

POLICY REPORT INTO  
SOCIAL CLAUSE USAGE IN  
IRISH PUBLIC PROCUREMENT

# TOWARDS A NEW STRATEGY FOR PROGRESSIVE PROCUREMENT



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## Introduction

Public Procurement might not be a term most people are familiar with, but everyone knows that the Irish state, through its various component parts, spends taxpayer money.

It could be a government department contracting an IT company to design some new system, it could be a local authority contracting for the construction of a library, or it could even be a public body purchasing some office supplies. This spending of money on goods, services and capital works, occurs via a process we call public procurement.

States are big spenders when it comes to procurement. OECD member states spend around €4.2 trillion annually,<sup>1</sup> with EU countries spending around €2 trillion.<sup>2</sup> In this state there's an annual spend of around €12 billion, which is around the same amount that's been spent to date on the pandemic income and business supports.<sup>3</sup>

This helps makes the Irish state one of the most significant actors in the economy. By using what Professor Marianna Mazzucato calls a '*mission orientated*' approach, this spending power can be used to support policy objectives and drive economic development.<sup>4</sup>

The use of *Social Clauses* in procurement contracts offers a highly effective way of doing this. A social clause is a provision in a contract which requires the contractor(s) to meet certain social and/or environmental obligations.<sup>5</sup> Also known as a *Community Benefit Clause*, it's a legal requirement stipulating that the contract must provide some *added* Social Value (Halloran, 2014).

This added value could be the creation of employment/educational opportunities, the raising of environmental or labour standards, increasing participation of marginalized groups or Small and Medium Size Enterprise (SMEs).

Social clauses have been tried and tested throughout Europe with great success. The EU Commission describes them as a '*strategic tool to drive social and labour policies forward in an effective manner.*' They have also been identified as significant to the EU's promotion of Green Public Procurement.

Unfortunately, as this policy report demonstrates, in this state their use has been too limited, too lacking in ambition and too uncoordinated. If this state is to take a '*mission orientated*' approach to procurement spending, one that can be used to advance policy objectives, then a number of changes are required.

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1 <https://www.oecd.org/gov/ethics/Corruption-Public-Procurement-Brochure.pdf>

2 Public Procurement | Internal Market, Industry, Entrepreneurship and SMEs (europa.eu)

3 By the end of March 2021 the Pandemic Unemployment Payment (PUP), the Emergency Wage Subsidy Scheme (EWSS) and the Temporary Wage Scheme (TWSS) had cost just over €11 billion <https://www.charteredaccountants.ie/News/ewss-crss-and-pup-extended-until-30-june> .

4 Mazzucato, M. (2020). Mission-oriented public procurement: lessons from international examples. UCL Institute for Innovation and Public Purpose, Policy Report, (IIPP WP 2020-20)

5 <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/social-clauses>

## Research Design

This report investigates social clause usage in this state over a three-year period (2018 -2020). As part of this empirical research government departments, local authorities and public bodies were surveyed on their use of social clauses.

Unlike some other EU jurisdictions, there is no publicly available database or departmental report on social clause use in this state. This deficiency in data collection, analysis and review required the author to undertake some primary research, in order to narrow this empirical gap.

A mixed methods approach was used which sought both quantitative and qualitative data. In the first known study of its kind, this allowed for the mapping out of the social clause contractual landscape. The quantitative data that was collected offers a snapshot of the total number of social clause contracts for the period, the total value of these contracts and a breakdown of the type of social clauses in use.

The qualitative data allowed for a more in depth assessment of the intended social value added by such clauses. This helped to identify areas where progress has been made, whilst highlighting weaknesses and room for improvement.

This report is structured across six different sections and proceeds as follows:

- 1. Firstly, it situates social clause usage within the historical context of a progressive approach to procurement spending and gives some historical and contemporary examples.*
- 2. The legislative framework, both European and national, within which it operates is then addressed, in addition to some common misconceptions/objections to social clause usage in this state.*
- 3. Following this, this state's current social clause state of play is examined, by looking at the role of the Office of Government Procurement (OGP) and the guidance its offered to contracting authorities on including 'social considerations' in contracts.*
- 4. The OGP's approach to data collection is then compared to that of other EU member states, with consideration given to how the OGP's data collection could be linked to other public administrative databases to improve overall interoperability.*
- 5. The findings of the report's quantitative and qualitative data collection are then evaluated.*
- 6. Lastly, recommendations for further required action are highlighted before concluding.*

