #73 (2016): Healthier Procurement: Improvements to working conditions for surgical instrument manufacture in Pakistan**

Swedwatch has worked on the monitoring of public tenders working with subcontractors and has analysed the impacts on employment, working and pay conditions in the global supply chain in different sectors and countries. With a focus on sustainable supply chains, there is a thematic link to Article 71(1) of the Directive. An example where improvements could be achieved is related to the purchases of surgical instrument manufacture from Pakistan. Since 2007, Swedwatch has documented for Pakistan anti-union policies, deficits in health and safety measures, violations of local labour laws with regard to minimum wage and excessive overtime, and widespread child labour. Since 2010, social criteria have been included in Sweden public contracts for surgical instruments, so an assessment of their effect could be made. In relation to the aspects listed above, Swedwatch found tangible effects on the ground in Pakistan, with improvements of conditions for subcontractors working for exporting factories: 'The prohibition of child labour is now strictly enforced, wages are paid in accordance with the minimum wage, and employees are not forced to work overtime. Challenges remain in health and safety, with workers still operating machinery without personal protective equipment, as well as insufficient wage levels. Capacity building in unionisation and collective bargaining is also needed' (p. 4). It thus 'recommends public authorities to exploit the full range of tools presented in the new EU directives with regards to setting social criteria in public contracts, as well as allocate adequate resources within the authorities for follow up, such as conducting audits, of social criteria in public contracts' (p. 5).

Source: Interview with Swedwatch; [Swedwatch Report #73](#) (2016): Healthier Procurement: Improvements to working conditions in surgical instrument manufacture in Pakistan; [Swedwatch Report #82](#) (2016): Agents for Change: How public procurers can influence labour conditions in global supply chains. Case studies from Brazil, Pakistan and Thailand; Swedwatch (2022): [Position Paper 'Key-Considerations-Sustainable-Public-Procurement'](#).

### 3.2.6. The Federal State of Berlin in Germany: the development and use of regional legislation to help enforce collective agreements<sup>101</sup>

This section examines the case of Germany from the point of view of regional legislation that sets minimum wage requirements for workers under public contracts above the national statutory minimum wage, with a particular focus on the legislation of the State of Berlin.

In Germany, six Federal States – Brandenburg, Berlin, Bremen, Mecklenburg–Western Pomerania (Mecklenburg-Vorpommern), Schleswig-Holstein and Thuringia (Thüringen) – have set minimum wage requirements for workers under public contracts above the national statutory minimum wage. Out of the 16 Federal States, 4 of them – Baden-Württemberg, Hamburg, Saxony (Sachsen) and Saxony-Anhalt (Sachsen-Anhalt) – have announced in the coalition agreements signed between the political parties in the respective regional governments to introduce new minimum wage requirements into their regional procurement laws before the end of their respective current legislative period.

The Federal State of Berlin is one of four Federal States – Bremen, Berlin, Mecklenburg–Western Pomerania and Thuringia– which provides for the possibility of including social clauses based on 1) collective agreements declared universally applicable by the competent (federal or regional) ministry, 2) prevailing collective agreements in the public transport sector, 3) specific minimum wages in specific sectors for workers performing public contracts, and 4) compliance with the ILO Core Labour Standards as well as on other social issues, i.e. 'the full programme'.

The regional legislation for the Federal State of Berlin (*Berliner Ausschreibungs- und Vergabegesetz*) is one of the few examples in Germany that contains more binding provisions for the use of social clauses for 'other social issues', for example, as a labour clause in public contracts stipulating the requirement to include and perform under public contract measures to promote the employment of female workers.

The Public Procurement Legislation of Berlin, alongside similar pieces of regional legislation, e.g. in Saarland and Thuringia, has inspired other Federal States and will be used as a 'blueprint' for the development of legislation on compliance with collective agreements at the federal level (*Bundestariftreugesetz*). This legislative initiative has been included in the 2021 coalition agreement for the new Federal Government (*Koalitionsvertrag 'Mehr Fortschritt wagen'* [Dare to make more progress] agreed between the SPD, Alliance 90/The Greens and the FDP. It sets out the aim strengthening the social partners, their autonomy to negotiate collective agreements as well as coverage by collective bargaining and collective agreements to ensure the payment of fair wages. In line with the objectives strengthening collective bargaining coverage, fair competition and social sustainability, public procurement by the Federal Government (*Bundesregierung*) should be tied to compliance with a representative collective agreement in the respective sector, with the award based on a simple, non-bureaucratic declaration. A public consultation was held in December 2022. The Federal Ministries for Economy and Climate Protection (*Bundesministerium für Wirtschaft und Klimaschutz/BMWK*) and Labour/Employment and Social Affairs (*Bundesministerium für Arbeit und Soziales/BMAS*) are currently working on a legislative proposal which is expected to be presented for parliamentary debate in the third quarter of 2023.

#### *The Federal State of Berlin*

The regional public procurement legislation in the Federal State of Berlin [*Berliner Ausschreibungs- und Vergabegesetz* (BerlAVG)], in place since May 2020, is one of the current regulatory frameworks in

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<sup>101</sup> The author of this section is Mathias Maucher.

Germany which ensures a return to compliance with the prevailing collective agreements as a legitimate labour clause in public contracts (thus falling into the 'Post-Post-Rüffert Phase'<sup>102</sup> since 2019).

A key objective was to enable the **legally safe and manageable use of ecological, social and gender equality criteria** in public procurement. It also specifies and explains the social and ecological aspects that must be taken into account in procurement in user-friendly administrative regulations. It stipulates in Article 9 Minimum Hourly Wage, Compliance with Collective Agreements (*Mindeststundenentgelt, Tariftreue*), and more precisely in Article 9(1)2, that 'Public contracts shall be awarded to contractors only if, when submitting a tender, they commit themselves to ... pay their employees during the execution of the contract ... at least the remuneration (including overtime rates) according to the regulations of the collective agreement applicable to the corresponding branch in the Land of Berlin.' This condition is also stipulated explicitly for the public transport sector in Article 10 Public Transport Services (*Öffentliche Personennahverkehrsdienste*).

