



Public Affairs: Mobilising action for Fair Trade Public Procurement

State of Play of Fair Trade Public Procurement in Europe

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Summary

Fair Trade is an alternative way of producing and trading. The main difference with conventional trade is that concerns for social and environmental responsibilities represent an integral part of the transaction, with a North-South focus, and are at the heart of the system. Nevertheless, Fair Trade, as conventional trade, is a free market based system and complies with competition rules at international, EU and national level.

Public Procurement and Fair Trade in Europe

A growing proportion of European consumers are caring more and more about environmental and social considerations. It creates opportunities for ethical products, such as Fair Trade. This trend is also reflected in the consumption patterns of public authorities. At EU, national and local level, public authorities and bodies are growing more aware of the importance of environmental, social and Fair Trade criteria, and tend to increasingly include them in their purchasing decisions. Public Procurement is an important sector of the European economy, currently accounting for around 16,3% of the European Union's Gross Domestic Product (GDP). This purchasing power represents a large opportunity to boost the sales of Fair Trade products and is an excellent way for public authorities to set an example and show their support to Fair Trade.

Public procurement is the process used by governments, regional and local public authorities or bodies governed by public law (financed, supervised or managed for more than 50% by public authorities) to obtain goods and services with taxpayers' money.

In the European Union (EU), public procurement is subject to Community and international rules. In 2004, the European Parliament (EP) and the EU's Council of Ministers adopted a Legislative package of procurement Directives¹, which conditions the national rules on this topic, giving a common basis to the 27 national rules managing public procurement in the Member States. These directives also acknowledged the possibility to use public procurement as a tool to support other policy objectives. Indeed, they allow to award contracts on the basis of other criteria than solely the price, which allows other aspects, such as the sustainability, to be valued and taken into consideration when purchasing.

¹ Directive 2004/17/EC of the European Parliament and the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal service sectors, and Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 coordinating the procedures of the award of public work contracts

The Public Affairs project is a 3 years project co-funded by the European Union that has aimed at mobilising action for Fair Trade Public Procurement (FTPP). In that frame, EFTA and its partners (IDEAS, Ctm-Altromercato, Oxfam-Wereldwinkels and ICLEI) have studied the European situation of FTTP. This research is the result of their work, and it analyses political, legal and practical aspects of FTTP at local, regional, national and EU level, in order to draw recommendations on how the situation could be enhanced.

Increasing political commitments in favour of Fair Trade and Fair Trade Public Procurement

Top level political commitment is a key element to develop FTTP. It can take on various forms and relate to purchasing policies exclusively or be more general. The political commitments to Fair Trade, whatever form and scope they have, provide transparency to the greater public as well as within the organisation, and are the first step necessary to implement a purchasing policy that includes Fair Trade objectives.

Through our research, we studied extensively the political support to Fair Trade and FTTP. We could observe that the number of such commitments had largely increased during the past ten years at local, regional and national level. The great development of the Fair Trade Towns Campaign in Europe is the clearest sign of it, together with the multiplication of declarations, resolutions, or plans of actions in favour of Fair Trade and FTTP. This growing concern for Fair Trade and FTTP has consequently been echoed at EU level (through different channels). It was relayed by civil society, local authorities, the European Parliament (EP) and the European Commission (EC).

The EU's interest for Fair Trade emerged almost 20 years ago. It culminated in 2009 and 2010 with a Communication of the EC² and Opinions of both the EESC³ and the CoR⁴ addressing Fair Trade and FTTP issues⁵. A recent resolution of the EP on new developments in public procurement⁶ also encourages FTTP. By the end of 2010, a guide is also expected to be issued by the EC to give guidance to public authorities on how to include social considerations (including ethical trade and Fair Trade) in public procurement.

Nevertheless, the situation of FTTP in Europe is not homogeneous. Our research showed that political commitments and their concrete follow up (action plan, practical guidance, FTTP practices) could only be found in Western Europe, in particular in countries where Fair Trade sales are important and Fair Trade Organisations flourishing and very active, such as the UK, France, Germany, Belgium, Scandinavia, Italy, Spain or the Netherlands. In these countries, Fair Trade awareness is high; people recognize and adhere to the concept, which encourages public authorities to follow the lead of public opinion. On the contrary, we could not find evidence of commitment to Fair Trade or FTTP practices in new EU Member States, nor in Portugal and Greece, where Fair Trade initiatives have a weak or very recent development and there is not yet a strong political support to Fair Trade activities.

The legal framework of FTTP: incomplete emerging legislations, and their interpretations

The political concern for Fair Trade and FTTP has been growing, but its translation into legislation will take time. For now, public procurement legal framework for social ethical and

² Communication from the Commission of the European Communities of 5 May 2009: *Contributing to Sustainable Development: The role of Fair Trade and nongovernmental trade-related sustainability assurance schemes* (com (2009) 215 final)

³ Opinion of the European Economic and Social Committee of 20 January 2010 on the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee: *Contributing to Sustainable Development: The role of Fair Trade and non-governmental trade-related sustainability assurance schemes* (REX/288 - CESE 108/2010)

⁴ Opinion of the Committee of the Regions of 10 February 2010 on *Contributing to Sustainable Development: the Role of Fair Trade and Non-governmental Trade-related Sustainability Assurance Schemes* (CdR 214/2009)

⁵ Detailed analysis of these documents is available in the corresponding chapter of the research

⁶ European Parliament Resolution of 18 May 2010 on *new developments in public procurement* (2009/2175(INI))

Fair Trade criteria still lacks clarity, as recently reminded both by the CoR⁷ and the EP⁸ in 2010.