## Progressive Procurement: Past, Present and Future

Governments use of social clauses in procurement contracts dates back centuries. In the 19th Century France, Britain and the US began to use their purchasing power to promote the participation of marginalized groups in the workforce.<sup>6</sup>

In early 20th Century they were a key part of US President Roosevelt's New Deal efforts to tackle the great depression. For example, the Works Progress Administration he established ensured that minimum wage and maximum hour clauses were inserted in all public contracts.<sup>7</sup> This not only helped to set a standard which raised private sector performance, but it helped to increase public consumption, reduced several types of mortality and lowered rates of crime.<sup>8</sup>

In the 21st Century over half of all EU members support their use, with the likes of Austria, Belgium, Denmark, France, Germany, Italy and the Netherlands having included them in specific *National Action Plans*.<sup>9</sup>

### Examples of such clauses include:

- *Labour activation (hiring of apprentices and people off the live register).*
- *Promoting disadvantaged groups (employing people with disabilities through 'reserved contracts').*
- *Improved pay and conditions (requirement to pay the living wage).*
- *Promoting greater SME participation (framework agreements/breaking contracts into lots).*
- *Promoting greater participation by social enterprises.*
- *Environmental objectives like promoting sustainability, reducing carbon emissions and/or environmental waste.*

### Noteworthy examples:

Recently Italian public bodies have used social clauses to increase the participation of SMEs and social cooperatives in public tenders.<sup>10</sup> For example a public body in

6 McCrudden, C. (2004). Using public procurement to achieve social outcomes. In *Natural Resources Forum* (Vol. 28, No. 4, pp. 257-267). Blackwell Publishing Ltd

7 Roosevelt required that all government contractors had to pay the minimum wage and a maximum level of working hours was imposed.

8 Fishback, Price (2017). "How Successful Was the New Deal? The Microeconomic Impact of New Deal Spending and Lending Policies in the 1930s" (PDF). *Journal of Economic Literature*. 55 (4): 1435-1485

9 <https://www.epsu.org/article/new-study-pay-and-other-social-clauses-european-public-procurement-epsu>

10 A public body ESTAR in Tuscany had a contract for €24 million, had a tender divided into lots, of which 8 were reserved for social cooperatives for a total value of €24 million

Tuscany had a contract for €24 million divided into lots, of which 8 were reserved for social cooperatives and the rest for SMEs.

In France one region used them for the dual purpose of promoting the participation of people with disabilities in the local economy and the consumption of locally grown organic food. They contracted a social enterprise which employs people with disabilities in the storage, cutting, cleaning, and packaging of organic food, and they now supply almost €2 million worth locally produced meals to students per year.<sup>11</sup>

In the North of this state, the Procurement authority worked with the local construction industry to ensure that contracts over a certain value had to meet certain labour activation and training/educational requirements. There has to be a percentage of workers hired from the live register, formally recognized paid apprenticeships and places in further education.<sup>12</sup>

In Preston England, a new economic development model of *Community Wealth Building* (CWB) was established which has a progressive approach to procurement at its core. CWB seeks to harness the power of what are called 'anchor institutions' to promote local spending and support local jobs. In the five years following its introduction in 2012/13, local spending went from 5% to almost 20%, whilst it rose from 39% to over 72% in the wider Lancashire area.<sup>13</sup>

Sinn Fein recently launched our own policy document on CWB, and this report is designed to act as a companion to that, particularly in relation to the role that public procurement plays in CWB.

Given the size of European spending on procurement (14% of GDP), the EU wishes to ensure that there is guaranteed equal access to fair competition for public contracts within the single market. So, the use of social clauses cannot breach EU Competition law, which necessitates an understanding of the European and National legislative environment in which they operate.

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11 European Commission (2020) Social enterprises and their ecosystems in Europe. Updated country report: France. Authors: Francesca Petrella and Nadine Richez-Battesti. Luxembourg: Publications Office of the European Union. Available at <https://europa.eu/!Qq64ny>

12 Social Clauses in Northern Ireland a research paper [https://www.nicva.org/sites/default/files/d7content/attachments-resources/cee\\_social\\_clauses\\_2013.pdf](https://www.nicva.org/sites/default/files/d7content/attachments-resources/cee_social_clauses_2013.pdf)

13 <https://www.preston.gov.uk/article/1335/What-is-Community-Wealth-Building->

# Legislative Framework: European and National

## European

For EU member states public procurement is governed by a combination of European rules (directives)<sup>14</sup> and national rules (legislation, regulations, and circulars). The different institutional design of member states means there is significant variability in their purchasing practices and respective procurement regimes.