The regional legislation for the State of Berlin implements a model which makes direct reference to applicable collective agreements. This requires the building up and regular updating of an online register of the applicable and valid collective agreements (*Tarifregister/Tariftreue-Online-Register*). This [register](#) offering a sophisticated search engine also applies to the Federal State of Brandenburg. Its purpose is to ensure the provision of tariff information for contracting authorities of the Federal State of Berlin and for bidders in the context of public procurement. One important piece of the system is the Common Procurement Vocabulary (CPV) codes. This European classification system for public procurement, aimed at standardising the references used by contracting authorities to describe the subject matter of procurement contracts, is used, implying a link of CPV codes to the relevant collective agreements.

This initiative increased the minimum wage to be paid by successful bidders to EUR 12.50/hour (compared to the EUR 9.60/hour national statutory minimum wage at the time of the enactment of the regional public procurement legislation in the Federal State of Berlin [*Berliner Ausschreibungs- und Vergabegesetz*]), based on a state-specific regulation of compliance with officially set cost rates, in line with the principle of spending 'public money only on good work' laid down in the 'Act against Restrictions of Competition' (*Gesetz gegen Wettbewerbsbeschränkungen/GWB*). This latter requirement only became valid as of 30 July 2020, based on the revised EU Posting of Workers Directive. It reconfirms the existing regulations on the advancement of women in the context of public procurement as stipulated in Article 13 Promotion of Women and Gender Equality (*Frauenförderung*) and in the Women's Advancement Ordinance of the State of Berlin (*Frauenförderungsverordnung*).

In Article 6: Assessment of inappropriately low offers in procurement procedures (*Wertung unangemessen niedriger Angebote bei der Vergabe*), it requires the contracting authority to request clarification from the bidder before rejecting its bid, if the price of the offer appears to be unusually low when awarding contracts for services, in particular by requesting further documents on the cost calculation. In Article 8: Respect for ILO Core Labour Norms (*Beachtung der ILO-Kernarbeitsnormen*), it requires the compliance of all bids for public contracts with the ILO Core Labour Standards.

The regional public procurement legislation in the Federal State of Berlin (Specific Part) [*Berliner Ausschreibungs- und Vergabegesetz*] contains in the specific part (*Besonderer Teil*) detailed explanations

<sup>102</sup> 'Post-Post-Rüffert-Phase' refers to a second phase (in Germany starting in 2019 and used in a number of Federal States) which came after the first 'Post-Rüffert-Phase' (2008–2019). The Post-Post-Rüffert-Phase is characterised by a regulatory approach which refocuses on the compliance with prevailing collective agreements in a sector whereas the 'immediate' Post-Rüffert-Phase was characterised by a regulatory strategy that aimed to get compliance with collective agreements in public procurement procedures only if those collective agreement were generally applicable and which also operated with the use of social clauses referring to (sector-specific) minimum wages as an award criterion.



on stipulations to encourage and apply SRPP in a legally safe manner including references to regional legislation that backs comprehensive labour clauses and the exclusion of companies from working under public contracts if they do not guarantee wages and conditions to their workers which are determined by collective agreements. It also provides for resources to increase the control and evaluation capacities of the competent public administrations. The regional public procurement legislation in the Federal State of Berlin finally provides for investments in the training of their staff, comprising, for example, an online training module for all staff dealing with public procurement questions and procedures.

A single point of contact for all bidders ([Kompetenzstelle Faire Beschaffung Berlin](#)) was set up. It has finally led to the development of publicly accessible information material to support the use of social clauses in public procurement. Some examples can be found here (all information available only in German):

- Regional public procurement legislation in the Federal State of Berlin ([Berliner Ausschreibungs- und Vergabegesetz mit Gesetzesbegründung](#))
- Requirement to comply with collective agreements in the Regional public procurement legislation in the Federal State of Berlin ([Tariftreuepflicht im Berliner Ausschreibungs- und Vergabegesetz](#))
- Register for Collective Agreements/Collective Agreement Information ([Tarifregister/Tarifinformationen](#))
- Regulations stipulating the application and execution of the requirement to comply with collective agreements ([Ausführungsvorschriften Tariftreue](#))
- Questions and Answers ([Fragen und Antworten](#))

### Context

The development and enforcement of regional legislation in Germany to encourage the use of and to help better enforce labour clauses in public contracts is a political reaction – mostly initiated and supported by centre-left governments – strongly linked to two developments:

- The case law of the European Court of Justice (ECJ) in the Rüffert case (C-346/06), dating from 2008, and related cases interpreting the Posting of Workers Directive (prior to its revision in 2018).

The 2014 Public Procurement Directives abandoned the 'market-oriented approach that had featured in the previous regulations, according to which public procurement shall achieve only the lowest price while purchasing works, supplies or services' (ETUC, 2022, p. 6). It was replaced by the objective 'to obtain better value for public money, to deliver better outcomes for societal and other public policy objectives while increasing efficiency of public spending' (ETUC, 2022, p. 6), as formulated by the European Commission itself in 2017. This reorientation is reflected in the updated SRPP framework, presented by the European Commission in 2021 in the Buying Social Guide, reflecting the insight that 'public buyers are not just interested in purchasing at the lowest price or best value for money, but also in ensuring that procurement achieves social benefits and prevents or mitigates adverse social impacts during the performance of the contract' (ETUC, 2022, p. 6) and highlighting that public procurement should be used strategically, in particular to support social policies and to help accelerate a transition to more



sustainable business models and ethically fair supply chains, but indirectly to also encourage a shift of public buyers to awarding decisions based on the most economically advantageous offer (MEAT), taking into account 'not only the direct costs of the public contract but also its life-cycle costs and its potential follow-up costs for the environment and the social security system'. (ETUC, 2022, p. 27).

