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# elni

## REVIEW

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- REACH and the safe use of chemicals
- Risk management under REACH
- Key priorities of NGOs on REACH
- Definitions of waste, recycling and recovery
- The UK Government's Ship Recycling Strategy
- Legislating e-waste management
- Exemptions under Article 5 (1) (b) RoHS Directive
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## The power of green public procurement

By Jill Michielssen\*

### 1 Introduction

Europe's public authorities spend the equivalent of approximately 16% of the EU's GDP on purchasing goods and services. It is therefore crucial that public procurement takes into account environmental protection if the EU is to achieve its Kyoto Protocol target of reducing greenhouse emissions by 8% from 1990 levels, by 2012. "Green" procurement can also contribute significantly to the EU's Strategy for Growth and Jobs. The EU has been legislating on public procurement since 1971 but in 2004, it adopted a new series of public procurement directives which make it absolutely clear that public authorities can take into account the environment when procuring goods, services and works. Further, it has, as part of its sustainable development strategy, called upon the Member States to adopt national action plans for greening public procurement by the end of 2006. A recent survey shows that there is still ample scope for improvement. The European Commission is helping the Member States adopt and implement their national action plans and has developed a series of tools (a hand book, a web site...) to this end.

The European Union has played a key role in setting up the United Nations Framework Convention on Climate Change and its Kyoto Protocol, under which the developed countries are required to reduce greenhouse gas emissions below levels specified for each of them in the treaty. The individual targets add up to a total cut in greenhouse-gas emissions of at least 5% from 1990 levels in the commitment period 2008-2012. The EU-15 is committed to deliver a collective 8% cut in greenhouse gas emissions by 2008-2012.

Europe's public authorities have a crucial role to play in achieving this aim. They are in charge of office buildings, lighting equipment, road construction, traffic lights, canteen services, cleaning services.... Every year they spend the equivalent of approximately 16% of the EU's GDP – around € 1 600 billion – on purchasing goods and services which they need for their day-to-day activities. If they bought greener products and services, this would have an immediate and positive impact on the environment.

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In 2003, a European Commission study showed that if all public bodies in the EU switched to green electricity, they would avoid more than 60 million tonnes of CO<sub>2</sub> emissions per year, thus contributing towards 18% of the EU's Kyoto target. Each year, the public sector buys more than 2.8 million PCs. If it started purchasing energy-efficient desktop computers, another 830 000 tonnes of CO<sub>2</sub> would be prevented, which would bring us an additional 0.25% closer to the Kyoto goal.<sup>1</sup> Other environmental benefits include more sustainable use of natural resources, waste prevention and recycling, and more sustainable cities.

### 2 EU Strategy for Jobs and Growth

Green public procurement can also contribute to the EU's Strategy for Growth and Jobs<sup>2</sup>, which was launched in the year 2000 by the leaders of the EU. The aim of the Strategy is to make the European Union the most dynamic and competitive knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion... and respect for the environment.

Public purchasers are important consumers. They can send strong signals to industry and trigger the development of new environmental technologies. This in turn could improve the EU's competitiveness. EU leaders have repeatedly stressed the importance of eco-innovation for EU competitiveness in the context of the EU Strategy for Growth and Jobs.

Indeed, public procurement can create the economies of scale which are required to bring new environmental products into the market and make European industry more competitive. As such, it one of the priority actions identified by the European Commission's Environmental Technologies Action Plan<sup>3</sup>.

Because it promotes energy efficiency and renewable energy sources, green public procurement can

1. For more details about environmental gains, see: <http://www.iclei-europe.org/?relief>

2. See Council Recommendation on broad economic policy guidelines of July 2005 and the Conclusions from the Spring EU Summit in March 2006, both at: [http://europa.eu.int/growthandjobs/key/index\\_en.htm](http://europa.eu.int/growthandjobs/key/index_en.htm)

3. For more details about the ETAP, see: [http://ec.europa.eu/environment/etap/archives\\_en.htm#actionplan](http://ec.europa.eu/environment/etap/archives_en.htm#actionplan)

also contribute to a more sustainable energy system in Europe, as set out in the recent Green Paper on a European Strategy for Sustainable, Competitive and Secure Energy.<sup>4</sup>

Contrary to common belief, green public procurement is not more expensive than conventional procurement. Many green alternatives, like energy-efficient computers, printers and photocopiers, are not more expensive than conventional products. And even if some of these products are more expensive to purchase, they generate savings during their life-cycle and can therefore save taxpayers' money. Energy-saving bulbs are around four times more energy-efficient than their counterparts and last up to ten times longer. Printers and copiers that can print double-sided lead to a reduction in the amount of paper consumed.

