

2022

CircPro
Interreg Europe

 European Union
European Regional
Development Fund

Preliminary market consultations as a way to involve businesses in circular public procurement

Author

Marina Sorokina
Kouvola Innovation Oy (Finland)

Contributions and acknowledgements:

Marita Melkko
Kouvola Innovation Oy (Finland)

Thomas Storfjord
Ane Christensen Tange
Alf Kristian Enger
Municipality of Elverum (Norway)

Gabriella M. Racca
University of Turin (Italy)

Evelin Piirsalu
Harri Moora
Stockholm Environment Institute
Tallinn Centre (Estonia)

About the CircPro project

The Smart Circular Procurement project (CircPro) aims at promoting the transition to a more circular economy oriented national and regional decision-making by increasing the implementation of circular procurement in the project partner regions.

CircPro's main objective is to improve the targeted policy instruments by incorporating the circular economy principles and criteria. The project is funded by the Interreg Europe Program (European Regional Development Fund). It gathers 11 partners from 9 EU regions and Norway.

More about the CircPro project:
www.interregeurope.eu/circpro

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Introduction

A preliminary market consultation or a market dialogue is an interaction with potential providers of goods, services and works or with independent experts or authorities initiated by a procuring organisation before launching a tendering procedure. It is one of the ways to perform market research or analysis preceding the procurement.

Preliminary market consultations with businesses are an efficient way for procurers to explain their needs and requirements to potential suppliers, especially in case of such novel approaches as circular procurement, get knowledge on goods and services available on the market, ideate possible solutions together with suppliers, identify a suitable procurement procedure and outline content of procurement documents and contracts. A successful preliminary market consultation leads to high-quality bids to choose from and fewer claims related to tender results.

Dialogues with businesses are crucial in the case of circular, sustainable and innovative procurement as they help procurers and suppliers understand each other better and find the best possible solutions jointly. In the case of circular procurement, preliminary market consultations provide a perfect opportunity to discuss the importance of the circular economy, think together on how to promote the circular economy in the procurement in ques-

tion and consider circular economy criteria to be included in the procurement documents. Such topics require mutual learning, as they are new to procurers and companies. It is wise to introduce new requirements gradually and via discussion.

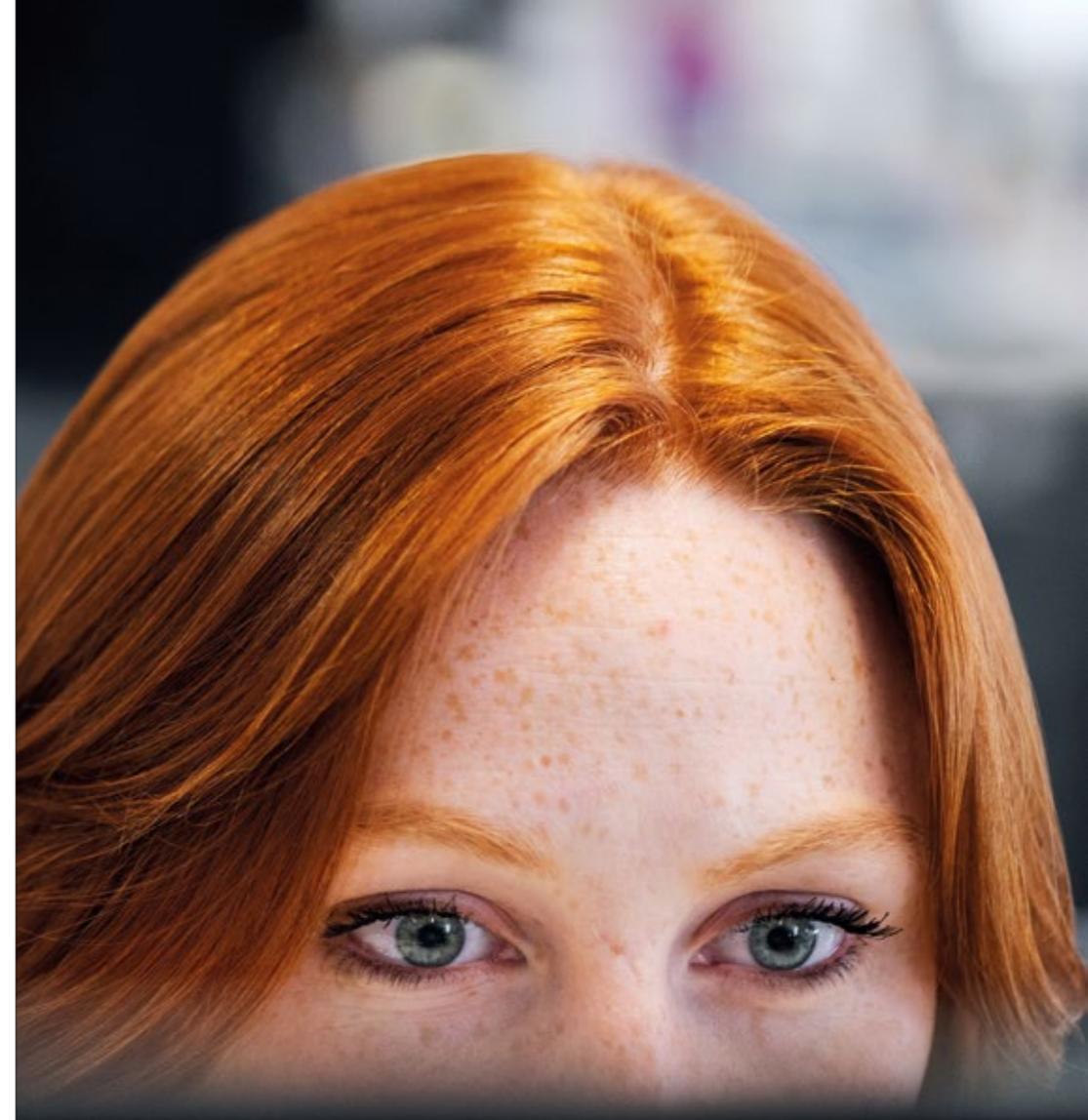
Not knowing the market and what it can offer is considered one of the barriers to circular procurement. Besides other benefits, preliminary market consultations help to overcome this gap. This guide covers practical aspects of planning and implementing preliminary market consultations with businesses within circular procurement. It is based on experiences from the CircPro project partner cities such as Kouvola in Finland and Elverum in Norway and complemented with information from the Piemonte region in Italy, the Andalusia region in Spain and Bulgaria.