The transposition of the 2014 EU Procurement Directives into German law was implemented by the 2015 'Act for the Modernisation of Public Procurement Law' (*Gesetz zur Modernisierung des Vergaberechts – Vergaberechtsmodernisierungsgesetz/VergRModG*). It stipulates a fundamental reorganisation of Germany's major procurement law. It also led to the revision of the 'Act against Restrictions of Competition' (*Gesetz gegen Wettbewerbsbeschränkungen/GWB*), providing the legal framework for German antitrust and competition law, but eventually also for the promotion of SRPP. The Act also contains all fundamental principles of German public procurement, in Part 4 under the heading 'Award of Public Contracts and Concessions' (GWB Articles 97 to 184). All provisions of the GWB and of the corresponding ordinances – with the 'Ordinance on the Award of Public Contracts' (*Vergabeverordnung/VgV*) being the most relevant, mainly covering delivery contracts and services contracts – apply to procurement procedures above the EU thresholds. The vast majority of procurement procedures below the EU thresholds – making up about 90 % of all procedures and accounting for about 75 % of the overall financial volume of public procurement in Germany in 2018 – however, are only subject to procurement rules for tenders with an economic value below the EU thresholds (see below). This implies that they are mainly governed by budgetary law at the federal, regional or even municipal level. This 'reality' also triggered another legal innovation with the 2017 'Ordinance on the Award of Public Contracts below EU Thresholds' (*Unterschwellenvergabeordnung/UVgO*) which defines the national common legal framework for procurement procedures below EU thresholds and follows the same conceptual approach as the 'Act against Restrictions of Competition' (*Gesetz gegen Wettbewerbsbeschränkungen/GWB*).

The current national/federal legal framework for social clauses in public procurement has the following key features:

- GWB, Article 97(3) stipulates that when awarding a contract, 'aspects of quality and innovation as well as social and environmental aspects shall be considered'. The competent contracting authorities thus shall accept the 'most economically advantageous tender' (MEAT), determined in GWB, Article 127(1) 'according to the best price–quality ratio'. GWB, Article 127(3), finally establishes the requirement that tenders can include environmental or social criteria to realise the quality aspect of public procurement. They, however, 'must be related to the subject matter of the contract'. In the phase of the contract performance, a 'nexus' also exists, namely between the social criteria and the contract performance conditions.
- As a generally applicable rule, under public contracts all companies providing goods or services must 'comply with all legal obligations including all legal social and labour law provisions such as the statutory minimum wage or statutory maximum working hours. Moreover, they also must comply with collective agreements but only when they are universally applicable (GWB, Article 128(1)).' (ETUC, 2022, p. 31). GWB, Article 128(2) stipulates that the contracting authorities can 'determine additional contract performance conditions which may in particular include economic, innovation-related, environmental, social or employment-related considerations or the protection of information confidentiality'. (ETUC, 2022, p. 31).

In addition to the federal legislative and regulatory level and public procurement done by the Federal State, there is a key role – given the clearly dominant share of goods and services procured by the

regional and local authorities in Germany, with 30 % and 58 % of the shares respectively (2018), compared to 12 % of the procurement activities done by the federal level – and legislative and political responsibility for the Federal States if they are to promote SRPP, with labour clauses in public contracts being a key element of such a 'strategy'. As of 15 September 2023, 15 out of 16 Federal States (Länder) – i.e. all of them with the exception of Bavaria (Bayern) – have their own regional procurement act (*Landesvergabegesetz*).

As a rule, they cover procurement both above and below the EU thresholds. This creates the legal architecture for public procurement in Germany where the regional procurement acts contain the more concrete and binding social clauses, including labour clauses in public contracts. The 'Act against Restraints of Competition' (*Gesetz gegen Wettbewerbsbeschränkungen/GWB*) in Article 129 explicitly mandates the Federal States to determine additional award criteria, in particular regarding environmental and social aspects in public contracts. This 'legal option', explicitly confirmed both by the national legislator and the Federal Constitutional Court – ruling that social clauses are a legitimate instrument to promote collective bargaining and also in full conformity with the German Federal constitution, has become more relevant in recent years and decades, given the two developments cited above and with the backdrop of the non-ratification by Germany of the ILO Convention 94 on Labour Clauses in Public Contracts, as the successive German Federal governments from 1949 onwards saw no necessity to do so, given the robust collective bargaining system with high coverage rates by collective bargaining and collective agreements at the time and afterwards.

Regional legislation initially introduced by some Federal States (*Länder*) in the early 2000s backed the inclusion of comprehensive labour clauses in public procurement and allowed the purchasing entity to exclude companies from the work under public contracts which do not guarantee wages and conditions to their workers as determined by collective agreements. The 'first generation' of so-called 'Acts on compliance with collectively agreed pay and working conditions/standards' (*Tariftrueugesetz*) applied to the construction sector only. The 'second generation' was extended to other economic sectors such as public transport or waste disposal before finally determining – in a third step – a general rule for all public contracts. This regional legislation was 'devalued' by the ECJ Ruffert Ruling (C-346/06), which declared them incompatible with EU law and implied that Federal States with their own regional legislation had to suspend their social clauses with reference to collective agreements. At the time, the ECJ only 'accepted' pay clauses which either referred to collective agreements which had been declared universally applicable or which were based on national legislation on statutory minimum wages. It should be noted that this latter condition was not fulfilled by Germany in 2008, and this has only been the case since 2015. The first condition is fulfilled in Germany only in exceptional cases and in any case, not for the collective agreements signed for the Federal State of Lower Saxony (Niedersachsen) and contested in the ECJ Court Case in question.

