



Social Services Europe

SSE Statement on the EC Guide/Commission Notice “Buying Social – a guide to taking account of social considerations in public procurement (2nd edition)”, Brussels, 26.05.21, C(2021)3573 final

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1) Introduction

[Social Services Europe](#) (SSE) is a **network of eight European umbrella organisations** – comprising Caritas Europa, CEDAG, E.A.N., EASPD, EPR, Eurodiaconia, FEANTSA and the Red Cross EU Office – **representing over 200,000 not-for-profit social and health care organisations**. We are **active in a sector employing over 11 million people, of which about half employed by social economy organisations**. It is also characterised by a strong employment growth dynamic in the last 10 to 15 years (with an increase of the workforce of more than 10% only between 2013 and 2018), also due to growing social needs. The COVID-19 pandemic clearly showed its relevance, its resilience, but also exposed challenges and weaknesses.

Our national members **support millions of people in various stages in life**, such as children, the elderly, persons with disabilities, people at risk or experiencing poverty and social exclusion, homeless people, migrants and asylum seekers and other vulnerable groups. They offer **care, support, guidance, education, and training services**, also with the aim to empower the people needing them. Social services are a **core part of national social protection systems** and are **services of general interest**.

2) Why is public procurement relevant for SSE and for the services provided by its members?

Public procurement and the relevant EU-level legislation in place – as part of a sustainable and supportive legal, regulatory, financial, and quality EU-level framework for social services – **is of high relevance for our members; and this for more than a decade already**. In the last 10 to 15 years, **SSE has regularly and intensively worked on this topic** with the aim to influence Directive 2014/24/EU and the EC Guidance on Socially Responsible Public Procurement (SRPP). SSE contributed to the [EC Consultation on the scope and structure of a EC Guide on Socially Responsible Public Procurement](#) (February 2018). Based on input from its members, in 2019 we compiled examples for the use of public procurement. SSE had also issued an [assessment of the 2014 Procurement Directive](#) and prior to this had made [proposals to the European institutions on the scope of the directive being revised and relevant wording](#) (2012). It is also expected that the Social Economy Action Plan (expected on 8 December 2021) will also deal with the use of SRPP.

Public procurement is a **complex process** which starts well before publishing a contract notice as first needs are to be assessed. It does not end with a contract award notice but continues with the contract performance and its evaluation.

- **Where public procurement is chosen by a public authority and/or has to be used** in order to organise and finance the delivery of social services, according to national legislation or regulation in place in an EU Member State, **SSE strongly promotes socially responsible public procurement (SRPP)**.
- This being said, **SSE does not believe that public procurement is often the right funding mechanism** through which to finance social service provision **and promotes the use of alternative models which focus more on partnerships and less on buyer-supplier logics**.

In a public procurement context, SRPP should generally be considered as “best practice”. Why? Because for SSE **best value** in public contracting when using public procurement does not mean lowest price. It means the **delivery of the best service quality** (in line with state-of-the-art methodologies, equipment, and technology, too), a **focus on the needs and capacities of the users** and **supportive rules and frameworks for employment, decent pay and training of an adequate number of well-qualified staff**.

In addition, for SSE **wider social, ethical, and environmental benefits of quality social services** need to be given clear weight by public buyers in the design of the appropriate instrument and in procurement decisions.

3) Next steps planned

Social Services Europe intends to **use this statement for a continued exchange on how and where to best promote socially responsible public procurement (SRPP)** and on the best use of the 2021 EC Guide “Buying Social” in the field of social services, with the European Commission, other relevant EU institutions, but also other stakeholders.

We also plan to **engage in discussions with the European Commission and other stakeholders**, such as national governments, based on reporting activities which will investigate the transposition of Directive 2014/24/EU in national law and its implementation in all 27 EU MS (or of specific aspects thereof, such as the review of the economic effects of the internal market resulting from the applications of the thresholds as required by article 92) foreseen by the Commission Services in 2022.

For SSE it is crucial to identify and promote alternative models to public procurement (complying with general principles of EU law, such as transparency or non-discrimination/equal treatment), **to collect evidence on their impact** on key features of social service provision such as service quality, affordability, accessibility, effectiveness, user involvement and employment conditions (from our members and research) **and to get full recognition for their use** (including in official EC documents).