The guide targets public procurers who need encouragement for dialogue with market actors and circular procurement in general. The guide considers a preliminary market consultation with potential suppliers, market engagement and a market dialogue as terms with the same meaning. It does not touch upon preliminary market consultations with independent experts or authorities and other forms of market analysis like desktop research, attendance of thematic trade fairs, etc., that cause fewer concerns among public procurers.

The legal basis for preliminary market consultations

Preliminary market consultations are a voluntary part of the public procurement process aimed at making the tendering procedure more efficient. Article 40 of Directive 2014/24/EU and Article 58 of Directive 2014/25/EU on public procurement outline that “before launching a procurement procedure, contracting authorities/entities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.” Similar provisions have been introduced into the national legislation of the European countries.

Compared to the other steps of the tendering process, preliminary market consultations are not strictly guided by the law. If there are no nationally or locally set guidelines, each public procuring authority decides itself whether and how it wants to engage in a dialogue with the market before launching an official tendering procedure. Nevertheless, engagement with the market must not distort competition or violate the principles of non-discrimination and transparency. The guide’s chapter “How to secure transparency, non-discrimination and fair competition” addresses these issues. It is possible to apply preliminary market consultations to any procurement irrespectively of its threshold.



Being an excellent tool to increase the efficiency of public procurement, engagement with the market can be encouraged locally by setting relevant targets in the region-

al and municipal policy documents and procurement programmes. Here is an example from the City of Kouvola, located in South-Eastern Finland:

Good practice: approach to strengthening communication between procurers and businesses to achieve strategic municipal goals in Kouvola (Finland)

To strengthen communication between buyers and businesses and to achieve the strategic goals of the city, in 2018 – 2021, the City of Kouvola took some measures to promote the implementation of dialogues with the market in municipal procurement:

- the Procurement programme of the City of Kouvola 2018 – 2021 set a goal to increase the number of market consultations per year;
- the Procurement guidelines of the City of Kouvola recommended procurers engage in dialogues with the market and gave some advice on how to conduct preliminary market consultations;
- evaluation of the necessity of preliminary market consultations was mandatory for all municipal procurement cases exceeding €300 000;

- to support the procurers, a procurement specialist helped municipal buyers plan, organise, conduct and document dialogues with the market.

The City of Kouvola started to monitor the number of preliminary market consultations implemented per year after the approval of the Procurement programme in 2018. The municipality counts public consultations implemented as live events or online meetings (due to COVID-19) toward this indicator. In 2019, market consultations were implemented in 17% or 17 of all municipal tenders. In 2020, the number of market consultations doubled. They took place in 32% or 35 of all city's tenders.