In reaction to the ECJ Ruffert Ruling (C-346/06), the adapted regional legislation backing the inclusion of comprehensive labour clauses in public procurement (*Tariftrueugesetze*) was reformulated as of 2008 to now permit the introduction of a broad range of social clauses, e.g. social clauses 'to set specific minimum wages for workers under public contracts, to promote certain groups of workers such as long-term unemployed or disabled workers ... for equal pay and equal opportunities or to make sure that public authorities purchase only products which were produced in compliance with ILO core labour standards' (ETUC, 2022, p. 30).

## 4. LOOKING FORWARD

After having analysed the state of play of SRPP in the EU on the basis of the data available and the views of the stakeholders and experts who were interviewed (Chapter 1), having explained the EU public procurement legal and policy frameworks (Chapter 2), and having analysed the transposition and implementation of the Directive in relation to SRPP at national level (Chapter 3), Chapter 4 draws some lessons and puts forward some recommendations. Section 4.1 presents some lessons that could be learned from green procurement and transferred to SRPP. Section 4.2 summarises the key findings from the study. Section 4.3 suggests recommendations to the EU institutions, Member States, contracting authorities and other stakeholders.

### 4.1. Lessons learned from green procurement

The 2030 Agenda for Sustainable Development (the 2030 Agenda) includes Target 12.7 of the Sustainable Development Goals (SDGs), which aims to 'Promote public procurement practices that are sustainable, in accordance with national policies and priorities'. The European Green Deal of 2019 states that 'Public authorities, including the EU institutions, should lead by example and ensure that their procurement is green. The Commission will propose further legislation and guidance on green public purchasing' (European Commission, 2019, p. 8).

Green Public Procurement (GPP) is defined as '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' (European Commission, 2008b). 'While GPP is a voluntary instrument and EU Member States are able to determine the extent to which policies or criteria are applied, it plays a key role in the EU's efforts to encourage a resource-efficient economy.' [...] 'The European Commission has been developing voluntary GPP criteria for several product groups. Furthermore, following the adoption of the 2020 Circular Economy Action Plan, the Commission is proposing minimum mandatory GPP criteria and targets in sectoral legislation and phase in compulsory reporting to monitor its uptake'<sup>103</sup>.

It is worth noting that the European Green Deal uses the term 'green' procurement instead of 'sustainable' procurement as used by the 2030 Agenda (sustainable procurement encompasses environmental, social and economic dimensions). Even before the publication of the European Green Deal, green procurement was much more advanced than SRPP in the EU.

As highlighted recently by some authors, 'the European Green Deal and many of the initiatives associated with it, including the Circular Economy Action Plan, aim to go beyond what is currently possible at the EU level.' (Andhov, et al., 2022, p. 13). They foresee the introduction of mandatory criteria in procurement related to food, construction, renewable energies, batteries, electronics, textiles and furniture, and other sectors. The same authors believe that, particularly under the European Green Deal, the main developments have happened in the area of GPP, 'where to some extent the interrelation between "green" action and its social dimension has been neglected ...there is a necessity to strengthen the social dimension of public procurement and recognise the role the public sector must play in addressing human rights violations in supply chains, and social dumping as equally burning issues that the EU currently faces.' (Andhov, et al., 2022, p. 15).

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<sup>103</sup> See European Commission's website on green procurement, Available at: [https://green-business.ec.europa.eu/green-public-procurement\\_en](https://green-business.ec.europa.eu/green-public-procurement_en).

Some European stakeholders have recently drawn the attention to the need for green and social aspects to be better integrated in procurement. For example, RREUSE<sup>104</sup> commented, 'RREUSE finds the existing voluntary approach to foster social and environmental considerations in public purchases insufficient to encourage using public procurement to achieve key policy objectives. Where relevant, social and green criteria should be mandatory and used jointly in those sectors that have the potential to promote an inclusive green transition, as is the case in the circular waste management activities of re-use and repair social enterprises.' (RREUSE, 2023, p. 10).

Another interviewee highlighted that green and social aspects are often treated in silos, while it is important to push for the adoption of sustainability to integrate the social, environmental and economic together. Being able to dialogue with the market is a necessary skill for public buyers. Public buyers need to have an overview of economic, legal, green and social aspects. The demand for expertise and capacity is high, as procurers cannot be experts in everything. They need to know where and who to ask; thus, support structures and helpdesks are important (interview with ICLEI).

Some interviews with EU stakeholders raised the point that lower attention in procurement to social aspects is a possible consequence of the European Green Deal. Among trade union representatives, it is thought that green procurement is taking a step forward because of the Green Deal and the climate crisis, but better policy coherence should be ensured between public procurement and other policy areas. It has also been observed that in EU competition policies, there is more openness to consider green requirements or aspects, but the Commission seems less ambitious in relation to social aspects (interview with ETUC). While reflecting on the lessons learned from green procurement, another trade union representative argued that green procurement is speeding up, particularly now, as GPP is advancing even more with the Green Deal and Net Zero. However, it is important to keep the green and the social aspects together (interview with EPSU).

It is important to acknowledge that environmental considerations in public procurement have gained more traction as it is easier to make objective arguments for them: climate change does not recognise borders – and is therefore commonly accepted (Andhov M., Caranta R., Janssen W.A., Martin-Ortega O., 2022, p. 15). When it comes to SRPP, social aspects are more difficult to quantify than green aspects (interview with ETUC). Along the same line, one interviewee commented, 'Cost is more real when it is quantifiable. However, the cost of not doing SRPP and the externalities are never taken into account' (interview with EPSU).

