



UNCITRAL Colloquium on the Law of International Trade for a Greener Future

Vienna, 23-24 October 2024

Carina Risvig Hamer

Professor administrative law and public procurement
Centre for Climate Change Law and Governance

Carina.hamer@jur.ku.dk

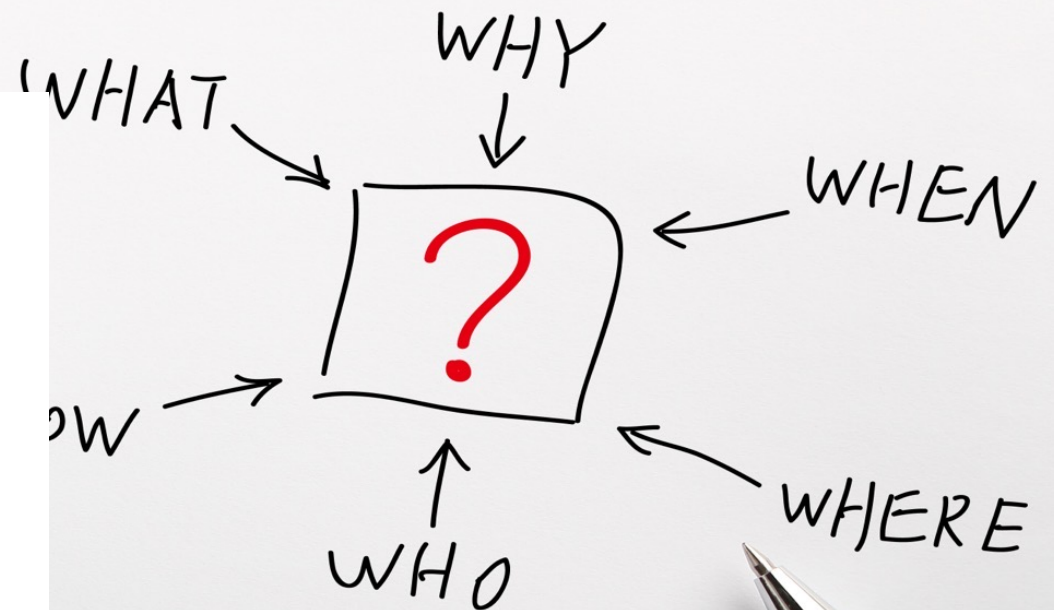
UNIVERSITY OF COPENHAGEN



Agenda

1. Policy considerations at EU level
2. The different tools (at EU level) to promote and include GPP
 - Contract management and enforcement
3. Challenges for the future

KØBENHAVNS UNIVERSITET



Policy considerations at EU level



Von der Leyen

“ I will propose a revision of the Public Procurement Directive”

Draghi-rapport

“More focus in public procurement on what to buy should, however, avoid a large administrative burden (the current framework has lead to 52 legislative acts for product groups, of which 43 have been already published or, at least, adopted).”

Evaluation of the Public Procurement Directives:

https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14427-Evaluation-of-the-Public-Procurement-Directives_en

Council Conclusions May 2024

... new rules that promote **sustainable procurement** and fair and effective competition while achieving, as far as possible, the removal of excessive and unnecessary administrative barriers (...)

UNDERLINES the importance for public buyers to **retain flexibility in determining the nature and inclusion of strategic considerations** in their procedures;



Finding the right balance in public procurement law?

Advocate general Kokott in 2011 C-368/10, Max Havelaar

... the challenge of finding an equitable balance between the requirements of the **internal market** and environmental (...)

- On the one hand, there can be no discrimination between potential tenderers or partitioning of markets.
- On the other hand, contracting authorities must be allowed to procure environmentally friendly, organic and fair trade products without excessive administrative burdens.



What is the purpose of public procurement?

Regulating climate and procurement at EU level



Products

Regulating products directly (with a spin-off to public procurement)

Ecodesign regulation



Undertakings

Regulating undertakings work on sustainability

Corporate sustainability reporting Directive (CSRD)

Corporate sustainability due diligence Directive (CSDDD)



Sectors

Regulating sectors

Constructions
Energy
Transport etc.

Different mechanisms in EU public procurement for GPP



Technical Specifications

Many acts contain minimum criteria



Exclusion grounds

Deforestation (Regulation (EU) 2023/1115)

Ecodesign Regulation



Award criteria

Netzero-Industry Act

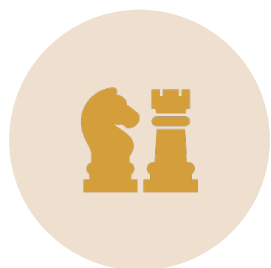
Ecodesign Regulation



Contract performance conditions

CSDDD

Challenges with the many rules at EU level



The interaction between the traditional procurement legal framework is challenged



Different implementation of the rules in the EU Member States



Places higher demands on public purchasers e.g. to their competences and knowledge



What does the many green requirements mean for competition?