Our research makes a detailed and wide overview of existing rules at regional, national and EU level. It shows that legal dispositions on sustainable and social procurement exist at all these levels. They allow the inclusion of such considerations (including Fair Trade) in public procurement procedures⁹. Unfortunately, they are not so clear on the way to do so and Fair Trade is rarely directly mentioned. As a result, various interpretations of the legal framework of Fair Trade Public Procurement exist. Certain national legislations are more specific on the inclusion of social or Fair Trade criteria, and interpretative guidance exists at EU, national and regional level.

As a result, legal uncertainties at EU and national level create legal insecurity for contracting authorities and are one of the main barriers to FTTP. A revision of the procurement legislations or indisputable and compulsory interpretations of legal courts at EU or national level would be necessary in order to clarify the existing legal uncertainties that keep back FTTP expansion.

The European Court of Justice (ECJ) has not yet ruled on the topic, even if its rulings on environmental and unemployment matters, studied in detail in the corresponding chapter of this research, can be of help. The only country that has national rulings on Fair Trade is the Netherlands, where it is considered legal to include Fair Trade criteria into tenders provided certain conditions are respected¹⁰.

Nevertheless, our study¹¹ permitted us to draw conclusions on the different legal possibilities to include Fair Trade in public procurement procedures. They are explained in detail in "*Buying Fair Trade, a European Model on Fair Trade Public Procurement*", presented in conclusion to the research.

Existing FTTP practices

Apart from the political and legal context that frame FTTP, it is also essential to study the resulting practices: are there concrete results of the political commitments and legal dispositions and what are they?

Over the past 3 years, the Public *Affairs* project partners have carried out researches on Fair Trade Public Procurement practices. The data collected have been analysed and summarised in this research, showing how contracting authorities include Fair Trade criteria in their tenders, what kind of products they buy, what definition and criteria they use, as well as the barriers and opportunities for FTTP they identify. The legal uncertainty concerning FTTP is identified as one of the main barriers by contracting authorities, as well as a lack of information on Fair Trade in general and on Fair Trade supply in particular.

Recommendations

The conclusions of this research on the state of play of Fair Trade Public Procurement, summarised above, bring up several recommendations on what should be done in order to facilitate and increase the use of Fair Trade Public Procurement as a tool for supporting sustainable development. These are not addressed only to policy makers and contracting authorities but also to Fair Trade organisations.

⁷ See footnote 5

⁸ See footnote 6

⁹ More details about how to include Fair Trade criteria in tenders are available in the second part of the research "The legal framework of FTTP: incomplete emerging legislations, and their interpretations" as well as in the conclusion of the research, in particular in the "European model on Fair Trade Public Procurement".

¹⁰ A detailed analysis of these courts' rulings is available in the second part of the research "The legal framework of FTTP: incomplete emerging legislations, and their interpretations"

¹¹ This study concerned: EU primary principles, secondary law and primary EU law cases, as well as national legislations, guides and case laws

Fair Trade Organisations should:

- Promote the adoption of a legal framework of how to include ethical and Fair Trade criteria into tenders by continuing and increasing advocacy work at regional, national and EU level
- Promote the adoption of a procurement policy which is friendly for social, ethical and Fair Trade issues, similar to the one existing for green and climate change concerns. Climate change is not a more valuable policy than social aspects of sustainable development
- Continue to pursue the work of awareness raising and dissemination of information on FTTP, in particular in countries where Fair Trade awareness is still low, to stimulate demand
- Develop more supporting tools for local authorities, with a focus on the legal constraints of public procurement
- Develop better dissemination of information regarding the supply of Fair Trade products
- Work with the current supplying companies in order to enhance their supply of Fair Trade products

Policy makers at local, regional, national and EU level should:

- Adopt stronger binding commitments and sharply monitor their implementation
- Have a harmonised interpretation of the legal framework of Fair Trade Public Procurement at EU level
- Adopt clearer legal dispositions with regards to the status of Fair Trade criteria in procurement procedures. It will be necessary to be particularly vigilant of the inclusion of clear dispositions to govern social and ethical procurement when the current directives will be revised.

Contracting authorities should:

- Increase the share of Fair Trade products in their procurement policy, as a tool for sustainable development

These recommendations should permit at mid and long term to help resolve the existing issues and to overcome the barriers that this research identified. Nevertheless, pending clarification or revision of the EU Directives on public procurement, contracting authorities wishing to continue purchasing Fair Trade products and looking for guidance on the legal way to do so may refer to "*Buying Fair Trade, a European model on Fair Trade Public Procurement*" developed through the Public Affairs project, available in hard copy or in digital version on the project's website.

More information can be found on:

<http://www.eftafairtrade.org/observatory/index.php/europeanmodelonftpp>

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