When key informants were asked about lessons that can be learned from green procurement and transferred to social procurement, very interesting points were put forward although it is clear that stakeholders' views differ. Starting from the European Commission, the civil servant interviewed believes that the main lesson that can be drawn from GPP is about the need to create awareness of SRPP, increase the technical capacity of public buyers and disseminate best practices, as has been done for years in the green sphere. The criteria defined for product areas in the green field (GPP criteria) are considered to be not very useful. There is the question of how these criteria could be transferred to the social field. In the strategic procurement dialogues (see section 2.5.2), the Commission mainly addresses the central administrations (ministries and agencies), in encouraging the take-up of strategic procurement, although some Member States allow the participation of regional bodies. These dialogues can focus only on social aspects or green aspects or on all three aspects, including innovation (interview with DG GROW).

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<sup>104</sup> RREUSE is an international network representing social enterprises active in re-use, repair and recycling.

The legal expert consulted shared the view that GPP has been quite effective in stimulating dialogue between individual contracting authorities that were doing it. Local and regional authorities were leading on the subject, and national authorities were learning from their experience and putting in place the framework to support or mandate GPP. The social field is different and the same model cannot be applied. There is no room for harmonization at the EU level for SRPP. For example, reservations are often used in some Member States but would not work in other Member States. In GPP, there are discretionary and mandatory criteria, thus perhaps there is scope to do the same with SRPP (interview with legal expert). A trade union representative shared the opinion that as public procurement has been discussed in many pieces of legislation, mainly in the environmental sector, it should be possible to analyse this legislation; identify, highlight and codify interesting and relevant provisions; and then develop concepts for social procurement (interview with EPSU).

Another interviewee pointed out that there are many examples of green sectoral legislation, in which it is obligatory to include environmental criteria in the Most Economically Advantageous Tenders (MEAT). Therefore, the lesson that can be learned is that all the time that was lost with green procurement before introducing mandatory criteria should not be lost in the social sector. The use of social considerations should be made obligatory, as the voluntary approach does not work. DG Environment has realized this and is imposing some compulsory criteria (interview with UNI-Europa). An Italian public procurement expert proposes that similar to the 'Minimum Environmental Criteria' provided for in the Italian GPP National Action Plan, 'Minimum Social Criteria' could be introduced for particular categories of goods and services to provide minimum participation criteria, award criteria and contractual clauses aimed at integrating social sustainability aspects into public procurement (interview with the Central Purchase Office of Lazio Region, Italy).

Another proposal that could be explored is publishing a directive on procurement in labour-intensive services (interview with UNI-Europa). It is known that there are specific social risks linked with contracts in some labour-intensive sectors, such as cleaning. The same rules could not be adopted in all labour-intensive sectors; for instance, legal services are also labour intensive. Therefore, in theory taking a sectoral approach could be useful, as is happening in the green domain. What is really important is to ensure cross-referencing between the Directive and sectoral legislation and to disseminate the information about sectoral legislation containing provisions on public procurement. Ireland provides an example of why cross-referencing, coordination and dissemination are important. The Clean Vehicle Directive contains some rules on procurement. In Ireland, the Procurement Office is responsible for procurement rules, but the Transport Department is responsible for this directive and the Procurement Office did not know about the Clean Vehicle Directive. If this lack of coordination and communication happens in a relatively small country, one could imagine what could happen in a federal or highly regionalized country (interview with legal expert).

Employer organisations, too, have highlighted that the existence of so many pieces of legislation in green procurement, for example Net Zero, is one of the major problems for their members. SMEs find it especially difficult to follow all this legislation, because there is no centralised repository for it (interview with BusinessEurope). The representative from SMEUnited highlighted that green procurement, like SRPP, is not happening enough. One major issue raised by their members is that contracting authorities are often inconsistent in the use of green and social criteria in their tendering procedures. In this way, they do not empower the market to develop the necessary capacity and skills to implement green and social procurement. By contrast, to help the market develop, it is very important that contracting authorities are very consistent in their approach toward strategic procurement in general and very clear in the definition of criteria to be met (interview with SMEUnited).



Finally, a local government representative proposed that it is possible to learn from case law in the green sector, such as the Concordia bus case and Winston case, with respect to how to make the link between the subject matter and the technical specifications and award criteria more impactful for SRPP. In the legislation on toxic chemical elements, it was very easy to make the link with social aspects, for example, with health and safety (interview with ICLEI).

In conclusion, despite the different views on this topic and especially on the voluntary versus mandatory criteria, it would be worth reflecting on which areas or sectors in the social domain could benefit from the introduction of specific procurement provisions in future sectoral legislation, in addition to the laws that have been analysed in section 2.4.

## 4.2. Key findings from research study

### **Key finding 1: Data about the volume and value of socially responsible public procurement (SRPP) in the EU does not exist, not even about the economic sectors in which it is used.**

Lack of data is due to the fact that both at EU and national level, systems to collect data on SRPP in a uniform and consistent way do not exist. Tenders Electronic Daily (TED), in which Member States are required to publish tender notices of procurement procedures above a certain value (the so-called EU thresholds), was not designed as a tool to track information on SRPP, as well as on green and innovation procurement. While it is true that TED allows to identify tenders (above the EU thresholds) which used the most advantageous economically tender (MEAT), without further specification about which criteria have been used in a tender, it is impossible from TED to determine if a tender includes social criteria. The use of MEAT as award criterion could only suggest a better probability that bidders respect the mandatory legislation in the social, employment and environmental fields and that qualitative criteria are included in a tender, without indicating whether they are related to social, environmental and innovation aspects.

Only anecdotal evidence exists about the development of SRPP and the economic sectors in which it is used. This evidence comes from European studies and projects focused on collecting good practices and the information given by practitioners and stakeholders involved in SRPP who were interviewed for this study. The economic sectors that have been most mentioned by stakeholders are: construction, cleaning, facility maintenance, security services, waste management and collection, gardening services and maintenance of green spaces, laundry services, catering services, food, graphics, office supplies, ICT and electronics, and social services.