4) SSE assessment of the EC Guide/Commission Notice “Buying Social – 2nd Edition” (26 May 2021)

4.1 What is in principle positive and/or helpful?

4.1.1 More general points

- SSE welcomes that the wording in the [2nd edition of the EC Guide](#) is **more supportive of SRPP than in the 1st edition of the EC Guide** “Buying Social. A Guide to Taking Account of Social Considerations in Public Procurement” (2010/2011). It is positive that it spells out that in order

to “address societal challenges, public authorities need to **step up efforts to deliver on all aspects of sustainability (social/ethical, environmental and economic).**” (p. 6) It is also helpful that the Guide starts off by highlighting that in the national recovery strategies – but also beyond! – “EU Member States will need to improve social inclusion and fairness through education and skills, employment, and social and territorial cohesion, and ensure that the green and digital transitions will create jobs, sustainable growth and socio-economic resilience“ and that “**socially responsible purchasing practices are a powerful instrument in the toolbox of EU national administrations to reach these goals**” (ibid). The Guide also spells out that “SRPP can help make measurable progress towards social goals, such as protecting human rights, promoting equality and creating high-quality employment and inclusion.” (p. 24) and highlights the advantages of having an “organizational strategy for buying social” (e.g., p. 26 or p. 28). These changes in the concrete wording and “general orientation” of the Guide could also be made as the 2014 Public Procurement Directive contains fewer constraints and a less narrow interpretation of EU Single Market law than the 2004 Directive.

- It is positive that the **Guide highlights different areas of action for which SRPP is said to be an appropriate tool and driver (pp. 9-15)**, including “fair employment and social inclusion”, “promoting decent work” and “opportunities for social economy and social enterprises”. SSE welcomes that the Guide lists concrete fields of action and presents for many of them good practice examples on how to make SRPP happen in procurement procedures. Our members are e.g., offering services in the fields of “employment opportunities for youth and older workers”, “employment opportunities for people experiencing social exclusion”, “societal participation and employment opportunities for persons with disabilities”, “improved diversity policies, social inclusion and employment opportunities for persons from disadvantaged groups” (p. 9) or “Integration and inclusion” (p. 15).
- The **Guide presents SRPP as a “valuable tool” (p. 14) to help achieve a range of EU-level social and employment policy objectives** (including by means of initiatives included in the EPSR Action Plan) and jointly defined ambitions such as “a highly competitive social market economy, aiming at full employment and social progress and to combat social exclusion and discrimination, [...] promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child” (p. 14).
Reality check: For SSE, it is, however, important to highlight that competition has to be oriented towards better quality and more well-being and has to be organised backed up by supportive regulatory and policy frameworks at all levels. A predatory competition that negatively impacts the provider infrastructure and plurality is detrimental. The whole process of SRPP needs to be oriented towards the objectives of “Aiming at full employment and social progress and to combat social exclusion and discrimination, [...] promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child”. For SSE it is not sufficient that these objectives are incorporated in the subject matter of a contract.
- SSE positively acknowledges that the Guide **clarifies that Article 18 of Directive 2014/24/EU, the social and environmental clause, is not a choice but legally binding** for public buyers (p. 8). It is also positive that the Guide shows how these non-negotiable requirements to respect national laws and collective agreements should be reflected by the commissioning authority **at each stage of the procurement process**. The same holds for **additional social requirements** that the public buyer identifies and wants to include.
- For SSE it is important that the 2nd edition of the Guide clarifies that **social criteria are taken into account at each stage of the procurement process**, which is a clear and welcome progress compared to the 1st edition. It is also important that public buyers are encouraged to ensure

that “procurement achieves social benefits and prevents or mitigates adverse social impacts during the performance of the contract.” (p. 7) The same can be said about the **illustration provided on how social criteria relate to different stages of procurement process**. For SSE it’s helpful that the Guide now uses the analogy with apples (p. 51) to explain that commissioning authorities indeed can give the preference to the purchase of apples grown by workers with good working conditions”, an analogy that could and should also be applied to the social services sector.