Some states don't go far beyond transposing the directives, whilst others take a more interventionist approach. According to Open Democracy, the EU's 2004 procurement directives had a strong neoliberal focus on "*the lowest price*" as the primary criteria for purchasing, which often limited the space for a progressive approach.<sup>15</sup> These saw procurement solely through the lens of cost '*efficiency*'.

However, changes to the Lisbon treaty in 2009,<sup>16</sup> and a 2014 review of these directives made the inclusion of social and environmental criteria not only possible, but actively encouraged.<sup>17</sup> This facilitated a move away from the logic of '*lowest price*' to a more holistic approach, taking account of multiple social and environmental aspects. As such '*equitable*' considerations could be placed alongside '*efficient*' ones.

The rise of the Corporate Social Responsibility (CSR) movement, which has also been endorsed by the EU Commission, can be seen as the other side of the progressive procurement coin. CSR encourages companies to shift their model of corporate governance to one that focuses on a wider range of social and environmental concerns than just maximising the return to shareholders. These two things can support and reinforce each other.

## National

This state has transposed these directives, and introduced some of its own rules, procedures, and guidance, like the Public Spending Code and the Codes of Practice for Civil Service and Public Service bodies.

At the time the updated directives were being adopted, there was recognition that progressive procurement could be hindered if contracting authorities solely focused on achieving the lowest cost bid. As a result, member states were offered

14 Directive 2014/24/EU on public procurement (goods, services and works), Directive 2014/25/EU on procurement by entities operating in the water, energy, Directive 2014/23/EU on the award of Concession Contracts transport and postal services sectors.

15 <https://www.opendemocracy.net/en/oureconomy/how-eu-rules-are-getting-in-the-way-of-progressive-public-policy-and-how-cities-are-fighting-back/> Also Most Economically Advantageous Tender

16 Lisbon Treaty itself contained the so-called Horizontal Social Clause which states that 'the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.'

17 The EU Commission has produced guidance with publications like 'Buying Social' (2011), 'Taking Account of Social Considerations in Public Procurement' (2011), 'Public Procurement as a Driver in Innovation in SMEs and Public Services' (2014). In 2019 it held workshops in 15 countries to raise awareness of socially responsible public procurement (SRPP).

the opportunity to exclude lowest cost only arrangements. this state chose not to take this opportunity.

O'Halloran (2020) notes that this state, unlike some other states, had no history of using social clauses and that '*one of a number of barriers*' to their use as a tool of public policy has been the '*confusion surrounding their legality*'.<sup>18</sup> Others include concerns for cost or value for money, and difficulties measuring the social value created.

At the level of local government, there's a real opportunity for councillors to start engaging more with the council's procurement process, by advocating for the inclusion social clauses that can help build community wealth, support local jobs and improved job conditions, and keep money circulating within the local economy. Engagement can be done both prior to, and at various stages of, the procurement process itself.<sup>19</sup>

For instance, at the pre-process stage 'soft' measures can be promoted like training, education and guidance which can support SME participation, or careful consideration can be given to how contracts will be aggregated and divided, because smaller size contracts can favour SMEs.<sup>20</sup>

At the specification stage, where a description of the product or service to be procured must be provided, there's a chance to promote policy objectives by requiring, for example, certain kinds of environmentally friendly material to be used. The contractor qualification stage allows for certain kinds of contractors to be excluded from a competition. This gives the option to exclude contractors who may have poor track record on environmental and/or labour rights.<sup>21</sup>

The award stage provides an even more forceful way of engaging in progressive procurement, as it allows for what are called 'set asides' which retains a percentage of contracts for particular types of contractors. This could be social enterprises, SMEs, firms owned by marginalised groups, etc. The contract conditions stage again allows for obligations to be placed on contractors and their tender rejected for failure to comply. For instance, this could payment of a living wage.

Despite all of the above, there are still many common misconceptions about the use of social clauses. Below are 4 common misconceptions and responses to each of these.