### **Key finding 2: Data collection, monitoring and reporting systems on SRPP, based on common indicators and requirements, must be developed at all levels.**

Without data collection, monitoring and reporting systems based on common indicators and set as a requirement, it is impossible to have data on SRPP. This impedes having a thorough overview of what works, what does not work, what should be changed and what should be kept.

### **Key finding 3: In the EU, most contracting authorities still award tenders above the EU thresholds solely on the basis of the lowest price or cost.**

The Single Market Scoreboard shows that in 2021, 10 Member States awarded from 82 % to 95 % of their above EU thresholds tenders solely on the basis of the lowest price or cost; six Member States awarded from 60 % to 80 % of such tenders solely because the offer was the cheapest one available; the remaining 14 countries awarded from 1 % to 56 % of such tenders on the basis of the lowest cost or price. This implies that quality criteria, social, environmental and innovation considerations are not included in tender documents.



**Key finding 4: Despite the fact that SRPP is being implemented slowly and below its potential across the EU, more and more contracting authorities are showing interest in SRPP.**

This is testified by the growing number of contracting authorities that are participating in the awareness raising and capacity building projects that the European Commission is implementing. The role of EU projects in bringing about change at national level has been recognised by some interviewees.

**Key finding 5: As most of the social provisions of the public procurement Directive were not mandatory, transposition into national law was not homogeneous. While most countries (out of the 17 Member States covered by this study) provided a correct transposition, some deviations from the Directive can be observed in some countries in relation to some provisions.**

The Buying for social impact project and this study found that most Member States (out of the 17 covered in this study) transposed the provisions of the Directive that are relevant for SRPP in a correct way, very often providing a literal transposition of such provisions. However, the same studies found that some Member States did not transpose the horizontal social clause (whose transposition was mandatory) and the provisions on reservations in a way that is fully in line with the Directive.

Literal transposition of directive provisions is not always positive, because the choice of using a directive instead of a regulation is to allow Member states to adapt the EU level provisions to their national laws, systems and traditions. Literal transposition can also lead to non-application of provisions.

Moreover and in addition to the cases where legal analysis has found the transposition not to be in line with the Directive, in many cases few Member States made use of all the possibilities provided by the Directive. Notable examples are the possibility to limit the use of the lowest price or cost as an award criterion and a better specification in national law of the possibilities provided by the light regime, including the possibility to ban the use of the lowest price or cost when awarding contracts for social and other similar services.

**Key finding 6: All the instruments included in the Directive that enable the achievement of social goals are considered useful, although to a different extent, and some instruments have not been used to their potential.**

The instruments that were most mentioned by stakeholders are the horizontal social clause, social and employment clauses, reserved contracts, and division into lots. Very few experts underlined other instruments such as exclusion grounds, selection criteria, pre-market consultations, innovation partnerships and the other types of procedures beyond the open procedure, as well as the rules governing subcontracting. The degree to which the light regime has been used at national level is also not clear. This testifies that these instruments are less known. The fact that they haven't been used a lot should not call into question their usefulness. On the contrary, guidance and capacity building measures should draw their attention to better inform and train procurers on how these instruments can be used to achieve social goals.

**Key finding 7: the application of the mandatory horizontal social clause for the promotion of collective bargaining and collective agreements is an area of legal uncertainty.**

The horizontal social clause does not offer sufficient legal clarity in cases when there is no applicable collective agreement but a contracting authority would like to require economic operators to engage in collective bargaining and to apply collectively-bargained labour standards. Representatives of SME associations also report that most of the complaints they receive from companies are about the non-respect of the mandatory social clause by contracting authorities, which award contracts only on the

basis of the cheapest offer, thus undermining fair competition with bidders that want to comply with social and labour law. The European Commission is encouraged to work with the social partners and experts in industrial relations to provide legal clarity.

**Key finding 8: Even the most favourable legal framework to SRPP would remain inapplicable without the provision of awareness-raising on the benefits of SRPP, adequate training and capacity-building measures.**

Legal frameworks that are favourable to SRPP and provide clarity about what can be done and what cannot be done are very important, but not sufficient if they are not coupled with awareness raising of the benefits of SRPP, adequate training and capacity building measures. Public procurement is a complex matter, strategic procurement, including SRPP, is even more complex. It requires adequate skills and technical capacity, not only from contracting authorities, but also from the market, to be able to respond. Shifting the mentality from awarding contracts solely on the basis of price or cost to taking into account social, environmental and innovation criteria, alongside economic considerations, requires time and can face a lot of resistance, including from the top management of contracting authorities, at all levels, and decision-makers. This is why policy-makers and stakeholders should not only focus their attention to legislation, but should also value and contribute to the implementation of capacity building actions and the dissemination of good practices.

Mutual learning among Member states, but also between contracting authorities within the same country, is very important, to encourage administrations to connect with other administrations, exchange information, tools and practices, and learn from each other.

The need to build capacity and the necessary time that is required by this are essential elements which should be taken into account when deciding whether to reopen the Directive or not. Moreover, an approach that sets requirements for all the social provisions in a renewed legislation would not be effective. A much more effective approach would be to require Member States and contracting authorities to define strategies for SRPP with targets to be achieved.

**Key finding 9: Successful implementation of SRPP requires cross-sectoral, inter-departmental collaboration and inter-institutional collaboration at all levels.**

For an effective implementation of SRPP, it is necessary to break down silos and for procurers to work together with civil servants in charge of social, employment, gender equality, social economy, and sustainable development policies. This should happen at all levels. Personnel of EU funds managing authorities should also be associated.

In order to acquire the skills and knowledge necessary to design and implement tenders that are ambitious enough in terms of social goals to be achieved, but are also commensurate with the capacity of the market to respond, it is necessary for procurers to implement market dialogues, launch pre-market consultations, and develop dialogue and collaboration with potential economic operators and all relevant stakeholders, including SEEs, civil society organisations, social partners, users' associations and groups of citizens that might become beneficiary of the goods, works and services to be procured.

