

Summary of the report

Public procurement and Labour in the EU

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In recent years, especially since the end of the 1990s, there has been an extensive interest in the consideration of societal concerns during the process of public procurement. This ambition strongly influenced the revision of the European Union directives on public procurement but the same desires and demands can be clearly seen within the Member States, not least at regional and municipal levels where many procurement decisions are made.

The demand that social, ethical and environmental considerations be taken into account in public procurement is not surprising when seen against the background of general societal change. It is legitimate that procurement financed by taxes shows consideration for the fundamental values that prevail among the taxpayers and within the decision-making bodies which govern the authorities. After all, we are concerned here with generally accepted regulatory objectives, such as the promotion of gender equality, the integration of the disabled, safe working environments and good working conditions. The aim of using tax payers' money effectively is by no means in conflict with ethical, social or environmental objectives. On the contrary, we believe that it is entirely possible to conduct procurement in an open and transparent way, based on free competition, while also integrating these goals. Further, a requirement to always accept the lowest tender without considering social and ethical factors cannot be derived from EU law.

Precaution

The problem is that there are many points that are open to interpretation, resulting in an uncertain legal situation. This ambiguous situation often seems to have led to a kind of radical 'precautionary principle' in the Member States: Since they are not certain what is applicable, they choose to keep within the bounds of what they are sure is permissible. At the same time, the fact that questions relating to public procurement often fall to authorities whose exclusive remit is to promote competition, and who therefore lack expertise and experience in the social and environmental areas, may have further reinforced this tendency towards caution.

Our analysis illustrates that, compared with other countries, Sweden has applied the 'precautionary principle' to an extreme degree. This is surprising in that there has been, and is still, a relatively strong public opinion in Sweden that social considerations should be taken into account in procurement, not least at the municipal level. However, it seems as if this opinion has encountered a series of counter-arguments premised on legal uncertainty, which has ultimately led to the legislation more or less ignoring the expressed desire that such requirements should be taken into account.

Sweden is lagging behind

Sweden has chosen as a starting point to give procurement legislation a broad field of application, and only to a limited extent to take advantage of the flexibility which Member States have outside the scope of the procurement directives. In Sweden, less emphasis has also been placed on the possibility of considering social aspects during the award of contracts than in Denmark, Finland, France or Germany. The prolonged debate about whether Sweden as an EU member is able to ratify the ILO Convention 94 can also be seen as an expression of the general caution which has resulted in Sweden refraining from requiring, enabling or even recommending that contracting entities take social considerations into account in connection with procurement.

The conclusion is that Sweden is currently lagging behind comparable nations when it comes to exploiting the possibilities offered by the legislative route in terms of integrating social and ethical considerations in public procurement. This legal situation seems not to be a result of deliberate policy but rather an indirect consequence of a radical 'precautionary principle' in combination with a lack of political will to seize the opportunities that exist, and a lack of motivation among the competition authorities to pursue the matter.

Proposal for new legislation

When our project was in its final stages, the government submitted a draft bill to the Council on Legislation with a



proposal for a new provision which stated the aim of the procurement legislation, based on the above mentioned Government Commission's final report. According to the draft bill a provision shall be inserted in both procurement laws under which the authorities should stipulate environmental requirements and social requirements to the extent that it is warranted by the nature of the contract. This is a first step in the right direction. However, if it stops there, the precautionary principle which we have described will persist. Many issues regarding the correct interpretation obviously remain. This applies to, for example, what consequences the new legislation arising from the Laval ruling will have in the procurement context. The new legislation will only define the conditions for trade unions to be able to use industrial action as a means to impose wage demands on foreign enterprises who are temporarily posting workers to Sweden. The question of what the contracting authorities can demand in terms of wages and other employment conditions is not addressed at all here.

Conclusion

There is thus reason to return the question of the point of departure for public procurement to the realm of politics and public debate: Do we wish to pursue social objectives including gender equality objectives in the use of tax payers' money or to narrowly emphasise short term economic efficiency? We believe that an acceptable and sustainable policy for public procurement must also integrate social and ethical aspects. We also believe that the EU regulation gives reasonable scope for this and we hope that this report can contribute to the return of the issue to the agenda.

The full report is available at www.sieps.se