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Is there a Swiss Approach towards Sustainable Public Procurement?

Marc Steiner*

I. Introduction

On a general note, it is important to highlight that the existence of a bilateral agreement between the European Union (at the time the European Community) and the Swiss Confederation on certain aspects of government procurement¹ does not mean that EU Public Procurement Directives are relevant for the legal framework of Swiss public procurement. Rather, the most significant international treaty for Switzerland is, by far, the World Trade Organization Agreement on Government Procurement of 15 April 1994 (GPA).² The bilateral agreement between the European Union and the Swiss Confederation broadens the scope of their mutual commitments under the GPA rules to regions and municipalities and grant, for instance, mutual access to procurement tenders by railway operators and contracting entities operating on the basis of special or exclusive rights granted by a competent State authority active in sectors such as drinking water, electricity, urban transport and airports.³ In this context it may also be mentioned that, under Swiss law, the legal framework for these industries is in principle the same as for the public authorities.⁴

Additionally, when discussing the legal framework of public procurement in Switzerland, one

should be aware of its distinctly federalist governmental structures. Therefore, the most important laws and ordinances discussed in this article such as the Federal Act on Public Procurement of 15 December 1994 (FAPP)⁵ and the Ordinance on Public Procurement of 11 December 1995 (revised 18 November 2009; OPP)⁶ are exclusively applicable on the federal level. As a consequence, the GPA is implemented separately on the federal and on the cantonal level. Switzerland has therefore 27 procurement laws.⁷ For harmonization purposes, all cantons entered into the Intercantonal Agreement on Public Procurement of 25 November 1994 (revised on 15 March 2001; IAPP).⁸ As an example to demonstrate how relevant the differences between the cantonal and the federal levels are, it can be mentioned that, under cantonal law, negotiations on tenders between the contracting authority and the bidders are prohibited, but in contrast permitted under federal law if certain requirements are met.⁹ There are also notable differences as far as remedies are concerned.

When implementing the revised GPA¹⁰ the Confederation and the cantons aim to simultaneously revise the FAPP and the IAPP. The initially intended complete revision of the federal public procurement statute with the aim to partially harmonize the Swiss legal framework¹¹ was aban-

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1 OJEU 2002 L 114/430 ss.; Swiss Classical Compilation of Federal Legislation – Systematische Sammlung des Bundesrechts (SR) 0.172.052.68.

2 SR 0.632.231.422; see www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

3 Cf. *Bernhard C. Lauterburg / Philipp Zurkinden*, "Switzerland", in: Hans-Joachim Priess (ed.), *Getting the Deal Through – Public Procurement 2012*, London 2012, p. 237.

4 Cf. *David Mamane / Sonja Stark-Traber / Michael Hess*, "A Q&A guide to public procurement law in Switzerland", 2012 (<http://uk.practicallaw.com/2-521-2557?q=public+procurement+switzerland>).

5 SR 172.056.1.

6 SR.172.056.11.

7 Cf. *Hubert Stöckli*, "A Tender of Works at the Gotthard: Observations on a Complex Procedure and its Consequences", in: *The International Construction Law Review 2008*, p. 4.

8 Cf. *Lauterburg/Zurkinden* (fn. 3), p. 237.

9 Cf. *Peter Galli / Elisabeth Lang*, "Switzerland", in: *Global Legal Group* (ed.), *The International Comparative Legal Guide to Public Procurement 2012*, p. 189.

10 See www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm and *Robert Anderson*, "The conclusion of the renegotiation of the World Trade Organization Agreement on Government Procurement: What it means for the Agreement and for the world economy", in: *PPLR 2012*, p. 83 ss.