More than (green) rules

- **Guidance**

Kommissionens håndbog, **Buying green! A Handbook on green public procurement**,

- **GPP Criteria**

- https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements_en

- **Sharing knowledge among stakeholders**

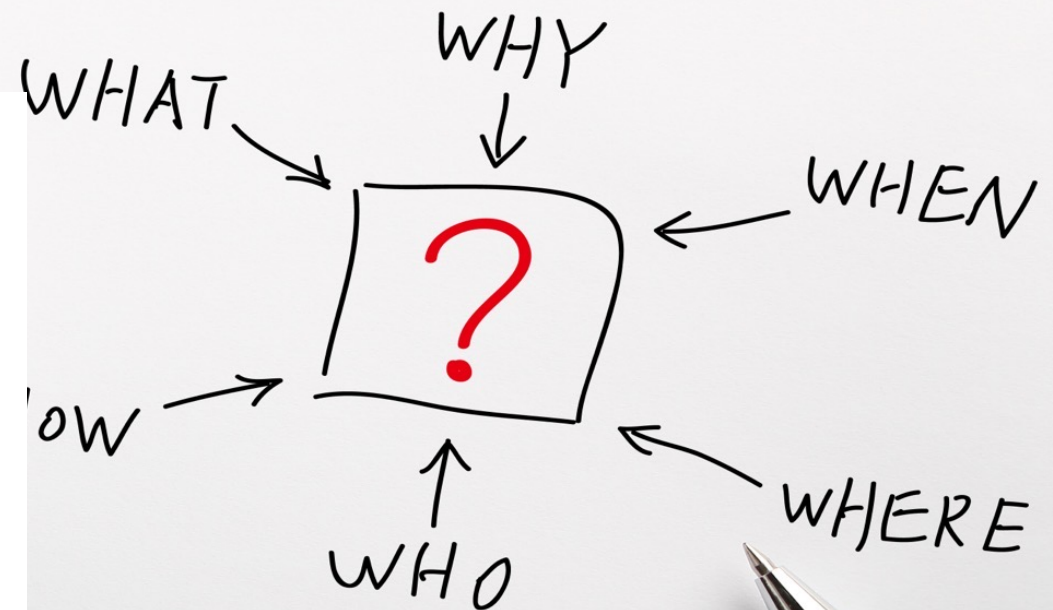
- Kommissionen Bigbuyers initiative
- <https://public-buyers-community.ec.europa.eu/about/big-buyers-working-together>

-

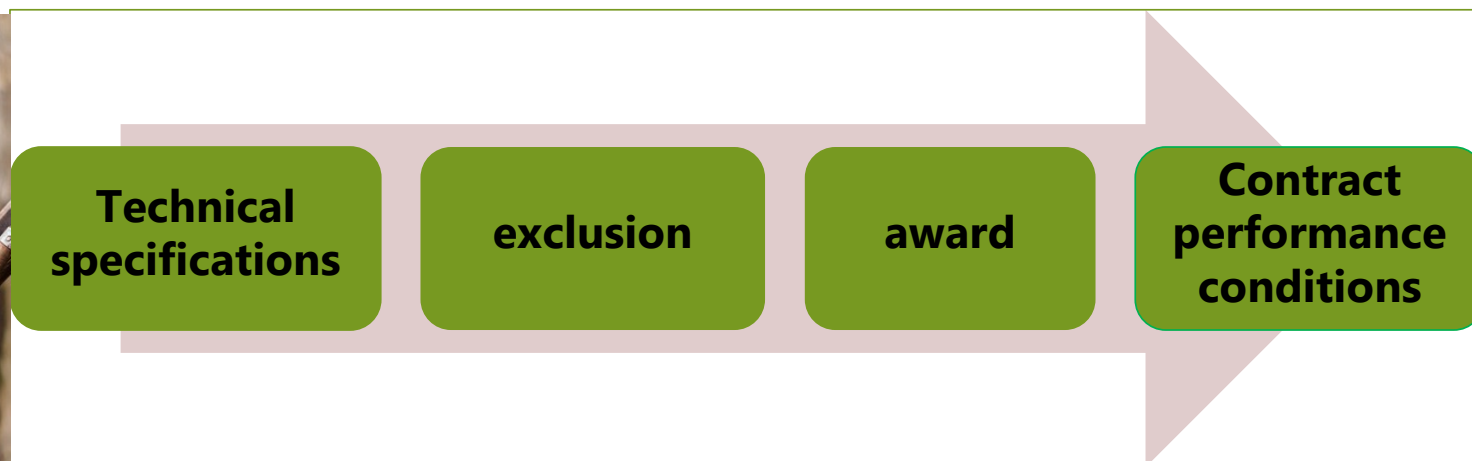


Green Public Procurement Toolkit

2. The different tools (at EU level) to promote and include GPP



2. What is possible?



Use the existing toolbox, e.g. :

