

**Can public procurement
serve as a model for
sustainable capitalism?
- A strategic view on the
strategic use of public
procurement**

Judge Marc Steiner,
Swiss Federal Administrative Court

(personal opinion)

Moscow, 18th June 2021

Purpose and topics of the presentation

- The European approach on sustainable public procurement
- The Swiss reform of the regulation on public procurement (keywords: competition based on quality, sustainability, innovation)
- #buildbackbetter by Joe Biden as a de facto “European” approach
- Digression: Wood trade policy / Russia at a crossroads

Sustainable (Public) Procurement: WTO Symposium 2017



WORLD TRADE
ORGANIZATION

GPA/W/341

30 May 2017

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Committee on Government Procurement

KEY TAKE-AWAYS FROM THE COMMITTEE'S SYMPOSIUM ON SUSTAINABLE PROCUREMENT

HELD IN THE CENTRE WILLIAM RAPPARD (WTO HEADQUARTERS), GENEVA, ROOM W,
22 FEBRUARY 2017

Report by the Secretariat

Strategic use of public procurement as purpose of the EU directive 2014/24/EU

Public procurement plays a key role in the Europe 2020 strategy [...] for smart, sustainable and inclusive growth' ('Europe 2020'), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds (Recital 2 of the Directive 2014/24/EU).

Judgment of the CJEU C-395/18 Tim SpA c/ Consip SpA (30 January 2020)

The principles of procurement enshrined in Article 18 of Directive 2014/24/EU reflect the fact that compliance with sustainability standards provided for in paragraph 2 must be seen like the principles referred to in paragraph 1 as “**a cardinal value**” with which the Member States must ensure compliance pursuant to the wording of Article 18(2) of that directive.

§ 97 of the Act against Restraints of Competition (GWB) implementing the new mindset

The mindset of the 90ties [as trying to avoid the integration of sustainability 3 aspects]) must (meanwhile) be considered as not being suited to gather a majority in a democratic process of decision-making (Jörg Wiedemann, Kulartz et alii [ed.], GWB-Kommentar, Köln 2016, para. 92 on § 97 GWB).

For an average German public procurement lawyer this finding was like an earthquake.

The Purposes of the new (Swiss) Federal Act on Public Procurement (FAPP)

Aim and purpose(s) of the law shall be:

- a. Economic and the from an (overall) economic (“volkswirtschaftlich”), ecological and social perspective sustainable use of public funds
- b. Transparency of public procurement procedures
- c. Non-discrimination between bidders
- d. Promotion of an effective and fair competition including measures against collusion between bidders and corruption

Procurement and Green Recovery

In addition to price, sustainability (such as labour or environmental protection conditions) can also be taken into account in particular when awarding services and contracts (Art. 29 BöB / IVöB). The most beneficial tender (previously "the most economically advantageous") will now be awarded the contract (Art. 41 BöB / IVöB).
[...] Quality competition among the tenderers is to be brought to the fore.
(www.mme.ch)

USA / Joe Biden / Steven L. Schooner

With the (new) federal government (willing) to lead in confronting climate change, it's (even more) time for the acquisition workforce to 'warm up' to sustainable procurement practices (mutatis mutandis Steven L. Schooner and Markus Speidel).
#buildbackbetter

Switzerland / Federal Act on Forest

Art. 34b Federal buildings and installations

1 The Confederation shall encourage the use of sustainably produced timber where appropriate in the planning, construction and operation of its own buildings and installations.

2 When purchasing wood products, it shall take account of factors such as sustainable and near natural forest management and the aim of reducing greenhouse gas emissions.

Russia's proposed log export ban in 2022 will have a far-reaching impact on global forest product markets

Russia exported 15 million m³ of logs in 2020, accounting for almost 12% of globally traded roundwood. Much of this trade may come to a halt in 2022 when a new law proposed by Russia's president will ban the export of softwood logs and high-value hardwood logs in January 2022. The Russian government is also considering measures to reduce illegal logging and restrict the export of green lumber.

Post Covid-19 response: Sustainable Public Procurement and Green Recovery

Switzerland should – considering the importance of its export industry – not envisage a concept of a post Covid-19 protectionism. Instead a Green Recovery Plan should apply. Sustainable Public Procurement can and must be seen as a key element of every strategy on Green Recovery / de iure or de facto Green New Deal (USA, EU and Switzerland).