Why engage in dialogue with the market?

Engagement with the market is worth considering in the following cases:

- procurement is complex and challenging; procurement of a non-standard item or new solution;
- new criteria (e.g. related to circularity) are planned to be introduced;
- a procurer is not sure whether the market can deliver desired solutions;
- a new public procurement procedure is planned to be applied;
- a procurer needs better information about services, products and technologies available on the market and their circularity;
- a procurer does not have answers to some questions and needs information from the market to proceed further with the procurement documents.

Market dialogues help all sides to understand each other and, thus, can bring several benefits:

- Procurers get to know suppliers and solutions available on the market, including new ones that have just entered the market. The market is constantly changing, and products and services are evolving. Market players have the best knowledge of those.
- Businesses can familiarise themselves with the procurers' needs through dialogue and, thus, offer solutions that suit the buyers the best.

- The market dialogue helps better to consider sustainable goals. While communicating their ambitions related to the circular economy, the contracting authority can encourage businesses to develop products and services further, prioritising recycling, reuse, or repurposing of the contract item or raw materials used. A good rule is to involve market players in dialogue each time there is a need for a new solution or operating model.
- A better understanding of the market gained through dialogue makes it easier for buyers to identify the most suitable procurement procedure for the purchase in question.
- The preliminary market consultations offer a good occasion for businesses to influence the content of the contract notice at this early planning stage. During the dialogue, economic operators learn more about the minimum requirements and comparison grounds and can comment on them. The contracting entity, in turn, gets quick feedback on requirements not feasible and an opportunity to adjust the contract notice before its official publication.
- The market dialogue is a perfect opportunity to discuss the importance of the circular economy and to think together about how to promote circular economy principles in the procurement case. What needs to be done to close the cycles in the project in question? How to prolong the service life of a product? To which

extent products can be repaired, reused or recycled? Can a service be bought instead of a product? It can also be a discussion about circular economy criteria to be included in the procurement documents.

- Discussions on circularity when many businesses are present can also reveal joint interests and inspire the establishment of new partnerships along the value creation chain and the development of new business models.
- Market dialogues can also display the bottlenecks that hinder circularity in some economic activities and, thus, give public actors new ideas related to the development of the infrastructure, making amendments to the regulatory framework, etc.
- By utilising information from the market, contracting authorities can develop a procurement case that would be attractive and realistic for many companies to participate. It fosters competition and results in a good number of offers. By making the procurement procedure more transparent for potential suppliers, market dialogues help to decrease the number of claims related to tender results.



Types of preliminary market consultations

There are different ways to organise preliminary market consultations depending on the buyer's needs and the time available for the procurement planning phase. The most common approaches to engaging in a dialogue with the market are as follows:

- A request for information in an official service for notices on public procurement and other platforms. A procuring organisation can compile a list of questions it wants to get answers to or share a draft contract notice or its part for comments. This method usually requires not so much procurer's time and other resources and allows receiving market feedback quickly.
- A joint meeting with suppliers, where all suppliers are invited. This approach allows the contracting authority to communicate with many market players and debate jointly.
- One-to-one meetings with suppliers. This approach is good when there are some trade secrets, innovative solutions, or other confidential information suppliers will likely not want to discuss with a group of competitors. However, this method is quite time-consuming for a buyer.

It is possible to utilise several approaches and organise follow-up consultations to develop one procurement case. Moreover, an informal dialogue not related to any specific competition is also a great way to grasp the market pulse. For example, municipal buyers can ask businesses how the municipality as a buyer is perceived and what improvements on a general level the city can bring to the future procurements.



A request for information



A joint meeting with suppliers



One-to-one meetings with suppliers

Good practice: preliminary market consultations within the Healthy Ageing in Public Procurement of Innovation project helped to define the procurement subject

The Healthy Ageing in Public Procurement of Innovation project (HAPPI project) developed a model for a cross-border joint procurement of innovative solutions in the health sector. In 2011, when the HAPPI project started, the procurement legislation didn't have explicit provisions about market consultations. The only basis was recital 8 of Directive 2004/18/EC, which allowed contracting authorities to use a technical dialogue with economic operators before starting an award procedure to seek suggestions for the preparation of technical specifications, provided that such contacts did not affect the transparency and competitiveness.