### 3 Sustainable development

Detailed Europe-wide rules on public procurement procedures were introduced as early as 1971, due to the economic importance and potential impact of these procedures on the EU's internal market. They are based on the principles of non-discrimination, equal treatment and transparency. Their aim is to achieve best value for the taxpayer's money, ensure a level playing-field for competing contractors promote European-wide competition. Indeed, a recent Commission study shows that EU Public Procurement Directives have increased cross-border competition and reduced the prices paid by public authorities by roughly 30%<sup>5</sup>.

However, the global economic and political context has evolved dramatically over the last few years. The concept of "sustainable development" has emerged and environmental concerns are now expected to be taken into account in all policy areas.

Sustainable development was included in the EU Treaty as an overarching goal in 1997 and in 2001 the EU leaders launched a common Sustainable Development Strategy. A revised version of this Strategy explicitly refers to public procurement and puts forward an ambitious target, namely that by 2010, the EU average should be at the level of the current most advanced level of green public procurement<sup>6</sup>.

The EU's new Public Procurement Directives, which were adopted on 31 March 2004 and are due to become law in all EU Member States at the latest

by 31 January 2006,<sup>7</sup> make absolutely clear that public authorities can, in many different ways, introduce environmental criteria into their procurement procedures.

The principal aim of these directives is to coordinate the procedures for the award of public works supply and service contracts, rather than create a unique and completely harmonised EU law on public procurement. All Member States have to comply with the directives and allow for the integration of environmental considerations into public procurement procedures. However, they are allowed to go further. For example, they can make green purchasing mandatory for certain parts of their administration or set targets.

In Denmark for instance, there is an obligation for all public authorities (at government, regional and local level), to take into account the environment when purchasing goods and services for their day-to-day work. In the Netherlands, the environment Minister has set a target of 50 % green public procurement for all public authorities, whilst central government should reach the 100 % Green purchasing target by the year 2010. Several countries, such as Belgium, France, have set targets for specific product groups (e.g. for the purchase of sustainably harvested timber products or environmental friendly cars). Many Member States provide non mandatory guidance and recommendations for green public procurement.

Local authorities manage an important part of the public procurement market. Whilst their contracts may be smaller in value, the results of their purchases (transport, schools, office buildings...) are more visible to citizens. The public procurement directives may not always apply to relatively smaller contracts awarded by local authorities, as they only concern contracts whose estimated value is above certain thresholds (the minimum threshold being 162 000 EUR for supply and services contracts concluded by central government authorities, 249 000 EUR for supply and services contracts concluded by non central government authorities and 6 242 000 EUR for public works contracts). However, all contracts, whether big or small, are governed by the EU Treaty and its provisions on non-discrimination, equal treatment and transparency, as well as its overarching goal of sustainable development. Therefore, green public procurement

<sup>4</sup> The Green Paper is available at:  
[http://europa.eu.int/comm/energy\\_transport/en/lpi\\_lv\\_en1.html](http://europa.eu.int/comm/energy_transport/en/lpi_lv_en1.html)

<sup>5</sup> For more details, see:  
[http://ec.europa.eu/internal\\_market/publicprocurement/studies\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/studies_en.htm)

<sup>6</sup> For more details, see:  
[http://ec.europa.eu/sustainable/sds2005/index\\_en.htm](http://ec.europa.eu/sustainable/sds2005/index_en.htm)

<sup>7</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

should be recommended and promoted at all stages of administration and for all public contracts.

Adopting legislation is not enough. In an important Communication of 2003 on Integrated Product Policy<sup>8</sup>, the Commission recognized the need to induce further changes in our consumption and production patterns if we want to reduce the tremendous pressure on the environment. We should ensure improved production and disposal methods, and seek to influence consumer patterns in many different ways, without hampering competitiveness. Public purchasers have been identified as key partners for reaching this objective.

#### 4 Scope for improvement

A recent survey shows that only 7 of the 25 EU member states practise a significant amount of green purchasing, meaning that more than 40% of their tenders published in the year preceding the study contained green criteria. But even in those "front-running" countries (Austria, Denmark, Finland, Germany, the Netherlands, Sweden and the UK) there is scope for improvement, because many of these "green" tenders were not formulated in a clear, non-discriminatory way.<sup>9</sup> Lack of environmental knowledge, budgetary constraints and legal uncertainty are the major barriers. The European Commission and many EU governments are striving to overcome these obstacles.