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18 <https://aran.library.nuigalway.ie/bitstream/handle/10379/16223/2020.FinalSocialValueThesis.pdf?sequence=1&isAllowed=y>

19 The main stages in the procurement process are (1) pre-process stage, (2) specification stage, (3) contractor qualification stage, (4) award stage and (5) contract conditions stage

20 Catherine Donnelly 'The Scope of Public Procurement Law' Kings Inn (2014)

21 Catherine Donnelly 'The Scope of Public Procurement Law' Kings Inn (2014)

## Four Common Misconceptions

**1. *The use of social clauses to boost local employment is anti-competitive and discriminatory from the perspective of EU Competition law.***

False. It's true that under EU law, public authorities must open and advertise all procurement contracts to other EU member states and cannot explicitly include local preference policies. Nevertheless, this does not negate the possibility of trying to increase market accessibility for SMEs.

The use of a best price-quality ratio can increase the chance of local firms winning contracts, whilst social clauses requiring companies with low carbon emissions could support more locally based firms. Consortium bidding and breaking large contracts into smaller lots can improve SME access. In Preston England, large food contracts were broken up into smaller lots to allow local farmers to supply yogurt and fruit to schools.

**2. *The use of social clauses go against the EU Procurement Directives.***

False. Under EU law Article 20 (1), the use of sheltered workshops which are designed to employ the long-term unemployed and those with disabilities are expressly laid out and as such are widely used.<sup>22</sup> For example, in the building of the Peace Bridge in Derry, the winning bidder was obliged to demonstrate a commitment to reducing local unemployment. As a result, people were taken off the live register, apprenticeships and graduate placement opportunities created, demonstrating the compatibility with EU law.

**3. *Social clause increase costs.***

Some argue that by attempting to raise standards, we will inevitably raise costs. In other words, what we gain in equity we lose in price efficiency. However, such assumptions aren't well supported by the evidence. In the Netherlands, public authorities used found that by trying to raise standards, 70% of the time the lowest bidder for the contract still won. This meant that the public authorities were still getting the lowest price bid in the majority of cases, but were increasing the social value of the contracts themselves.

**4. *Contracting authorities have a duty to get the lowest price in order to get value for money.***

Its in the interest of the public that spending is used to support the public good. A sole focus on the lowest price to the exclusion of other concerns can create risks. For example, the Scally Report in the Cervical Check scandal identified 'lowest' price contracts as one of the main reasons quality issues were not flagged early enough.<sup>23</sup>

22 [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536295/IPOL\\_STU%282015%29536295\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536295/IPOL_STU%282015%29536295_EN.pdf)

23 <https://www.oireachtas.ie/en/debates/debate/seanad/2021-03-26/18/>

## Social Clauses: Policy and Practice

From a legislative perspective, progressive procurement remains a fairly underdeveloped area.<sup>24</sup> Guidance for contracting authorities has come mainly via administrative circular from the Office of Government Procurement (OGP) which was set up in 2014.

Operating as an office within the Department of Public Expenditure and Reform on a non-statutory basis, the OGP doesn't have a regulatory function. This means it cannot issue statutory instruments which place obligations on the spending behaviour of contracting authorities.

As such, it acts more in an advisory capacity, informing contracting authorities of their obligations and what they deem best practice.<sup>25</sup> In recent years it has tried to promote the inclusion of social and environmental criteria.

In 2018 it announced the establishment of a Social Consideration Advisory Group,<sup>26</sup> and produced an information note for departments. Then in 2019 it published the



24 Only 4 opposition bills related to procurement could be identified.

25 According to the OGP's Statement of Strategy (2021-2023) their mission is 'To enable better and more transparent public procurement that is socially, environmentally and economically sustainable through guidance, advisory services and training.' <https://ogp.gov.ie/statementofstrategy/>

26 The Advisory Group aim to identify policy issues and areas that can be addressed using progressive procurement, and to advise public bodies on how to implement social clauses.

circular *'Promoting the use of Environmental and Social considerations in Public Procurement'*.

The guidance suffers from several related weaknesses which, as we will see, is borne out in the data.

Firstly, the wording of the OGP's guidance needs to be more robust and less non-committal. Some allowances can be made here given the OGP's lack of statutory authority. The OGP's own information note states that *'there is no fixed definition of a social consideration'*.<sup>27</sup> This issue was frequently highlighted by local authorities in their responses to the survey. This underscores the need for legislation like a Social Value act which can provide such a definition.

In addition, the OGP states that *'social considerations already included in public procurement processes and contracts as a result of statutory requirements.'* However, as we'll see in a moment, compliance with already existing statutory requirements doesn't provide added social value, which is the very *raison d'être* for using a social clause provision.

Secondly, the OGP's circular says that education and training can be provided but again this appears to be optional. O'Halloran (2020) notes that one of the barriers to greater social clause usage in this state is ignorance of their existence or fear of compatibility with EU law. Thus, specific training for procurement officers should be mandated.