- Use existing agreements - buy used, etc
- Talk to the market
- Competition v. minimum requirements
- Lifecycle costs/labels etc.
- Contract terms (development/staircase) v. minimum requirements



Green contract conditions

Procurement conditions

- Technical specifications standards, labels etc.
- Award criteria
- Exclusion and selection (particular attention to termination requirements)

- **Green contract conditions**

1. Contract performance conditions

- “Linked to the subject matter”
- Must be stated in the procurement documents
- Procurement principles

- **Examples:**

- Waste minimisation or resource efficiency
- The delivery of goods in large boxes instead of delivery as individual goods
- That the contract requires the recycling of waste produced during or after the use of a product.
- Conditions linked to so-called "last-mile" transport, where the transport of goods for the final trip to the contracting authority's location must be done by emission-free vehicles
- Many, many more...

Green contract conditions

- **Enforcement of green contract conditions**
- Making sure the contracting authority gets what the tenders promised
 - “Procurement greenwashing”
- **Development of green contract conditions**
- How the contract can develop over time and take into account new green elements and innovation
 - Innovation clauses
 - Contract review clauses
 - Continuous improvement of green elements over time
 - Cooperation in the contract phase

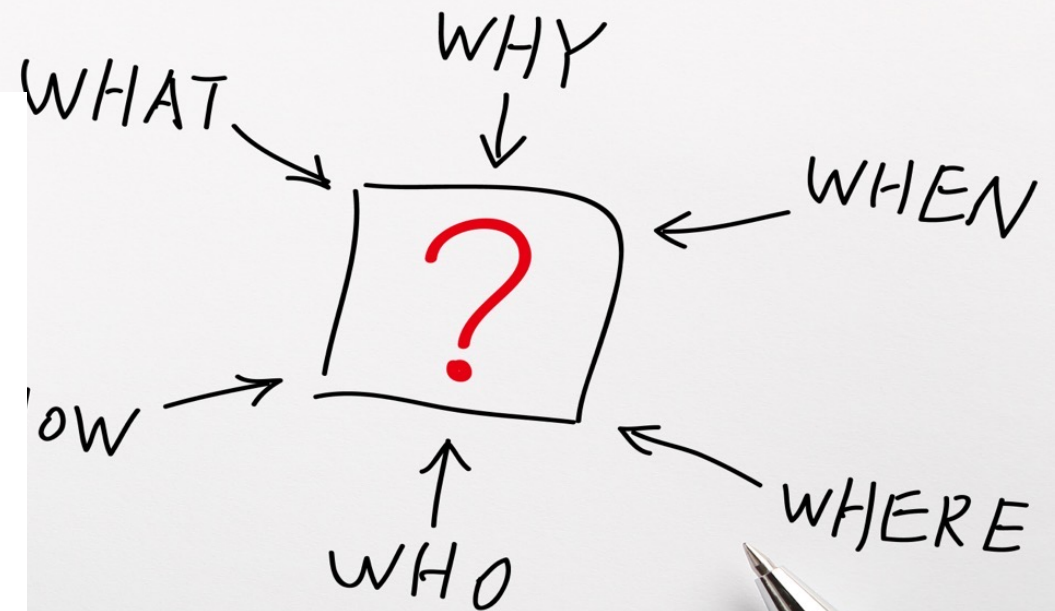
Contract modifications in Article 72
Can require a new procurement procedure

Compliance: Green contract conditions

- **To enforce:**
- Need to know what applies in the contract
 - Contract management - compliance
 - Investigations/checks/new documentations
 - Contract law - interpretation
 - Documentation e.g. labels
- What is the consequence?
 - Penalty? Termination?
 - Not necessarily good for cooperation/contractual relationship – but it can potentially be necessary to avoid it being a contract modification



3. Challenges for the future



Some of the challenges with including climate in procurement

- 1) Defining what green procurement is
- 2) Knowing what is green and what works
- 3) Ensuring that what is delivered is green
- 4) Knowing what the market is capable of
- 5) Resources at the contracting authorities
- 6) A little bit the procurement rules (mostly the many new ones)
- 7) Will there be more GPP if mandatory rules/goals?



Contracting Authorities needs tools – not rules!

- **The rules are not the main challenge for introducing more GPP**
 - Lack of knowledge about what works
 - Use existing procurement tools
 - Need for more official guidance
 - Better input from the market
 - Knowledge sharing
 - Education
 - I don't believe in mandatory requirements



PROCUREGREEN



**Questions &
comments?**

Professor Carina Risvig Hamer

Carina.hamer@jur.ku.dk

Linkedin:

<https://www.linkedin.com/company/procuregreen/?viewAsMember=true>

<https://jura.ku.dk/sustainabilityhub/procuregreen/>