The European Commission has published a handbook entitled "Buying Green" which is available in all the EU languages (see subsidiary article). It explains in clear, non-legal terms how to include environmental criteria in the different stages of a public procurement procedure, going from the definition of the subject matter to the formulation of contract clauses. It also contains a number of concrete examples of local authorities buying green.<sup>10</sup>

The Commission has also created an extensive website on green public procurement<sup>11</sup> (<http://ec.europa.eu/environment/gpp/>) which has useful background information and links to databases of environmental criteria for products, to national websites on green public procurement, and to environmental management schemes and eco-label websites. The website is currently under revision so as to include more structured and focused information for both policymakers and purchasing

officers, and practical examples of green tender specifications.

To raise awareness and improve the quality of green tender documents, the Commission is financing workshops in various EU member countries and will shortly design a training toolkit with concrete examples of green tender specifications for a list of products.

The Commission services are also working with the Member State to stimulate the adoption of national action plans on green public procurement. Local public authorities need high level political support to achieve sustainable public procurement practices. Member States' central government should enact guidance, organise training and make available useful legal and environmental information. The national action plans should set forth targets and indicate the measures to achieve those targets. The Commission services will help collect useful background information, develop structural indicators for measuring green public procurement and ensure regular monitoring of the situation.

The European Commission will continue to work closely with EU governments to promote green public procurement throughout Europe, but it relies on each individual purchasing officer deciding to give it a try and thus help to achieve a more eco-friendly world.

Public authorities should show the way. They cannot ask citizens to be environmentally responsible while not doing anything about their own environmental impact. By applying a green purchasing policy and making it known, they will encourage both public and private purchasers to develop more sustainable consumption patterns. Because of the huge purchasing power of the public sector, immense environmental benefits can be achieved by encouraging them to "buy green". This chance cannot be missed.

<sup>8</sup> For more details about the IPP Communication, see: <http://ec.europa.eu/environment/ipp/ippcommunication.htm>

<sup>9</sup> More information at: <http://europa.eu.int/comm/environment/gpp/media.htm#state>

<sup>10</sup> The Handbook is available at: <http://europa.eu.int/comm/environment/gpp/guidelines.htm#handbook>

<sup>11</sup> At: <http://europa.eu.int/comm/environment/gpp/>

***A global issue***

*The EU is not alone in seeking to promote the application of green public procurement policies. On a global level, the 2002 World Summit on Sustainable Development in Johannesburg called for “public procurement policies that encourage development and diffusion of environmentally sound goods and services”. And in January 2002, the Council of the Organisation for Economic Co-operation and Development (OECD) recommended “to improve the environmental performance of public procurement.”*

*In the aftermath of the World Summit, the Marrakech Task Forces were created. These are voluntary international initiatives led by a particular country, committed to carry out a set of activities which support the Marrakech Process on sustainable consumption and production in various key areas. The United Nations Environment Programme (UNEP) coordinates the work of the task forces and offers assistance to the lead countries.*

*One of the six Task forces covers sustainable public procurement and is led by Switzerland. The Commission services are taking part in the work of the Task Force. The purpose is to develop a training toolkit covering strategic and practical information on sustainable public procurement (including green public procurement) and to implement it globally.*

*Outside the EU, several “green purchasing” initiatives have been launched. In Japan and the Philippines for example, federal government departments and agencies are obliged by law to adopt a green procurement program. Especially in Japan, green (public) procurement is considered as a new competitive challenge for industry. In Canada, the federal government has just committed to implement a comprehensive green procurement policy by 2006.*

*In the USA, green public procurement has been introduced through the use of Presidential Executive Orders, such as the Order prescribing energy efficiency standards for computer equipment purchased by Federal agencies (based on Energy Star labelling scheme).*

The international legal framework for government procurement is the Government Procurement Agreement (GPA). It is one of the multilateral agreements annexed to the WTO Agreement and therefore only applies to those WTO members that have subscribed to it<sup>12</sup>. Although the GPA itself does not contain any reference to environmental protection, the Sixth Recital of the Preamble to the WTO Agreement, which also informs the annexed agreements, recognises the need to act in accordance with the principle of sustainable development and to protect and preserve the environment. Therefore, it is broadly accepted that the GPA allows contracting entities to take into account environmental considerations when defining technical specifications (including process and production methods) and selection and award criteria, on condition that they are not discriminatory, and are sufficiently objective and verifiable.