Thirdly, there's a lack of comprehensive data collection, analysis and review. Information on who is using social clauses, what types are being used, and to what effect, is not collected centrally. This lack of oversight hampers a co-ordinated policy response.

Moreover, if the OGP sees itself as playing an advisory role, rather than a regulatory one, then that advice should be empirically data driven. But if the OGP isn't even collecting this data, it's hard to see how its best placed to offer evidence based advice.

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27 file:///C:/Users/DoyleCi/Downloads/Social-Considerations-Information-Note-Final\_12.12.2018.pdf

# Improving Data Collection and Interoperability

## Data Collection

Some EU countries have specific legislation on social clauses and their data collection is linked to that legislation.<sup>28</sup> A number of these have chosen to make this data publicly available to private operators who use this for research and analysis.

There is much merit to making data such as this publicly available in order to improve transparency and regulatory oversight, spur innovation, acknowledge good supplier performance and CSR, flag risks of poor supplier performance and CSR practices, lower costs by identifying potential bid rigging in competitions which pushes up prices,<sup>29</sup> etc.

This state doesn't have a publicly available database of this sort, whilst the OGP's website is rated poorly and has fallen further in recent years.<sup>30</sup> Nevertheless, the creation of such a thing hardly seems like a major undertaking. Under Regulation 84 of Statutory Instrument (SI) 284/2016:

*'Contracting authorities are obligated to send a statistical report containing other such information as the Minister may request from time to time in respect of procurement'.*

As noted by the OPLA (Office of Parliamentary and Legal Affairs) *'This is a very broad discretionary power'.* So, there is scope for the Minister to request such information on social clauses which could be provided to the OGP.

However, this might not even be necessary as the OGP has now *recommended* that all Departments and public bodies implement environmental criteria as part of their *Green Public Procurement*, and that by 2020 all were to report on how they were implementing this.<sup>31</sup> This will be reported in a section of each Department's annual report.<sup>32</sup>

Given that this information is now being collected for social clauses with environmental concerns, it could easily be collated for information on clauses with non-environmental concerns.

## Improving Interoperability

There would also be great value created from linking such a database to other public administrative database to improve interoperability. Interoperability refers to

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28 For instance, Italy uses social clauses to promote the participation of marginalised groups and this data is collected their National Database of Public Contracts.

29 A senior official in the Department of Enterprise, Trade and Employment, Clare McNamara, said bid-rigging enabled companies to extract a higher price for the work as rival bidders that agreed to lose would submit inflated bids or not submit a bid at all. <https://www.irishtimes.com/business/economy/bid-rigging-and-gun-jumping-targeted-in-new-legislation-1.4474261>

30 According a recent OGP client satisfaction survey 'The OGP website is the key area in need of immediate improvement given the continued lower levels of satisfaction amongst users.' This rating has fallen by further 12% since 2018. [file:///C:/Users/DoyleCi/Downloads/2020-OGP\\_Client-Satisfaction-Survey-Results.pdf](file:///C:/Users/DoyleCi/Downloads/2020-OGP_Client-Satisfaction-Survey-Results.pdf)