The HAPPI partners adopted a market and demand-driven approach to defining the specific field of procurement. To this end, they relied on the actual healthcare needs identified by end users and the results of an extensive online market consultation conducted via a web-based platform. Initially, interested companies were selected based on their possession of ISO9001 certification. The companies that achieved a sufficient score were then evaluated by expert committees to ensure that the proposed innovation was in line with the real innovation needs of institutions accommodating the elderly (i.e. hospitals and residential facilities). Finally, the 30 selected companies were invited to meet the consortium for an in-depth pre-

sentation of the proposed solution. The meeting ended with a final ranking.

In parallel, four information days were held in London, Turin, Vienna and Paris, which were attended by 60-90 people. The purpose of the information days was to explain the project, the planned procurement procedure and the expected benefits for suppliers and end users.

In addition, two studies were conducted as part of the HAPPI project: the first was aimed at identifying networks of innovative SMEs, while the second covered the main economic players in the "ageing well" sector. The first study was conducted through e-mails sent to more than 600 European intermediaries. The second study analysed the situation in 26 European countries through a questionnaire addressed to institutions and professionals.

The needs identification was followed by a market-based approach, strongly influenced by possible existing solutions. The project partners did not know from the beginning what kind of products and services they wanted to buy and went through the process of selection and analysis of more than 150 solutions. Once the preliminary market consultation phase was over, it was possible to define the tender strategy and the proposed innovation.

What is the best time to start preliminary market consultations?

If a market engagement seems necessary, it is advisable to start preliminary market consultations as soon as a contracting authority has defined its procurement needs. The bigger, more complex or innovative the procurement case is, the more time should be reserved for the market dialogue. Up to 6-12 months might be needed for planning and market consultations in the case of complex procurement projects.

In circular procurement, it is wise to start discussions as early as possible to understand how ready to deliver circular solutions the businesses are and how far it is possible to extend circular economy goals in the procurement case. Arranging market consultations and communicating ambitions related to the circular economy early in the procurement planning phase would give businesses some time to better prepare for the actual tendering.

In general, the preliminary market consultations should be organised well before the tendering so that the procurement procedure and the content of the contract notice can still be modified if necessary. It makes no sense to engage in dialogue with the market when there is no more possibility to amend the procurement documents or procedure based on the received information, for instance, due to high time pressure.

Whom and how to invite to preliminary market consultations?

The success of preliminary market consultations significantly depends on who participates in them. It is worth listing types of organisations that are good to involve in dialogue and planning how to reach out to them.

The circular economy requires collaboration within value chains and a life cycle perspective. In circular procurement, it is crucial to consider how to maintain purchased items during their use phase and deal with them at the end of their functional life cycle to secure their long lifespan and recovery of materials used in the products. The involvement of people with expertise in diverse fields related to different product life cycle stages leads to a deeper discussion. Thus, it is rewarding to attract to a market consultation not only sales persons but also architects, product designers, representatives of maintenance organisations and the recycling market, as well as end users.

At the stage of preliminary market consultations, no one should be excluded from the discussion. A good practice is to share information publicly and widely so that

as many potential bidders as possible become aware of the forthcoming procurement. The following information-sharing channels can be utilised:

- Publication of a prior information notice in a national official service for notices on public procurement (like HILMA in Finland or Doffin in Norway) or TED;
- Publication of information in commercial tender notification services;
- Publication of information on a website and social media channels of the procuring organisation;
- Sending direct emails with a link to publicly published information about the market consultations to relevant suppliers (this requires good knowledge of the market by a procurer);
- Via intermediary organisations like chambers of commerce, business associations, regional development companies, etc. that have good knowledge of the market players and can forward information to the relevant businesses;
- Publications in newspapers;
- Sharing information at relevant events.

When a contracting authority publishes an invitation to a market consultation in an official service for public procurement notices, there is a need to fill in the minimum required fields. However, sharing more detailed information about the procurement case might bring better results and help involve the right market players in a productive discussion. The invitation to a market dialogue can include the following information:

1. Brief information about the contracting entity.
2. Background and description of the procurer's needs:
 - What needs the sought solution should satisfy?
 - Who are the end users of the solution?
 - Is the demanded solution a product, or can it be replaced with a service?
 - What are the requirements of the end users in terms of the quality of a product or service?
 - What ambitions related to the circular economy does the procurement aim to pursue?
 - For instance, minimisation of used virgin materials (products with recycled content), prolongation of the product's useful life (products that are easy to repair, maintain, upgrade, adjust to the changing user needs, etc.), maximisation of materials recycling (products that are easy to disassemble at the end of their useful life and recycle, non-toxic materials, etc.).
 - What strategies, programmes or targets guide the procurement?
3. The reason for organising the preliminary market consultation. For example, looking for innovative solutions, getting to know what services and products that can satisfy the procurer's needs are available on the market or being developed and how mature the solutions are, getting to know companies or partnerships that can offer the relevant solutions, getting feedback of the companies on a draft contract notice and requirements, etc.
4. Practical information like time, place, agenda, and registration link in case a joint meeting of the procuring organisation and potential suppliers is going to be organised. In case a procuring organisation would like to get some written input from the market players, there is a need for information regarding where to find the questions, to whom to send the answers and by what deadline. It is also good to mention the contact details of a person from the procurer's side who could answer possible questions.
5. Description of market players whom the public procurers would like to engage in a dialogue. However, no one should be excluded at this point, and all interested economic operators should have an opportunity to participate in the market dialogue.
6. Information about how the results of the preliminary market consultations will be used (for example, for the development of a contract notice). What information received from the market will be put publically, where and why?
7. If already known, the timeframes for the main phases of the procurement procedure.

8. Information explaining that:

- participation in the preliminary market consultations does not prevent the market players from submitting a bid in the potential future tendering;
- market players who refrain from participating in the preliminary market consultations are equally allowed to participate in the potential tendering phase;
- organisation of preliminary market consultations does not oblige the public authority to conduct a

tender procedure in the future (the public authority can decide to stop the tendering process after the market dialogues).

It is recommended to share information about the market consultation events at least four weeks in advance to allow companies to arrange their schedules to participate in the meetings. In case of a request for information, a reasonable time must be given for answering the questions.

Case law: a decision of the Italian Council of State

In December 2018, the health company of Brindisi, a public administration providing healthcare in the province of Brindisi, located in the south of Italy, published a notice of preliminary market consultation to identify economic operators for the future procurement of electro-medical equipment maintenance services. The Brindisi health authority established specific requirements for the participation of economic operators in the preliminary market consultation, limiting the occasion to the manufacturer or its associates. Imposed minimum requirements effectively prevented participation in the market consultation of those who did not have a connection or commercial agreement with the equipment manufacturer.

The Council of State, in its ruling 6302 of 23 September 2019, partially reformed the decision taken at the first

instance by the Regional Administrative Court of Apulia, which established the legitimacy of the limitations imposed on participation in the preliminary market consultations. The judges of the Council of State ruled that preliminary market consultations constitute an exploratory instrument aimed at gathering information for the subsequent drafting of tender documents and ensuring wider dissemination of the procurement plans of contracting authorities. However, limiting the preliminary market consultation only to undertakings qualified by equipment manufacturers, thereby favouring, rather than counteracting, the lock-in phenomenon, is illegal. The limitation of competitive comparison is only justified if supported by specific reasons on the contracting authority's impossibility, rigorously ascertained, to meet its needs by turning indiscriminately to the market.

What to discuss with the market?

A well-prepared plan for a market dialogue event with potential suppliers increases the chances for a fruitful discussion. The content of the meeting can vary freely depending on the procurement in question and what information the procurers want to learn from the market players or communicate to them. The agenda can include the following items:

1. General information about the event

All meeting participants must understand the purpose of the meeting, what will be and will not be discussed, how the received information will be used, where to find meeting minutes and other materials, etc.

2. Introduction to the procurement case

The most important thing is to present the procurers' needs and communicate ambitions related to the circular economy so that market players can think about solutions they can offer.

3. Strategic goals that guide the procurement

If the goal is to contribute to achieving some municipal or regional strategic targets by implementing the procurement case, it is worth explaining to the potential suppliers what documents guide the procurement, what is the current situation, and what still needs to be done.

4. Topics to discuss

The discussion topics can vary significantly depending on the procurement subject and the prior knowledge of the procurers. Here are some examples:

- Where in the production and supply chain is the environmental impact the greatest?
- How to promote the circular economy and close the cycles in the procurement case?
- Where do the suppliers themselves have an opportunity to influence the circularity?
- What forms of cooperation among economic operators can be useful in reducing waste and encouraging recycling and reuse of contract items or waste materials produced?
- Is it possible to encourage the creation of temporary associations in which there is cooperation between those who produce a good or provide a service and those who are to be in charge of disposal or encourage the second use of waste?
- What services available on the market can satisfy the procurer's needs?
- Are the solutions that can meet the needs available on the market, or is there a need to develop them?
- Can cooperation among economic actors foster the creation of innovative solutions?
- How well do the production chains provide comparable information on the life-cycle environmental impacts of a product?
- How can the circularity of the solution be verified?
- How can the circularity of the solution be improved during the contract period? What incentives can be included in the contract?
- What is a realistic percentage of recycled content to add to the procurement requirements?