11 See Preliminary Draft of a FAPP of 30 Mai 2008 – Vorentwurf vom 30. Mai 2008 für ein Bundesgesetz über das öffentliche Beschaffungswesen (VE BÖB). The doctrine stated in this respect that although a partial harmonisation of public procurement rules is long overdue, it is doubtful that the Cantons will follow suit (see *Carole Gehrler*, "Public Procurement Legislation, When Public Entities go Shopping", *Walder Wyss & Partners News Letter No. 82*, 2008).

done after the findings of the preliminary consultation process were reviewed.¹² Subsequently, in a first step, only the OPP was revised; the amended text came into force on 1 January 2010.¹³ Since the revised OPP text is crucial to Sustainable Public Procurement (SPP), the following report will focus on the federal level. Shortly after the revision of the OPP, the Swiss Federal Procurement Commission issued a brochure titled “Sustainable Procurement – Recommendations for the federal procurement offices” (Recommendations).¹⁴ These recommendations were considered to be a milestone, especially in regard to the implementation of the ILO Core Labour Standards (publicly perceived as one of the most important tools to abolish the worst forms of child labour).¹⁵

II. Incorporating the sustainability objective into the legal framework governing (federal) public procurement

1. First steps

Much like in German legal thinking especially, the initial and predominant position in the late nineties was that public procurement was only about the price and market access; secondary policy goals (“vergabefremde Aspekte”) were considered to be “government by procurement” and hence to be avoided. At the same time other opinions were voiced differentiating between environmental and social aspects pointing out that the link to the subject-matter of the contract is easier to establish when discussing environmental features (“Umwelteigenschaften”) understood as being part of the quality of the product.¹⁶ According to this understanding, two main lines of argument allowed a cer-

tain inclusion of Green Public Procurement (GPP). Firstly, the definition of technical specifications – as presupposed in Article VI GPA –, including the production processes and methods of the procured products, are permitted as long as they do not create unnecessary obstacles to trade.¹⁷ Therefore, according to the initial Swiss approach, the technical specifications were the easiest way to take into account aspects of GPP.¹⁸ Secondly it was explicitly mentioned in Article 21 FAPP that when looking for the economically most advantageous offer, environmental impact aspects (“Umweltverträglichkeit”) could be taken into account. The *Helsinki Bus* case argument according to which the consideration of the environmental impact does not presuppose a direct economic benefit for the contracting authority¹⁹ was easier to make compared with legislative frameworks where sustainability concerns were not explicitly mentioned (at the time).

2. Constitutional provisions

A second important argument is to be seen in the new Federal Constitution of the Swiss Confederation of 18 April 1999.²⁰ According to Article 2 of the Constitution, the Swiss Confederation is “committed to the long-term preservation of natural resources”. This purpose is the logical consequence of what is said in the preamble, namely that the Swiss People and the Cantons shall adopt the new Constitution “mindful of their responsibility towards creation” and conscious of their “responsibility towards future generations”. Furthermore, in Article 73 of the Constitution it is stated that “the Confederation and the Cantons shall endeavour to achieve a balanced and sustainable relationship between nature and its capacity to renew itself

12 Cf. the relevant press release of the Federal Council of 18 June 2009 (www.admin.ch/aktuell/00089/index.html?lang=de&msg-id=27511) and *Galli/Lang* (fn. 9), p. 193.

13 Cf. the relevant press release of the Federal Council 18 November 2009 (www.news.admin.ch/message/index.html?lang=de&msg-id=30179).

14 Cf. www.bbl.admin.ch/bkb/02617/02632/index.html?lang=de (Recommendations) and *Eveline Venanzoni*, “Implementing SPP practice in Switzerland”, in: European Commission, GPP News-Alert, No. 10 March 2011.

15 See point IV. below.

16 Partly underlying a comparable understanding by *Gerhard Kunnert*, WTO-Vergaberecht, Baden-Baden 1998, p. 43.

17 Cf. with very convincing arguments *Peter Kunzlik*, International Procurement Regimes and the Scope for the Inclusion of Environmental Factors in Public Procurement, in: OECD (ed.), The Environmental Performance of Public Procurement, Paris 2003, p. 157 ss.