31 <https://www.gov.ie/en/publication/efa12-green-public-procurement-gpp/>

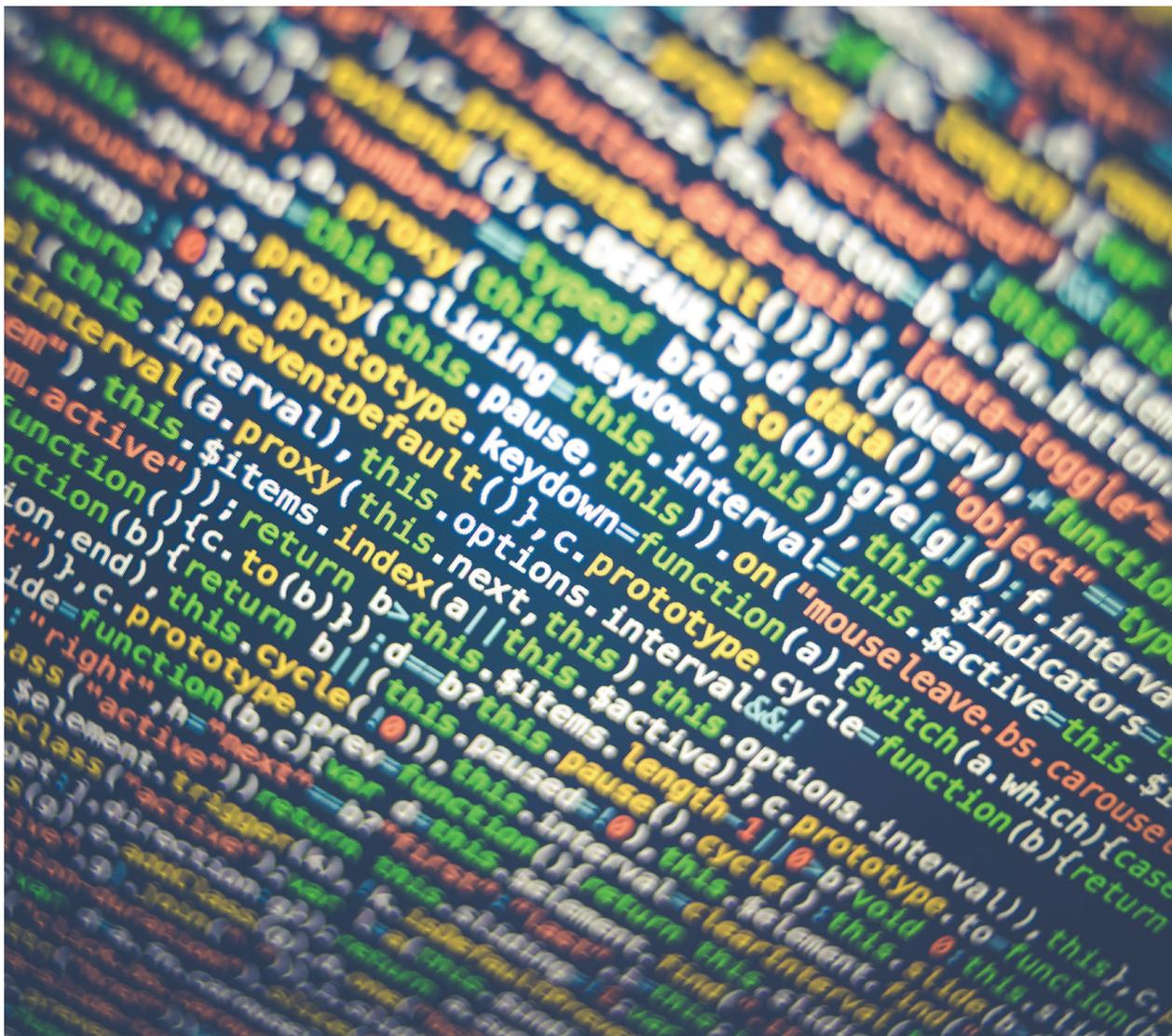
32 DPER-Circular-20-2019.pdf

the ability of *'multiple and disparate organisations' databases to freely and securely exchange and reuse data between their respective systems'*.

According to the EU Commission, *'it is unlikely' that member states policy objectives on 'industrial policy, sustainable development and security across Europe, can be achieved unless interoperable eGovernment services are swiftly implemented.'*

Linking public procurement data to other public administrative databases like the Company Registration Office (CRO), the Land Registry, Court Records, Revenue and the Lobbying Register would greatly improve interoperability. The Department of Public Expenditure and Reform recently announced that they would not be enacting all part of the Data Sharing and Governance Act 2019, which lays the foundations for such database linking.<sup>33</sup>

The Act allows for the establishment of the Data Governance Board and the introduction of a comprehensive new Data Sharing and Governance Framework for the Public Service. According to the Minister, *'This enabling piece of legislation will allow*



33 <https://www.gov.ie/en/press-release/58839-minister-mcgrath-and-minister-of-state-smyth-announce-enactment-of-the-data-sharing-and-governance-act-2019/>

*us to be more progressive in how we use the data that we have... Data sharing will bring significant benefits in the efficient delivery of public services’.*<sup>34</sup>

Table 1 gives some examples of other EU member states which link their procurement data to other public registries.

*Table 1:*  
**Example of Public Database linkages**

<b>EU Member State</b>	<b>Procurement data linked to</b>
Austria	Corporate Register, Lobbying Register, Land Register and Business Information Register
Bulgaria	Corporate Register and Tax Authority
Croatia	Court Register, Tax Authority and Criminal Records
Estonia	Corporate Register, Tax and Customs Authority and Criminal Records
Latvia	Corporate Register

By linking procurement data to other such public registries it’s possible to save time, reduce data entry and improve efficiency for both contractors and contracting authorities. Linking the e-procurement system to these registries allows significant parts of the tender document to be auto-filled, whilst reducing the risk of data entry errors.