Breaking down silos is also important in relation to fostering better mutual understanding between the business sector, SEEs, and social partners, to detect and foster possibilities to cooperate even in the context of public procurement.

**Key finding 10: Methodologies and tools to measure the social impact of public contracts have to be identified, developed and disseminated.**

At present there is very little knowledge about this. Once the right methods and tools have been

identified, the capacity of procurers and economic operators must be enhanced with respect to how to use them.

### **4.3. Recommendations to the EU institutions, Member States, contracting authorities and other stakeholders**

This Section provides the recommendations arising from the research.

#### **4.3.1. Recommendations under the current legal framework**

##### *Recommendations to the EU institutions*

- To remedy a situation in which socially responsible public procurement (SRPP) implemented by EU institutions is almost non-existent and to respect the commitments made in the Social Economy Action Plan, each EU institution should review its internal public procurement policies, by setting targets for the implementation of strategic procurement, including SRPP, on an annual basis, with appropriate reporting and collection of data. The European Commission should lead by example.
- The European Commission should issue guidance to EU institutions on strategic procurement, including on social, employment and gender equality aspects, coupled with examples of how and when social considerations can be taken into account during each stage of EU institutions' tendering procedures.
- Each EU institution should organise adequate training of staff involved in procurement procedures, to ensure full respect of procurement rules, and develop the capacity to implement strategic procurement in its own tendering procedures. SRPP also involves designing procurement procedures that facilitate the participation of SMEs and SEEs in EU tenders.
- Collaboration should be developed at interdepartmental level (between DG GROW, DG EMPL, DG Environment, DG REGIO, DG REFORM and all other DGs) and interinstitutional level (between all EU institutions) to increase understanding and improve the application of strategic procurement, including SRPP, in purchases by the EU institutions.
- Whenever suitable, the EU institutions should promote public procurement as a tool to mainstream social policy and sustainable development objectives in new sectoral policy and legislative initiatives.
- The European Commission should launch an evaluation study to thoroughly assess the implementation of the social aspects of the Directive in all EU Member States, with particular focus on the horizontal social clause.
- The European Commission should develop an interpretative communication to clarify the legal uncertainty as to what is possible under the horizontal social clause, especially in terms of the promotion of collective bargaining and collective agreements across the procurement cycle. It should also update the ILO Conventions listed in Annex X by means of comitology.
- The European Commission should recommend to all Member States to ratify ILO Convention 94, and to support its implementation also at local level. This would help to resolve issues around the hierarchy/application of collective agreements.

- The European Commission should publish guidance clarifying under what circumstances, when a public authority needs to procure social services; it can make use of grants or other forms of financing; and how this can be justified.
- The European Commission should better clarify the interplay between public procurement and state aid rules, and align legal recognition of the specific characteristics of the social economy and of the not-for-profit sector in public procurement and state aid legislation.
- The European Commission should continue facilitating exchanges of experience and good practices and mutual learning among EU institutions and agencies, Member States and contracting authorities, on strategic procurement, including SRPP. This is very important in the areas of the Directive where there is still some legal uncertainty, for example on social considerations and the link with the subject matter, and on the horizontal social clause, in particular the obligations deriving from collective agreements.
- The EU and the Member States could develop information campaigns to boost a common culture on the importance of social values in public procurement.
- The European Commission should revise and transform Tenders Electronic Daily into a tool that can be used to monitor and report on strategic procurement, including SRPP, and work with Member States to develop monitoring and reporting systems on strategic procurement, including SRPP, with common indicators. User-friendly search functions should be developed.
- The European Commission should work with Member States to develop monitoring and reporting systems on strategic procurement, including SRPP, with common indicators.
- The European Commission should collect methodologies and tools to measure the social impact of public contracts, and develop measures to build the capacity of contracting authorities to use these methods and tools.
- The European Commission and all EU institutions should increase the transparency and public scrutiny of their own and Member States' tendering procedures.

*Recommendations to Member States, regional and local authorities*

- Develop national, regional and local procurement policies, strategies and action plans with clear targets for SRPP.
- Develop guidance on SRPP, including models of social clauses, and disseminate good practice examples across the country, including from other Member States.
- Organise training and capacity-building for SRPP, starting with training of trainers, to progressively cover the contracting authorities of the whole country, including by using EU funding; and make sure that training on SRPP is reflected in national qualifications for procurement professionals.
- Develop common systems to ensure appropriate reporting and collection of aggregated data on strategic procurement, including SRPP.
- Raise awareness that public procurement can be used to promote social, employment and gender equality policy goals, both at the political and operational level, by all institutions and contracting authorities.

- Ensure and promote effective collaboration and knowledge exchange between procurement officials and departments responsible for social, employment and gender equality policies in all institutions and public administrations for better implementation of SRPP.
- Promote a deeper discussion with trade unions and qualified operators at the national level, with a view to improving SRPP regulation and implementation.
- Contracting authorities should establish and maintain regular dialogue with relevant experts while ensuring consultation with social partners, NGOs and other relevant stakeholders, to plan and assess SRPP policies and tendering procedures.
- Contracting authorities should make better use of preliminary market consultations, reserved contracts and division into lots, including to ensure better participation of SMEs, social economy enterprises and civil society organisations in procurement procedures.
- Contracting authorities could consider increasing the weight to be given to quality criteria (from on average 70 % to 80 % and even more) versus price or cost (from on average 30 % to 20 %).