18 Cf. *Marc Steiner*, Die Umweltfreundliche Beschaffung – vergaberechtliche Möglichkeiten und Grenzen, vergaberechtliche Studie (Expertise on GPP), erstellt im Auftrag der Beschaffungskommission des Bundes (BKB, the Federal Procurement Commission), Aarau 2006, p. 69 ss.

19 ECJ [2002] ECR p. I-7213 *Concordia Bus Finland Oy Ab ./.* *Helsingin kaupunki and HKL-Bussiliikenne*, para. 69.

20 SR 101.

under consideration of the demands placed on it by the people". This idea also influences Swiss foreign policy. Article 54 paragraph 2 states: The Confederation shall "promote [inter alia] the conservation of natural resources".

What is interesting in this context is that the Constitution of April 1999 was only intended to be a update of the old constitution without significant material changes ("mise-à-jour"/"Nachführung"). This intention, however, does not apply when dealing with its Article 2. This so-called update, when discussing the aims and purposes of the Confederation in the context of our time, acknowledges the preservation of the natural resources as indispensable.²¹ Such statement of intent goes beyond the concept of a mere update.²²

Obvious similarities exist with EU primary law allowing for comparisons to be drawn. Therefore, the reasoning of the European Court of Justice in the *Helsinki Bus Case* – naturally discussed in a European context – can apply *per analogiam*. If the environmental protection requirements must be integrated into the definition and implementation of "Community policies and activities", it must – as stated by the Court – be concluded that the rules governing award criteria in the procurement directives must be interpreted in such a way so as not to exclude the possibility for the contracting authority to consider criteria relating to the preservation of the environment when assessing the economically most advantageous tender.²³ The same rule can be considered to hold for Switzerland.²⁴ A balance

must therefore be struck between primary (i.e. constitutional) law forming the economic constitution on the one hand and the primary law dispositions considered to form an environmental constitution on the other hand.

This balancing exercise has been acknowledged long ago by the government when formulating the Sustainable Development Strategy,²⁵ and the commitment of the government was reaffirmed when reframing Article 27 of the OPP.²⁶ This was significant for procurers of the Federal Office on Buildings and Logistics, because the OPP was drafted in their own department. Even more significant was the commitment voiced by the director of this department, the most important procurer of the Confederation, when writing the preface to the Recommendations for sustainable procurement described above. The most relevant statement reads as follows: "The Federal Constitution of 18 April 1999 makes sustainable development a long-term objective of the national policy: The Swiss Confederation strives to promote sustainable development and to secure the long-term preservation of natural resources and a just and peaceful international order. In order to implement its constitutional task of sustainable development the federal government has adopted the 'Sustainable Development Strategy'. The federal government should set an example in its own consumer behaviour by respecting social, economic, health and environmental factors in meeting its needs for goods, services and construction works. Therefore it needs to procure goods, services and construction works meeting a high standard of social, economic and environmental demands throughout their entire lifetime."²⁷

III. The Economically most advantageous offer: Must life-cycle costing by definition include the calculation of external costs?

From a Swiss perspective it is important to state that the *Helsinki Bus Case* and the *Wienstrom Case* are expressing thoughts which, from a comparative law point of view, are meaningful when interpreting Swiss public procurement law.²⁸ This view was supported by the Swiss use of the concept "economically most advantageous offer" when defining the awards criteria. Carl Baudenbacher has argued that Swiss people are usually sensitive to quality which

21 Dispatch of the Federal Council on a new Federal Constitution of 14 January 1997, Federal Gazette – Bundesblatt (BBl) 1997 I p. 127 s.

22 Cf. *Luzius Mader*, "Die Umwelt in neuer Verfassung? Anmerkungen zu umweltschutzrelevanten Bestimmungen der neuen Bundesverfassung", in: UR P 2002, S. 105 ff., S: 119 f. The government considered this "breach" with the concept of update to be legitimate considering the broad support for the newly proposed aim (BBl 1997 I p. 128).