It could help identify risks and those who should be excluded from competitions for public contracts. For example, those with particular court judgements against them, identified poor employment practices, tax abuse, etc.

It can also help acknowledge good behaviour by identifying firms who are exhibiting good CSR practice and creating more stakeholder value. It can also be used to facilitate more targeted economic planning. However, in the absence of such a database it falls to others to try gather this information.

Below are the report’s findings on the state of play of Irish progressive procurement over the last 3 years.

<sup>34</sup> <https://www.gov.ie/en/press-release/58839-minister-mcgrath-and-minister-of-state-smyth-announce-enactment-of-the-data-sharing-and-governance-act-2019/>

## Report Findings

The following information was sought from government departments (18), local authorities (31) and public bodies (184) over the period 2018-2020:<sup>35</sup>

■ <i>Year of Contract</i>
■ <i>Value of Contract</i>
■ <i>Description of Contract Work</i>
■ <i>Type of Social Clause used</i>
■ <i>Description of Social Clause</i>

This period was chosen as 2018 marked the year the OGP formed the Social Consideration Advisory Group and issued its first information note on the inclusion of social considerations in contracts.

It should be noted that the study sample does not include other types of organisations that engage in significant procurement spending like hospitals and universities. As such, we do not claim to have identified *all* procurement contracts containing a social clause over the time period.

The novelty and value of this data collection is that it both provides a first estimate for the value of social clauses in this state, and places a floor underneath these estimates. Summary level data of the study sample is presented in table 2.

For government departments there was a 100% response rate. Of 18 government departments only 7 had utilized social clauses in the study period. For these 7 a total of 20 contracts with social clauses were identified, with a value of €9.1 million.

The contract with the highest value was from issued by the Department of the Environment in 2018. A contract worth €7 million was issued for the operation of the national Emergency Call Answering Service, and the clause related to reduced energy consumption.<sup>36</sup> This means that this single contract accounted for 77% of the total value of social clause contracts issued by departments over the period.

35 Information was requested via a variety of means: parliamentary questions, questions from councillors to the chief executives of their respective local authority, administrative request and Freedom of Information (FOI) request.

36 Public Procurement Contracts – Thursday, 25 Feb 2021 – Parliamentary Questions (33rd Dáil) – Houses of the Oireachtas

Table 2:  
**Summary of Study Sample (2018-20)**

Organization Type	No. Contacted	Response Rate	No. identified having used social clause	Total no. of Social/Green Clauses identified (2018-2020)	Total value of contracts containing clause (2018-2020) <sup>37</sup>	Comment
Gov Dept	18	100%	7	22	€9.1 million	Dept of Enviornment single highest spender (€6.9 million) on contract with environmental social clause provision
County Councils	31	84%	13	216	€337 million	Dublin City Council has tendered for a contract (€125 mill) for 585 housing units with labour activation social clauses. <sup>38</sup>
Public Bodies	184	63%	30	219	€354 million	SEAI single biggest spender on a contract (€220 mil) as part of Energy Poverty Programmes

The response rate for local authorities was lower (84%) with the disclosure of information more incomplete.<sup>39</sup> Partial responses were received from a number of authorities, with information on the value of contracts or the year contracts were issued not provided. As a result, in instances where the value of the contract was provided but the year was not disclosed, these are included in the total value for the three year period, but aren't allocated to a given year as per the time series chart 1.

Only 13 local authorities were identified as having used social clauses. For the period these local authorities had social clause contracts worth €337 million.<sup>40</sup> The local authority with the single highest value contract was Dublin City council, although this contract is still out to tender.<sup>41</sup> Of these local authorities Galway County, Cork County and Tipperary County Council were amongst the most frequent users.

The lowest response rate was in terms of public bodies (63%) with just 30 public bodies identified as having used social clauses. It's worth noting that this category is the broadest, with many of the bodies contacted being small, not being generally big spenders on public procurement or in receipt of public money. This could help account for the lower response rate. Of those bodies that did respond, all information sought was provided.

Contracts valued at €354 million were identified for the period. Yet it should be noted that around 62% of this is accounted for by a single contract from SEAI (€220 mill), which has an environmental clause as part of its efforts to install energy efficiency measures in eligible homes nationwide under Energy Poverty Programmes.