Reality check: Still, it is important to stress that these clarifications are made for cases where public procurement is or has to be used, but that SSE does by far not consider public procurement as the most effective and appropriate funding mechanism through which to finance social service provision in the field of social services.

- SSE considers in principle useful that the Guide multiple times **encourages public buyers to link their procurement more to particular “social outcomes and impacts”**, e.g., linked to sustainable development (p. 6). It also spells out that they can consult the suppliers and bidders of a product or service “as part of a market consultation, what type of contract or framework agreement would best allow them to deliver social outcomes” (p. 47).
- More generally, SSE acknowledges that the Guide is a useful tool to **support the alignment of public procurement with the social, environmental, and economic objectives of the EU**. It can also help – should this impulse be taken up by the policy and decision makers from local to national level – to better consider commitments set out in the Sustainable Development Goals (SDGs) and links between environmental and social objectives in procurement to facilitate a “just transition” in line with the aims of the European Green Deal.

4.1.2 More specific points

- Of particular interest for SSE is the **coverage by the Guide of the special regime for social, health, education and cultural services** (p. 12; p. 49; pp. 53ff). It highlights – in case a public procurement model is chosen by the competent public authority (or has to be used according to national legislation or regulations) – that “**public buyers are encouraged to take into account ‘quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation’**” (p. 12; similar: p. 55). It is also positive for SSE that the Guide contains an **explicit reference to quality standards that “can also be applied when procuring social services, such as the 2010 Voluntary European Quality Framework for Social Services.”** (ibid.)

Reality check: What on paper reads fine, however, in reality is often not happening on the ground, influenced by an interest of public buyers to reduce legal insecurity to a maximum.

- It is positive for SSE – and also in line with existing evidence – that the Guide highlights that a special regime and separate rules should apply to **social services** which “by their nature (...) are **generally of limited cross-border interest.**” (p. 53)
- Our membership includes “work integration social enterprises” for which the Guide underlines that the “**Procurement Directives provide the scope to promote social inclusion by reserving contracts for work integration social enterprises** or those operators which employ at least 30% persons with disabilities or disadvantaged workers.” (p. 9) This is another positive feature, as the **confirms the possibility to use reserved contracts for “sheltered workshops** and economic operators whose main aim is the social and professional integration of persons with disabilities or disadvantaged persons” (p. 58) in line with Article 20.

Reality check: However, SSE members report that in practice things often look differently,

*meaning that the **recourse to public procurement puts higher hurdles for or makes a user- and human rights-based social and labour market inclusion more difficult**, in particular where unequivocal supportive national legislation to support organisations and services with high shares of persons with disabilities or disadvantaged workers is lacking. The problems in practice are also reflected by the fact that **in some EU Member States local authorities are reluctant to make use of the relevant provisions** which are seen as reducing competition and as an additional cost factor.*

- SSE welcomes that – under the heading “Accessibility and design for all” (p. 10) – the **Guide unequivocally underlines that “procuring goods, services and works that are accessible to all, including persons with disabilities, is a fundamental aspect of SRPP and is compulsory in public contracts.”** (ibid.). SSE also considers helpful that the 2nd edition of the Guide underlines the requirements for the design of a number of products and services of the 2019 European Accessibility Act (pp. 17-18).
- The Guide covers the category of **posted workers** (p. 20f), potentially also relevant for certain sub-sectors of social services, such as (home-based) elderly care and support. It is positive that it recalls that the most recent revision of the Posting of Workers Directive 2018/957/EU “strengthened the principle of equality between posted workers and those in the host State, including equal remuneration” (p 20) and that now “posted workers are entitled to all mandatory terms and conditions of employment in the host state” (ibid).

