

Taking Account of ILO Core Labor Standards in Textile Procurement

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***The opinions expressed here are personal**

Three key issues

- The characteristics of law and policy (background) concerning the public procurement of textiles
- Art. 7 para. 2 of the Ordinance on Public Procurement (OPP) as the legal basis for excluding potential suppliers which cannot guarantee compliance with the ILO Core Labor Standards.
- What does the future hold?

Political and legal background I

When it comes to taking account of social aspects, textile procurement is one of the classical trailblazers.

The working hypothesis: because of the special reputational risks associated with procuring textiles in the Far East (rather than the former, decentralized system of procurement from suppliers in Central Switzerland), the DDPS is particularly motivated to address sustainability issues.

Political and legal background II

In 2002, the Defence Procurement Agency invited tenders for 220,000 'Gnägi' bodywarmers and 270,000 olive-green T-shirts for the Armed Forces. The contract for the T-shirts was awarded to two Romanian companies and one Thai company; ...

Political and legal background III

...; the production order for the 'Gnägi' bodywarmers was awarded to suppliers based in India, Hong Kong and Thailand. Swiss textile companies were not considered ...

(question in Parliament 03.1017 by Toni Brunner on 19 March 2003)

Political and legal background IV

In a double bind:
political pressure on the
administration from both the left
and the right (cf. Motion Pardini
12.3693 of 12 September 2012)



Political and legal background V

Compared with the earlier wording, the WTO Law (Government Procurement Agreement 2012) and the Directive 2014/24/EU are now much better attuned to sustainability, and distinctly more so as regards ecological than social matters.

Case study: the Max Havelaar case (ECJ)

"Strictly speaking, sugar tastes the same whether it has been traded fairly or unfairly. Nonetheless, a product which has been unfairly marketed leaves a sour taste in the mouths of customers who have a sense of responsibility."
(Conclusions of Advocate General Juliane Kokott in case no. C-368/10, margin note 110)

Legal and political background VI

- Reform of public procurement law: Art. 1 of the preliminary draft of a FAPP:

The purpose of this law [inter alia] is to ensure that public resources are used economically («best value for money») **taking sustainability into account**

Legal and political background VII

The (gist of the) Federal Council's reply to Toni Brunner: We're sorry that we can no longer offer the 'protectionism' model. Nevertheless, the procurement agency obliged the prospective foreign suppliers to respect the ILO Core Labor Standards (especially regarding child labor).

ILO Core Labor Standards: The statutory basis

Art. 8 Federal Act on Public Procurement (FAPP), procedural principles:

Para. 1, letter b: The contracting authority will only award a contract for services in Switzerland to a tenderer who will guarantee compliance with health and safety regulations and the working conditions standards.

(cf. for the future Art. 14, preliminary draft of FAPP)

ILO Core Labor Standards: The new regulatory basis I

- ▶ Art. 7, para. 2, OPP (version applicable since 1 January 2010):

If the subject of the contract is a task to be performed abroad, the bidder has to assure at least the respect of the ILO Core Labour Standards as per Annex 2a [of the OPP].

Swiss finish (federal level; since 2010)

If the subject of the contract is a task to be performed abroad, the bidder has to assure at least the respect of the ILO Core Labor Standards (Swiss Federal Ordinance on Public Procurement [RS 172.056.11])

ILO Core Labor Standards: The new regulatory basis II

- ▶ Explanatory report on the amendment to the OPP dated 18 November 2009, p. 7

Embodying [the ILO Core Labor Standards ... was judged, during the consultation process, to be a positive step, not least] because it created a "level playing field" on more equal terms for foreign and Swiss suppliers.

Interpretation of the approach taken by Swiss Textiles

- ▶ Art. 7 of the Unfair Competition Act (UWG):

In particular, any company which does not observe the working conditions to which its competitors are legally bound is acting unfairly.

ILO Core Labor Standards and the supply chain

- ▶ The 2010 sustainability recommendations by the Federal Procurement Commission (now called the Procurement Conference or BKB) correspond to Art. 14 para. 1, last sentence, preliminary draft of FAPP:

The suppliers shall (also) oblige their sub-contractors to respect these requirements.

Requiring compliance with ILO Core Labor Standards conforms to world trade law

Whereas, in the WTO context, it is debatable whether and to what extent it is permissible to impose import bans and trade sanctions if social standards have been infringed, there is no problem if, **as regards items for its own consumption**, the state demands ILO Core Labor Standards which are more than mere international contract law.

What does the future hold? I

- Will living wages be taken into account?
- fair trade aspects as a possible contract award criterion, as exemplified by the ECJ's judgement in the Max Havelaar case?

[The Max Havelaar case is codified in Art. 67 in the new Directive 2014/24/EU. In the WTO context, sustainability aspects are the subject of a 'work programme'.]

What does the future hold? II

Swiss Textiles answer to the consultation on the reform of the FAPP of 29 June 2015:

Social requirements and criteria are to be allowed, ... and effective inspection and continuous monitoring are to be mandatory.

[economiesuisse sees things differently.]

View of procuring entities: Although I don't really want an obligation, I would like a permission / the possibility to manage reputational risk.

References to the speaker's framework of ideas

Taking account of social aspects in the context of public procurement (in Switzerland), 3rd version 2015 (www.igoeb.ch; www.nachhaltige-beschaffung.ch; cf. summary https://www.evb.ch/fileadmin/files/documents/Oeffentliche_Beschaffung/Sozialpapier_Zusammenfassung_final_20150529.pdf)

Presentation: "Sustainable Public Procurement – Legal Background" on the occasion of the hearing before the European Parliament's Internal Market and Consumer Protection Committee on 24 May 2011 (<http://www.europarl.europa.eu/document/activities/cont/201105/20110527ATT20402/20110527ATT20402EN.pdf>)

Presentation: "Sustainability in Public Procurement (and the GPA): Possible Approaches", WTO conference on the Government Procurement Agreement on 17/18 September 2015 (https://www.wto.org/english/tratop_e/gproc_e/symp092015_e/S3-2Steiner.pdf)

Thank you for listening!

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