<sup>12</sup> Canada, European Communities (including its 25 member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom), Hong Kong China, Iceland, Israel, Japan, Korea, Liechtenstein, Netherlands with respect to Aruba, Norway, Singapore, Switzerland, United States : More information at: [http://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm)



The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.

The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

#### **The Environmental Law Division of the Öko-Institut:**

The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:

- Undertaking projects in developing countries
- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

Main areas of research:

- **European environmental policy**
  - Research on implementation of European law
  - Effectiveness of legal and economic instruments
  - European governance
- **Environmental advice in developing countries**
  - Advice for legislation and institution development
  - Know-how-transfer
- **Companies and environment**
  - Environmental management
  - Risk management

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of *homo oeconomicus institutionalis*, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover

- Product policy/REACH
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conservation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

sofia is working on behalf of the

- VolkswagenStiftung
- German Federal Ministry of Education and Research
- Hessian Ministry of Economics
- German Institute for Standardization (DIN)
- German Federal Environmental Agency (UBA)
- German Federal Agency for Nature Conservation (BfN)
- Federal Ministry of Consumer Protection, Food and Agriculture

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## elni

*In many countries lawyers are working on aspects of environmental law often with environmental initiatives and organisations or as legislators, but have limited contact with other lawyers abroad, although such contact and communication is vital for the successful and effective implementation of environmental law.*

*In 1990 a group of lawyers from various countries therefore decided to initiate the Environmental Law Network International (elni) to promote international communication and cooperation worldwide. Since then elni has grown to a network of about 350 individuals and organisations from throughout the world.*

*Since 2005 elni is a registered non-profit association under German Law.*

*elni coordinates a number of different activities:*

### **Coordinating Bureau**

The Coordinating Bureau was originally set up at and financed by the Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit making research institute. The Bureau is currently hosted by the University of Applied Sciences in Bingen. The Bureau acts as an information centre where members can obtain information about others working in certain areas thus promoting the development of international projects and cooperation.

### **elni Review**

The elni Coordinating Bureau produces and sends to each member the elni Review twice a year containing members' reports on projects, legal cases and developments in environmental law. elni therefore encourages its members to submit such articles to be published in the Review in order to allow the exchange and sharing of experiences with other members.

### **elni Conferences and Fora**

elni conferences and Fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to bring together scientists, policy makers and young researchers, giving the opportunity to exchange views and information as well as developing new perspectives.

### **Publication Series**

The elni publications series contains 12 volumes on different topics of environmental law.

- Environmental Law and Policy at the Turn to the 21st Century, Liber amicorum, Betty Gebers, Ormond/Führ/Barth (eds.) Lexxion 2006.
- Access to Justice in Environmental Matters and the Role of NGOs, de

Sadeleer/Roller/Dross, Europa Law Publishing 2005.

- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant 2002.
- Voluntary Agreements - The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London 1998.
- Environmental Impact Assessment - European and Comparative; Law and Practical Experience, elni (ed.), Cameron May Ltd. London 1997.
- Environmental Rights: Law, Litigation and Access to Justice, Deimann / Dyssli (eds.), Cameron May Ltd. London 1995.
- Environmental Control of Products and Substances: Legal Concepts in Europe and the United States, Gebers/Jendroska (eds.), Peter Lang, 1994.
- Dynamic International Regimes: Institutions of International Environmental Governance, Thomas Gehring; Peter Lang, 1994.
- Environmentally Sound Waste Management? Current Legal Situation and Practical Experience in Europe, Sander/ Küppers (eds.), P. Lang, 1993
- Licensing Procedures for Industrial Plants and the Influence of EC Directives, Gebers/Robensin (eds.), P. Lang, 1993.
- Civil Liability for Waste, v. Wil-mowsky/Roller, P. Lang 1992.
- Participation and Litigation Rights of Environmental Associations in Europe, Führ/ Roller (eds.), P. Lang, 1991.

### **elni Website: elni.org**

The elni website at <http://www.elni.org> contains news about the network and an index of elni articles, gives an overview of elni activities, and informs about elni publications. Internships for young lawyers/law students at the Öko-Instituts environmental law division are also offered on the web.