***Reality check:** While securing equal wages for posted workers and those in the host country, still a link to wages set by collective agreements, not by statutory minimum wages, is difficult. In a number of EU MS, however, collective agreements define pay and labour conditions (such as wages, holidays, working hours, standby duties) and thus also strongly influence real labour costs. Unless labour costs “deriving” from collective agreements are recognised as economic wages, bidders may score high, e.g., for the quality of their services but risk being undercut by competitors offering lower wages and less advantageous employment conditions.*

- Being for a very large share of the membership an integral part of the social economy, it is important for SSE that the Guide acknowledges that the **Procurement Directives “also encourage public buyers to consider dividing contracts into lots, which may be more accessible to social economy organisations and social enterprises.”** (p. 9)
- SSE welcomes that the **Guide sets out how the full range of modalities of public procurement** contained in Directive 2014/24/EU **can be used** (p. 47ff). This comprises a) the competitive procedure with negotiation (article 29), b) competitive dialogue (article 30) and c) innovation partnerships to implement innovative service concepts and/or new models of service provision (article 31). It contains examples how to use them. It is also positive that the Guide mentions the **importance of evaluating needs before initiating any procurement**, e.g., in the case of the competitive dialogue which foresees an exchange between the commissioning authority and potential bidders on the needs to be addressed and on the solutions and service design to appropriately address those needs identified, based on the requirements of the public buyer. For SSE it, however, seems that these “specific” modalities of public procurement that allow to address some of the limitations of the “standard format” (= open procedure) are **not (yet) actually made use of (at least not to any relevant degree) in the field of social services.**

***Reality check:** There is anecdotic evidence from SSE members that the range of procurement modalities listed in articles 29 to 31 of Directive 2014/24/EU is not used as a rule, meaning that the “standard procedure” (with elements of SRPP) still being the general standard. One reason might be that public buyers are discouraged to use them by auditors.*

4.2 What is problematic and/or lacking?

4.2.1 More general points

- The Guide is **cautious about actually encouraging public buyers to go for SRPP** and to give clear preference to bids giving more weight to the realisation of social policy objective, innovative models of the delivery of social services and/or social, labour, human or user rights. It explains the options and provides promising practice examples.
- The Guide does **not mention that there are proven, tested and long-functioning alternatives across the EU MS to public procurement, including for the social services sector**. On p. 55 the guide lists in-house provision, the cooperation of different public buyers and (a specific constellation for) the award of grants, but **unfortunately omits to mention alternative modalities** to purchase and finance social services by public authorities and to proceed to the selection of service providers. SSE thinks of, e.g., a) **triangular contractual relationships** between a funding agency, a provider and a user of social services, b) **user-based modalities** (personal budgets; service vouchers) or c) the more general **use of public grants based on contracts with service providers having the authorisation, accreditation, or license** by the relevant public authority to deliver social services.
- Continuing from the last point, the Guide is **silent about the fact that** in order to have sustainable ways of organising, providing, and funding social services, **all providers need a level-playing field**, also as they need to invest in service infrastructure and qualified personnel and thus incur costs to sustain this infrastructure and to qualify and employ their personnel. This point is essential as in the field of social services, at least in some sub-sectors, it is difficult to fully plan ahead both the precise needs of the (current and future) service users and the exact number of those having those needs for care, support, guidance, education, or training.

4.2.2 More specific points

- Even though the Guide contains illustrations on how social criteria relate to different stages of procurement process, it still seems to **show some reluctance to promote the use of social criteria in the technical specifications**. Alike, it also appears as if the Guide still seems to contest a corporate social responsibility (CSR) link for other services from the same provider.
- The Guide is **not specific about what are/might be appropriate contractual and funding arrangements to arrive at positive social outcomes and impacts** in a procurement framework, even though it mentions that “Successful social outcomes contracts often involve partnership with social enterprises and jointly designing services” (p. 87). The example of Social Investment Bonds (SIB) included in the Guide to underpin and illustrate the advantages of procurement for social outcomes and impacts (p. 88) is not really convincing. Social outcome contracting (p. 86ff) and “payment by results” (p. 87) in the field of social services are complex issues which for SSE are not best addressed by using public procurement procedures.
- For SSE, in addition to the Guide also **other instruments are needed to help amplifying the impact of the Guide and to create dynamics beyond the Guide**. SSE would welcome continued efforts by the EC to encourage the EU MS to increase the take-up of SRPP. This could be done e.g., through **National Action Plans, targets for shares of SRPP** as well as **training and other appropriate support measures for buyers and bidders**. Earlier initiatives, such as the Buying for Social Impact Project (2018-2020) and [Report](#) (2020), exist to build on.