23 ECJ [2002] ECR p. I-7213 *Concordia Bus Finland Oy Ab ./. Helsingin kaupunki and HKL-Bussiliikenne*, para. 57.

24 Cf. *Steiner*, Expertise on GPP (fn. 18), p. 103.

25 Cf. concerning the latest action plan 2012–2015: www.are.admin.ch/themen/nachhaltig/index.html?lang=en.

26 Cf. *Marc Steiner*, "Sekundärziele im öffentlichen Beschaffungswesen: In welche Richtung schwingt das rechtspolitische Pendel? Ein Blick nach Europa und zurück in die Schweiz" (Sekundärziele), in: *European Law Reporter* 2011, p. 380 ss., p. 384.

27 Recommendations, p. 4.

28 Cf. *Steiner*, Expertise on GPP (fn. 18), 42 ss.

means that price is not the only parameter to be taken into account.²⁹ What is clear is that the underlying concept behind Article 21 FAPP is that the award is typically based on the “economically most advantageous offer” and that the award based solely on the basis of the lowest price is the exception when considering broadly standardized goods.³⁰ The commentary of the Federal Council concerning this Article 21 FAPP elaborates on the notion of quality which can include aspects of usability, safety, availability, reliability, cost-effectiveness and ecology.³¹ It cannot be established whether the European Parliament was influenced by this same concept when drafting the resolution of 25 October 2011 on the modernization of public procurement.³² But it expressed the same idea “that, in order to develop the full potential of public procurement, 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, in terms of economic, social and environmental benefits – taking into account the entire life-cycle costs of the relevant goods, services or works” and stressed “that this would not exclude the lowest price as a decisive criterion in the case of highly standardized goods or services”.³³

In Switzerland, however, life-cycle costs are typically not used to internalize external costs, instead the successful means to avoid unwanted external (environmental) costs is to grant extra points when evaluating the quality of the purchased product.³⁴ This also corresponds with the concept of the *Helsinki Bus Case*; granting points for lower emissions means *de facto* the internalization of external costs but under the quality aspect.³⁵ Higher quality (in terms of less external environmental costs) justifies a higher price when assessing the most advantageous tender. In 2004 the European Parliament already tried to adopt the internalization of external costs directly in the monetary calculation.³⁶ The proposal of the European Commission of 20 December 2011 aimed for a compromise, stating that only “external environmental costs, directly linked to the life-cycle, provided their monetary value can be determined and verified”, should be considered.³⁷ In order to reconcile the understanding of life-cycle costs with the concept of a directive, which is by definition not a full-fledged codification, it should preferably be made clear that the contracting authority can choose whether to calcu-

late the life-cycle costs on the basis of the actual expected costs during the use (and the disposal) of the product (like energy consumption and maintenance costs) or whether life-cycle costing should also contain – without too much difficulty – some traceable external costs.³⁸ This would also help the Commission, were it to be called upon to develop a methodology on the calculation of life-cycle costing, to propose as an initial step a more narrow interpretation of the life-cycle costs and then, in a subsequent step, to tackle the more ambitious and therefore optional concept of including the internalization of external costs.

IV. Recent Developments in Switzerland – ILO Core Labour Standards

In Article 7 para. 2 OPP (version of 18 November 2009), it is stated that if the subject-matter of the contract is a task to be performed abroad, the bidder has to ensure at least that the ILO Core Labour Standards are respected. These standards (including guarantees especially with regard to forced or compulsory labour and the worst forms of child labour) are listed in an Annex 2(a) to the revised OPP.³⁹ This is a fairly spectacular development, considered that social aspects were rather neglected in the past when looking at the Swiss SPP concept. Even more astonishing was the lack of resistance

29 Cf. *Carl Baudenbacher*, “Swiss Economic Law Facing the Challenges of International and European Law” (Swiss Economic Law), in: Report to the Swiss Jurists Day 2012, ZSR 2012 II, p. 419 ss., p. 454.