In addition, there can be presentations by external experts. Expert presentations on the topics related to the procurement case bring not only educational value to both the suppliers and procurers but also help start a discussion. Specialists of different research and higher education institutions and authorities can join the meeting as neutral experts not directly interested in the particular procurement case. Furthermore, similar procurement cases successfully implemented in other locations can serve as inspirational examples for the meeting participants. Thus, procurers or end users of the solutions can be invited to present their cases.

Moreover, if the procurement is not new, it is crucial to go through the previous contract period to see what things worked, what needs to be improved, where there were problems to tackle, etc. This evaluation can give an idea of what to discuss with the market before launching the next procurement.

If the draft contract notice is ready, it is possible to go through it with the market players to get their feedback on the feasibility of the requirements or suitability of the planned procurement procedure. A good practice is to send the documents to the registered participants in advance to give them time to check the materials and prepare for the discussion.



Good practice: preliminary market consultations revealed the environmental impact of public procurement of drugs for the health care sector in the Innlandet county (Norway)

In collaboration, Elverum and 12 other municipalities from the Innlandet county landed a new agreement valued at approximately 12 million NOK per year on the supply of medicines, multi-dose and nutrition drinks to their health care sector. The municipalities held an open tender competition and a dialogue conference. The aim was to review the upcoming procurement with potential suppliers and investigate possibilities before making the tender documents. During the dialogue conference, the procurers addressed suppliers some questions to check what measures can be included in the procurement to make it more environmentally friendly: Where in the production and supply chain is the environmental impact the greatest? What environmental requirements can be set for suppliers? etc.

The preliminary market consultation participants named last-mile transportation and destruction of drugs as the chains with the most significant environmental impact. Based on this information, the municipal procurers de-

ecided to change the pricing structure in the tender documents. Previously, the health sector could order drugs and other supplies every day of the week and get them delivered within 24h. The potential numerous deliveries were included in the price of drugs to cover suppliers' costs. After the market dialogue, it was decided to include only one delivery per week in the price of the products and to introduce a rate for transportation beyond the one delivery. These changes resulted in significantly lower prices for the products and less transportation leading to fewer transport and greenhouse gas emissions. If the municipal health care centres place their orders once per week, their costs will be less than before. If they continue ordering several times per week, their expenditure will rise. Such measures work as an incentive to minimise the transportation of goods per week.

In addition, the procurement included a requirement for a supplier to take back the outer packaging when delivering new goods and reuse or recycle it.

Good to know: the principle of “do no significant harm”

The EU Regulation 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility introduces the principle of “do no significant harm” to the environment (DNSH). The principle is yet neither mandatory nor generally applicable in public procurement. However, the DNSH principle is essential to access funding for recovery and resilience after the Covid-19 pandemic, providing that all measures, including reforms and investments, proposed in the national recovery and resilience plans of the EU Member States should not cause any significant damage to the environment.

Within the DNSH principle, measures are assessed on their compliance with six environmental objectives. One of these objectives refers to the circular economy. The Technical guidance on the application of ‘do no significant harm’ under the Recovery and Resilience Facility Regulation prepared by the European Commission states that “an activity is considered to do significant harm to the circular economy, including waste prevention and recycling, if it leads to significant inefficiencies in the use of materials or in the direct or indirect use of natural resources,

or if it significantly increases the generation, incineration or disposal of waste, or if the long-term disposal of waste may cause significant and long-term environmental harm”.

Even being not yet generally mandatory for public procurement, the DNSH principle can be used as a reference in tenders’ planning and discussed with the economic operators during the preliminary market consultation.

