

# The Revised GPA-More Scope for Green Public Procurement?

Judge Marc Steiner,  
Swiss Federal Administrative Court

# Purpose and topics of the presentation

- The revision of the GPA: Green Public Procurement endorsed, “constructive ambiguity” concerning social aspects
- Relevance of the EU public procurement reform 2014
- Regulatory density (“Regulierungsdichte”) of the GPA as a key argument
- GPA is not about regulating private consumer choice, but about the public consumer choice itself -> more policy space

# Revised GPA: WTO Symposium 2015

**SESSION 3: Ensuring the continuing relevance of the GPA: the New Work Programmes of the GPA Committee and related policy considerations**

*Chair: Mr Antony Taubman, Director, Intellectual Property Division, WTO Secretariat*

 Thursday, 17 September, 14.30-16.30

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14.30

Chairman's introductory remarks

# PPMs: There is more policy space within the GPA compared to “normal” WTO-law

Technical specifications – this was true already concerning Art. VI of the GPA 1994 – may include the characteristics of the products ... such as ... the processes and methods for their production ...

## PPMs: There is more policy space within the GPA compared to “normal” WTO-law

Compared to classical WTO law this formula allows for more policy space; it's a *lex specialis* compared with the ordinary PPMs debate. Why? GPA doesn't deal with measures such as an import ban or a trade sanction in the general WTO context. The GPA is **not about regulating** private consumer choice but about public **consumer choice** itself.

# Revised GPA and Sustainability Issues I

Art. X (6) revised GPA

on technical specifications:

For greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment.

# Revised GPA and Sustainability Issues II

Art. X (9) revised GPA

on the tender documentation:

The evaluation criteria set out in the notice of intended procurement or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery.

## Rev. GPA and Sustainability Issues III

Art. XXII (8) revised GPA:

The Committee shall undertake further work to facilitate the implementation of this Agreement and the negotiations provided for in paragraph 7, through the adoption of work programmes for the following items:

(iii) the treatment of sustainable procurement;

## Revised GPA and Sustainability Issues IV

Art. XXII (8) revised GPA + Annex E:

The work programme on sustainable procurement shall examine [...] the ways in which sustainable procurement can be practiced in a manner consistent with Parties' international trade obligations.

[This is especially true concerning social aspects.]

## Interplay GPA and EU Directives

The contracting authorities ... which apply [this Directive] ... should therefore be in conformity with the [Government Procurement] Agreement .... (Recital 7 Directive 2004/18/EC). -> **Framing and applying EU law is interpreting the GPA!**

## EU: Green Paper COM(2011)15 final (I)

The **first** objective [of public procurement] is to increase the efficiency of public spending (**best value for money**; p. 4).

## EU: Green Paper COM(2011)15 final (II)

Another **complementary** objective is to allow procurers to make better use of public procurement in support of common societal goals: These include protection of the environment ... and combating climate change, promoting innovation and social inclusion (p. 5).

# Single Market Act COM(2011)206 final

Key action: Revised and modernised public procurement legislative framework, with a view to underpinning a balanced policy which fosters demand for environmentally sustainable, socially responsible and innovative goods, services and works (p. 19).

# European Parliament Resolution “Modernisation of Public Procurement” (25 October 2011)

Takes the view that [...] the criterion of lowest price should no longer be the determining one for the award of contracts, and that it should, in general, be replaced by the criterion of most economically advantageous tender [...] taking into account the entire life-cycle costs of the relevant goods, services or works;

# EP Resolution “Modernisation of Public Procurement” 25 October 2011

[...] stresses that this would not exclude the lowest price as a decisive criterion in the case of highly standardised goods or services; [...]; stresses that supporting the criterion of ‘maximum economic benefit’ would foster innovation and efforts to achieve the best quality and value, i.e. to comply with the requirements of the Europe 2020 strategy

## Directive 2014/24/EU – Philosophy

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

See also recital 17 on buying innovative goods.

## Directive 2014/24/EU – Philosophy

Recitals 47 and 95:

Public authorities should make the best strategic use of public procurement to spur innovation. Buying innovative products, works and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges.

## Directive 2014/24/EU – Philosophy

Recital 95: In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement.

## Communication COM(2008) 400 final

Such a shift (to a greener economy) could also boost the competitiveness of European industry by stimulating innovation in eco-technologies – which have been recognised as a high-growth sector where Europe is already a world leader (p. 2).

## Directive 2014/24/EU – Award Criteria

Art. 67 / Recitals 89-92: “most economically advantageous tender” / “best price-quality ratio” / “social, environmental and innovative characteristics” / including factors involved “in the specific process of production”

## Directive 2014/24/EU – Award Criteria

Art. 67 / Recital 92: When assessing the best price-quality ratio contracting authorities should determine the economic and qualitative criteria **linked to the subject-matter of the contract** that they will use for that purpose.

## Directive 2014/24/EU – Award Criteria

In a ruling on the purchase of electricity, an award criterion relating to the amount of electricity produced from renewable sources **in excess** of the expected consumption of the contracting authority was ruled inadmissible, as it was not linked to the subject matter of the contract (C-448/01 EVN/Wienstrom).

# Directive 2014/24/EU – Life-cycle costing

Art. 68:

Life-cycle costing shall .. cover parts or all of the following costs ....:

(b) costs imputed to environmental **externalities** linked to the product ... during its life cycle, provided their monetary value can be determined and verified; ... costs such as emissions of greenhouse gases ...

## GPA and secondary policies / Does a “purity principle” apply?

According to the purity principle one purpose of public procurement regulation would be to establish a system that reduces as far as possible the insertion of non-economic criteria into the procurement process (definition by Sue Arrow-smith / Christopher McCrudden discussing the GPA).

## Revised GPA – Rules on Award Criteria

Art. XV: [..] the entity shall make the award to the supplier that the entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the notices, has submitted

- a) the most advantageous tender; **or**
- b) where price is the sole criterion, the lowest price.

## **GPA 1994 – Basic Rule on Award Criteria (unchanged in revGPA 2012)**

Given the objective of the GPA of laying down minimum standards to be applied, it has opted for flexibility and, in addition to allowing awards on price, also allows other criteria to be taken into account, provided they have been set out in the tender documentation (Peter Trepte).

## GPA 1994 – Abnormally Low Tenders

One can realistically not expect from an international framework like the GPA a substantial contribution to the solution of the problem when discussing abnormally low tenders (Gerhard Kunnert), because the GPA is about minimum standards.

# Conclusion on the interpretation of the GPA: GPA is setting minimum standards and not to be seen as a comprehensive procurement codification

The GPA as setting minimum standards is meant to be **compatible with different views on economic policy**; a strict "purity principle" would rather be a possible characteristic of a full fledged / comprehensive regulation.

# Peter Kunzlik on Neoliberalism and EU Public Procurement

Neoliberals: Public Procurement should not merely abolish restrictions on international access to public contract opportunities but should “neoliberalise” the public contracts market (Kunzlik, The Cambridge Yearbook of European Legal Studies, Vol. 15, p. 311). -> Neoliberals go for the “purity principle”.

## A minimum of consistency?

WTO, ILO, UNCTAD, UNEP etc. are sub-systems of the same overarching system. This presupposes the idea of an at least to some extent coherent legal framework / world order. The GPA is not only about trade, but also on governance and to a certain extent on sustainability, without disregarding the core principles of the GPA (balance of interests).

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