30 Cf. *Steiner*, Sekundärziele (fn. 26), p. 381.

31 Cf. *Baudenbacher*, Swiss Economic Law (fn. 29), p. 455.

32 Cf. *Baudenbacher*, Swiss Economic Law (fn. 29), p. 651.

33 2011/2048(INI); P7_TA(2011)0454.

34 Cf. *Steiner*, Expertise on GPP (fn. 18), p. 79 s.

35 Cf. *Steiner*, Expertise on GPP (fn. 18), p. 44 with references.

36 Cf. *Angela Dageförde*, Umweltschutz durch öffentliche Auftragsvergabe, Berlin 2004, p. 123.

37 COM(2011) 869 final, Art. 67.

38 Whereas the European Parliament would like to see a concept even including the internalisation of external social costs (see report Marc Tarabella of 11 January 2013, p. 109 ss.).

39 See Recommendations, p. 10; see also Art. 55 of the Commission proposal and Annex XI thereof (COM[2011] 896 final, also considering a violation of the ILO Core Labour Standards as a possible exclusion ground; so ILO Core Labour Standards would in the future not need to be dealt with in the context of contract performance conditions any more.

against a comparable norm when discussing a harmonized procurement law.⁴⁰ The Swiss textile industry's position was especially noteworthy, arguing that because of their reputational risks when selling textiles, they have become more and more compelled to control their supply chain, meaning that it was in their own interest that a rule should be set according to which competitors would equally have to respect the ILO Core Labour Standards.⁴¹ The disregard of these standards offers grounds for exclusion based on Article 8(1)(b) FAPP, which states that the contracting authority will only award a contract for services in Switzerland to a tenderer who will guarantee compliance with [inter alia] the terms and conditions of the employment of workers.⁴² In addition to this norm, the law additionally stipulates a punitive damage claim ("Konventionalstrafe"). Pursuant to Article 6(1) OPP, the bidder must not only abide by the rules as stated in Article 8(1)(b) FAPP, but is obliged to contractually bind their third parties contractors (subcontractors and suppliers) to follow the same procedural rules. The bidder is liable for its third parties, and it will be subject to sanctions if any key third parties are found to be in breach of the minimum social standards. In this respect, the procuring entity shall observe the principle of proportionality.⁴³ The notion of "key third parties" is a compromise, as the legislature is aware that in some sectors it is difficult to control the whole supply chain. This compromise also limits the transaction costs on both sides. A key party is therefore considered to be a subcontractor or supplier delivering an important component, or fulfilling an important partial service or a party operating in a particularly high-risk area (from an ILO perspective).⁴⁴ Last but not least, the Recommendations voice the idea that there must be more than just a self-declaration assuring compliance. The contracting authority can

rely on earlier audits guaranteeing observance of the required standards, but if there is a risk of the bidder breaching the minimum social standards, then generally an audit is required.⁴⁵ The underlying message is that on the federal level ILO Core Labour standards must be taken seriously.

V. Latest Developments in Switzerland – Controlling and Reporting in the Implementation of Sustainable Public Procurement

There are basically two possibilities of assuring that the departments and agencies make the step from forming a strategic target and formal communication to real implementation of Sustainable Public Procurement. One is to make SPP mandatory by legislation or via internal instructions issued by the departments or – in the case of public procurement – by the Federal Procurement Conference. Another way would be to establish a controlling and reporting structure in order to make the efforts of each department and agency transparent and traceable. Switzerland has to date been reluctant to implement rules on "what to buy" within the public procurement sector, and has therefore opted for the latter option. Given that, when exchanging views with other governments collecting procurement statistics is often described as a rather difficult task and the data received may not be meaningful, let alone accurate, one must say that from a comparative perspective this is an interesting choice.