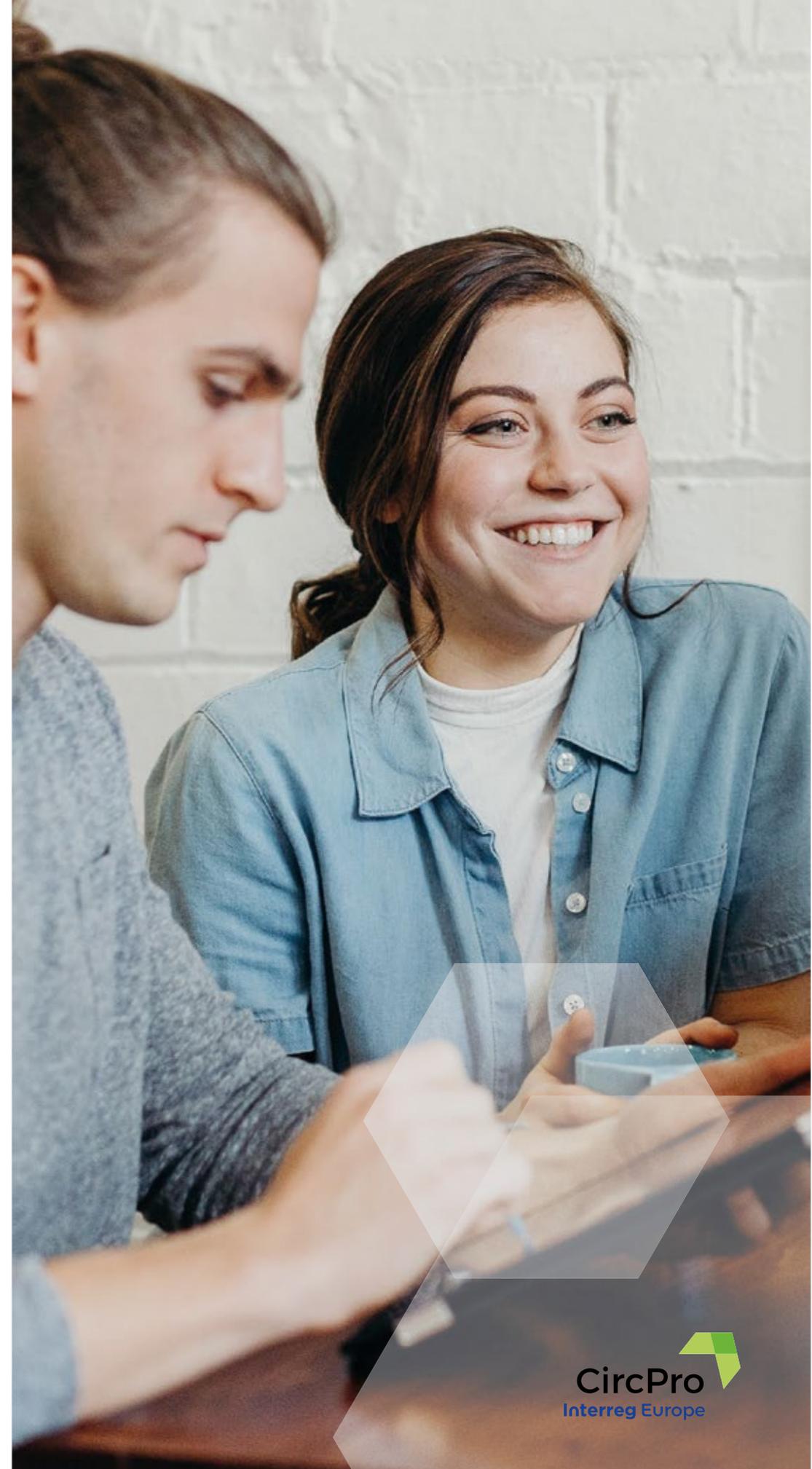
Normative references to the “do no significant harm” principle

The DNSH principle was first provided by Article 17 of the EU Regulation 2020/852 (framework to facilitate sustainable investment) and later included in the EU Regulation 2021/241 (the Recovery and Resilience Facility). To support national authorities in the Recovery and Resilience Plans development, the European Commission issued Technical guidance on the application of ‘do no significant harm’ under the Recovery and Resilience Facility Regulation.

In case of a request for information, the questions can be more tailored to the solutions a particular company can offer:

- What is your company's area of expertise?
- What solutions, products, or services that could meet our needs do you currently have?
- What innovative solutions, products or services that could meet our needs could you offer?
- What obstacles or problems are to be solved in order for a product or service to enter the market (e.g. legislation, economic, technical problem, etc.)?
- What prior commitment would encourage you to design a product or service?
- What kind of cooperation between different companies does the solution you offer require? You can also name partners needed to deliver the solution.

It is also good to ask whether businesses have any other information about their solution, product, or services or specific questions regarding the needs of the procuring authority. To not disclose commercially sensitive information, in the request for information, it is important to ask companies to specify which of their answers are confidential. (Motiva, 2020 (2)).