#### 4.3.2. Recommendations for future reform of the EU public procurement framework

##### *Recommendations to the EU institutions*

- Review the Financial Regulation governing procurement carried out by EU institutions to clearly identify social goals – the promotion of quality employment, social inclusion, equality and non-discrimination, including gender equality, and sustainable development – as essential aims of procurement, in line with Articles 8, 9, 10 and 11 TFEU.
- Align the provisions of the Financial Regulation governing procurement carried out by EU institutions with the Directive on public procurement, to include all the opportunities offered by the public procurement Directive in relation to SRPP, such as reserved contracts, selection criteria, award criteria, contract performance clauses and rules on abnormally low tenders. Include in the Financial Regulation provisions similar to those of the Remedies Directive.
- Strengthen the conditionalities in EU funding related to public procurement, including SRPP; set requirements for monitoring and reporting; and develop programmes to enhance the capacity of managing authorities to implement strategic procurement and to report on it.
- Revise and clarify the mandatory social clause, by explicitly stating that collective agreements can never be considered a discriminatory measure in public contracts. Expand the list of ILO Conventions in Annex X. Refer to gender equality as one of the matters which may be addressed in award criteria and contract performance clauses to ensure compliance with equal pay legislation.
- Reconsider the operation of the Posted Workers Directive as a standard benchmark for the employment terms that can be enforced in public contracts, in light of reforms to that Directive and the benefits of applying living wages and other non-legislative initiatives in public contracts.
- In the revision of the procurement Directive, limit the use of the lowest price or cost criterion as much as possible, and define the sectors in which the application of MEAT based on a BPQR assessment is mandatory, following the example of sectoral legislation on green procurement.

- In the revision of the procurement Directive, exempt collective agreements as a general rule from the link to the subject matter, and give Member States the possibility of justifying exceptions to the link to the subject-matter requirement where important social objectives cannot effectively be addressed through measures that are strictly limited to the goods, services or works being purchased.
- In the revision of the procurement Directive, lower the threshold for reserved contracts for the social and professional integration of persons with disabilities and disadvantaged workers and cancel or extend the duration of three years for reservations of public contracts for social and other personal services. Replace the term 'disabled workers' with 'workers with disabilities'.
- Include in the Procurement Directives references to the Pay Transparency Directive and any future EU legislation on due diligence, to ensure that contracting authorities are aware of gender equality and human rights obligations which apply to contract awarding and performance.
- In the transposition phase, set up working groups in which social partners and some relevant EU-level organisations representing the social economy and social service providers can participate, following the examples of the Directives based on Article 153 TFEU.
- Consider developing specific Directives to regulate public procurement in specific sectors, such as in labour-intensive, low-skilled service sectors.



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## ANNEX 1 – LIST OF INTERVIEWS

### European level

- BusinessEurope, the European social partner representing the voice of businesses (2 representatives);
- European Federation of Public Services Unions (EPSU);
- European Trade Union Confederation (ETUC) (2 representatives);
- European Commission, DG GROW;
- European Commission, DG EMPL (written contribution instead of interview);
- Local Governments for Sustainability (ICLEI);
- Public Procurement Analysis, a firm providing advice, support and capacity building on sustainable public procurement;
- SMEUnited, the association of crafts and SMEs in Europe with around 70 member organisations from over 30 European countries, a recognised employers' organisation and European Social Partner;
- Social Services Europe (SSE), a network of 8 European umbrella organisations – currently comprising Caritas Europa, CEDAG, E.A.N., EASPD, EPR, Eurodiaconia, FEANTSA and the Red Cross EU Office – representing over 200,000 not-for-profit social and health care organisations;
- UNI-Europa, European Services Workers Union.

### National level

#### Belgium

- Walloon Public Service [Service Public de Wallonie (SPW)] (three experts);
- Social services [Centre Public d'Action Sociale (CPAS)] of the Municipality of Auderghem (one of the 19 Municipalities of the Brussels Capital Region);
- Federal Institute for Sustainable Development (Institut fédéral du développement durable);
- Flemish Employment and Vocational Training Service (VDAB), the Public Employment Service of Flanders;
- Fédération Générale du Travail de Belgique (FGTB), a federal trade union (former trade unionist).

#### Czech Republic

- Ministry for Regional Development (contracting authority);
- Railway Infrastructure Administration (contracting authority);
- Charles University (contracting authority);
- A trade union (OSSS);

- TESSEA, an NGO covering more than 70 social enterprises and social economy supporters from all over the Czech Republic and contributing to strengthening the social entrepreneurship sector in the country;
- People, Plant, Profit - P3, an NGO focusing on the development of the social economy in the Czech Republic.

### **Italy**

- Invitalia, the National Agency for Inward Investment and Economic Development, owned by the Italian Ministry of Economy;
- Central Purchasing Body from Lazio Region;
- a representative from the European Network of Cities and Regions for the Social Economy (REVES), who contributed in relation to Italy.

### **Spain**

- Provincial Council of León;
- Malaga Provincial Council;
- Unión General de Trabajadores, (UGT – Public Services), a national trade union;
- the Assembly of Cooperation for Peace (Asamblea de Cooperación por la Paz, ACPP), one of the most important and experienced NGOs in Spain in the field of social economy;
- former Secretary General of the Valladolid City Council (only in relation to the good practice described in Box 8).

### **Sweden**

- National Agency for Public Procurement (NAPP) (Upphandlingsmyndigheten in Swedish), (two experts);
- Stockholm Region;
- Swedish Association of Local Authorities and Regions (SALAR);
- Swedwatch, an independent, non-profit research organisation striving to promote responsible business practices, including in the context of public procurement, to represent the NGO sector
- Trade Union Confederation (TCO) (Swedish Confederation of Professional Employees).



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The aim of this study is to present the possibilities offered by Directive 2014/24/EU on public procurement for the achievement of social goals and to analyse how these possibilities have been transposed into national law and implemented by contracting authorities across the EU. Another aim is to identify obstacles to the use of existing provisions and make recommendations with regards to possible future EU action.

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