However, the Swiss case is also remarkable because a general effort to improve procurement control under the aspect of implementing certain governance standards has also led to standards being implemented in regard to Sustainable Public Procurement. What sounds like a relatively modest change is in fact a paradigm shift and will probably prove to be a very ambitious course of action. According to Article 2 of the fully revised Ordinance on the Organization of Public Procurement (on the federal level) dated 24 October 2012 (OOPP),⁴⁶ procurement must be economically efficient, legally compliant procurement and sustainable.

The OOPP foresees the gradual establishment of a procurement controlling scheme with the objective (*inter alia*) to steer federal procurement towards economically, environmentally and socially

40 Art. 25(3) VE BöB.

41 Cf. Steiner, Sekundärziele (fn. 26), p. 386.

42 The legal basis for the exclusion itself can be found in Art. 11 FAPP.

43 Cf. Recommendations, p. 14.

44 Cf. Recommendations, p. 10.

45 Cf. Recommendations, p. 13 s.

46 SR 172.056.15, entered into force 1 January 2013; cf the relevant press release www.news.admin.ch/message/index.html?lang=de&msg-id=46443.

sustainable procurement.⁴⁷ Specific monitoring on SPP is foreseen, comprising all key data allowing reporting on whether and how far economical, environmental and social aspects of sustainability have been taken into account in the procurement procedure. These key data shall be gathered electronically by all procuring entities.⁴⁸ The entities responsible for centralised procurement shall also take the necessary measures in order to enable an efficient procurement controlling including the monitoring on SPP.⁴⁹ The Federal Procurement Conference is established as the strategic body qualified for the procurement of goods and services (on federal level). It adopts strategies and guidelines and has the special task to promote SPP in its three dimensions.⁵⁰ For the future, this could mean that there will more guidelines issued on sustainable procurement of specific product categories.⁵¹ If all this is taken seriously, then the organisation of the concerned agencies needs to be revised; it is probable that additional manpower specialising on SPP will be necessary, not – or at least not only – for the Federal Office for the Environment (FOEN), but also inside the Federal Office of Buildings and Logistics itself.

VI. Concluding Remarks: A paradigm change

The author remembers an extraordinary situation in 2001, when attending a class on the basics of public procurement led by the Federal Office of Buildings and Logistics. An official of the FOEN wanted to present her (rather moderate) views on life-cycle costing as a concept to be taken into account in the public tender process. By way of an introduction to her presentation, a high-ranked official of the Federal Office of Buildings and Logistics stated that what the audience was about to hear was in no way supported by the management of his

administration. The participants were thereby categorised as what would be called “passengers at their own peril” in air travel. Much has changed since then, especially on federal level.

How to deal with the federalist aspects of the Swiss system when trying to achieve a broad consensus on SPP remains to be seen. One of the methods to improve professionalism could be cooperations between smaller municipalities assuring joint procurement and the ability to appoint joint procurement officials with the relevant know-how. This would assure – at least to a certain extent – minimum standards of governance and good practice on SPP at the same time. Fair trade issues are starting to gain attention after the *Max Havelaar* case,⁵² but since the category of contract performance conditions does not exist in Switzerland, the discussion will probably focus on technical specifications and award criteria when discussing fair trade,⁵³ if not on the introduction of contract performance conditions. However, concerning Green Public Procurement, it is literally in the air that the decisive steps towards a credible implementation are now about to be made.

47 Art. 4(b) OOPP.

48 Art. 8 OOPP.

49 Art. 12(1) OOPP.

50 Art. 24(a) and (i) OOPP.

51 See concerning the recommendations on the procurement of (certified) wood www.bbl.admin.ch/kbob/00493/00495/index.html?lang=de.

52 ECJ judgment C-368/10 of 10 May 2010; see also *Marc Steiner*, „Gütesiegel für ökologische Produktion und Max Havelaar-Label für Fortgeschrittene: Der EuGH und die nachhaltige Beschaffung“, *European Law Reporter* 2012, p. 130 ss.

53 Cf. *Martin Beyeler*, “Kaffee: Bio und Fair Trade”, *Baurecht* 2012, p. 262 ss.