How to secure transparency, non-discrimination and fair competition

The main rule to remember while engaging in a market dialogue is to share the same information related to the procurement case with all market actors interested. During a market dialogue event or bilateral meetings with businesses, it is not allowed to allot such information with the participants that would not be included in the contract notice or otherwise be openly available for all market players. All information shared during the preliminary market consultation must be a part of the procurement documentation available to all tenderers on the date of publication of the call for competition.

In the case of a joint meeting, a good practice is to draw up a meeting report so that companies who have not been able to participate in the consultations can still get information about the main issues discussed during the meeting and what responses other participants received to their questions. The meeting minutes should, however, be anonymous so that it is impossible to relate questions and comments of the consultation attendants with certain companies. In the meeting report, it is advisable to include a procurer organisation's comments on all questions and ideas expressed during the meeting. If some ideas will not be utilised for further development of the

procurement case and reflected in the contract notice, there is a need to explain the reasons for this.

In the case of one-to-one meetings with potential suppliers, procurers should use the same questions and procedure for all consultations and allocate the same amount of time for each company. Essential is to keep the meeting minutes and write down companies' possible questions about the procurement case. Afterwards, the contract notice can be updated based on these questions guaranteeing that all market players receive the same information.

During market consultations, the procurement unit may receive ready-to-use document templates or calculation models from one of the potential suppliers. Utilising such materials as a part of a contract notice may create a risk to fair and non-discriminatory competition and, thus, should be viewed with caution by both the contracting entity and the bidder. If there are no other means to ensure the non-distortion of the competition, it may lead to an undesirable situation of excluding this tenderer from the bidding procedure.

Good practice: provisions of the Italian Public Contract Code

In Italy, the Public Contract Code admits the use of preliminary market consultations provided that:

1. they do not have the effect of distorting competition,
2. they do not result in a violation of the principles of discrimination and transparency.

Therefore, where a tenderer has provided documentation in prior consultation or otherwise participated in the preparation of the award procedure, the contracting authority shall take appropriate measures to ensure that competition is not distorted by the bidder's participation.

Disclosure to other bidders of relevant information exchanged as part of the tenderer's participation in the preparation of the procedure or obtained as a result of such involvement, as well as the setting of appropriate

deadlines for the receipt of bids, are considered adequate measures (Article 67 of the Italian Public Contract Code). Conversely, excessively tight deadlines for the bid submission would facilitate bidders who participated in the procedure preparation.

Where it is impossible to ensure compliance with the principle of equal treatment, the bidder concerned shall be excluded from the procedure. Before proceeding to their exclusion, the contracting authority invites candidates and tenderers (starting date), within a time limit not exceeding ten days, to prove that their participation in the preliminary market consultation (or participation in preparing the award procedure) does not distort competition. If the bidders prove that there will be no distortion of competition, they may participate in the tendering procedure. Otherwise, they will be excluded from participating.

How to minimise risks

While engaging in a market dialogue, it is good to bear in mind some risks that may occur and develop a strategy to cope with them.

Whilst answering procurers' questions, suppliers tend to provide information that benefits them. The buyers should be aware of this and use the market input only as a factual basis for their assessments. The market dialogue can make the procurers smarter and bring valuable input to advance the procurement. Nevertheless, the contracting authority is the one who designs and decides the content of the competition. It is advisable not to rely solely on the answers provided by the businesses or other parties but to use them together with the information from other sources.

Furthermore, joint consultations with suppliers are sometimes seen as events that can foster bid rigging or unfair competition. By attending such joint meetings, companies can get an idea of how tough the competition during the tendering phase will be and what other businesses are interested in bidding. In the worst scenario, it might lead to secret illegal agreements between businesses aimed, for example, at raising the prices or lowering the

quality of services and products offered. In its report "Recommendation of the Council on Fighting Bid Rigging in Public Procurement", OECD provides some advice on how to recognise and prevent bid rigging. However, in circular procurement, the focus is often placed on functional performance, the ability of a solution to satisfy the need, rather than how exactly it is done. It gives the floor to innovative solutions and encourages competition not only between products but also between products and services, making bid rigging more difficult.

In addition, it is not always easy to start a dialogue during a joint market consultation, as businesses might not want to comment or ask questions in the presence of their rivals. If a contracting authority plans to discuss something that may constitute a trade secret, it is better to arrange one-to-one meetings or prepare a request for information. Under other conditions, a facilitator may help start a discussion with businesses. Moreover, it might be advantageous to invite external experts from a research institution or a public authority who can present a topic related to procurement and share their views regarding the possible content of the upcoming tender.

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Thank you!

Marina Sorokina
Kouvola Innovation Oy (Finland)

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