Other public bodies which have been frequent users of social clauses include the

37 This relates to the total value of contracts identified as having a social clause. Some county councils did not provide information on the value of the contracts, or years in which they were drawn up. This means the council numbers are underestimated. Lastly the largest contract identified Dublin City Council which is out for tender.

38 Due to data limitations arising from some County Council failing to disclose information on the value of certain contracts, Dublin City Council's contract although the largest identified is still out for tender.

39 Information from local authorities was sought via various means; councillor issued questions, administrative request and FOI.

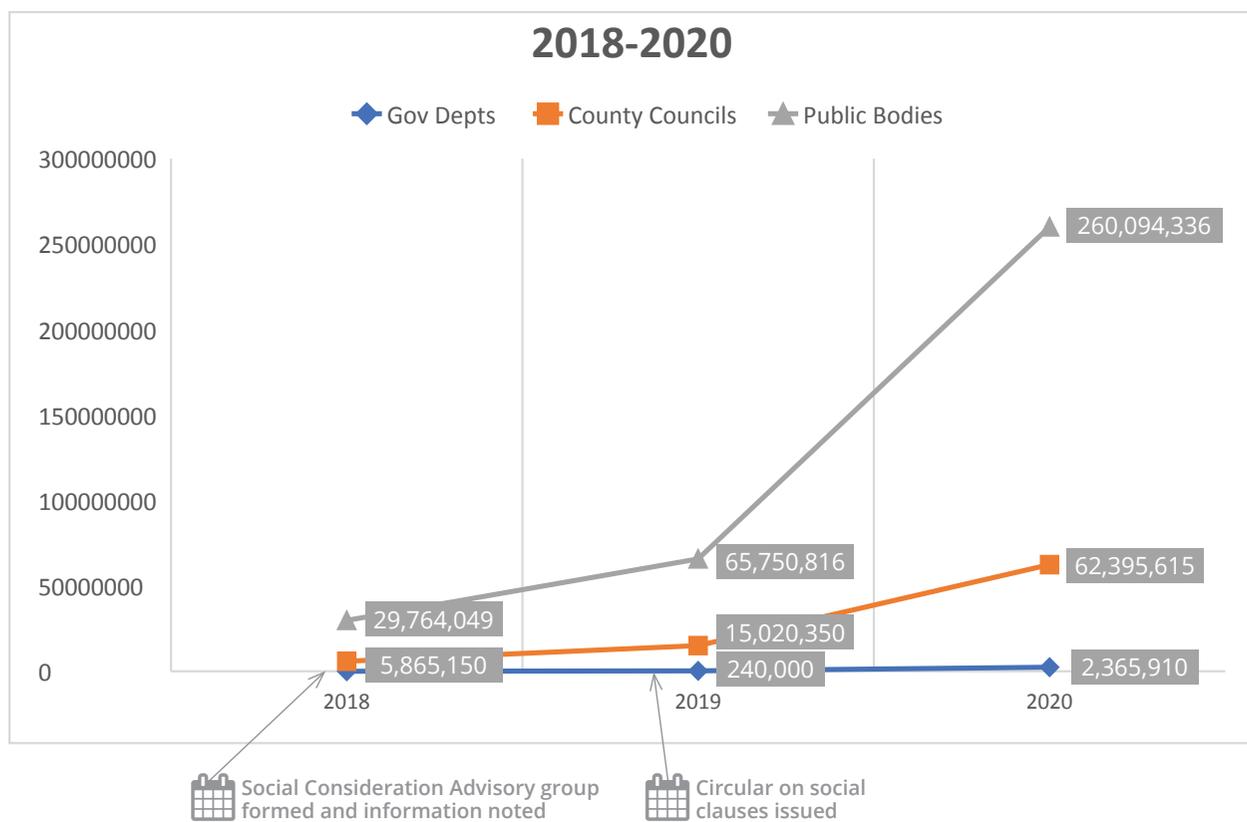
40 Figure doesn't include contract for 125 million DCC because not yet signed s

41 A contract for 125 €million for the construction of 585 housing units contains a labour activation clause, whereby 10% of the workers must be comprised of workers who had been unemployed for at least 12 months.

Marine Institute, Teagasc and the Grangegorman Development Agency. These three alone accounted for around 25% of the total for public bodies.

Chart 1 present some trends in the growth of social clause usage.<sup>42</sup> Notwithstanding the issues of partial disclosure of information, we can see there has been a general increase in the value of social clause contracts , which on the face of it seems positive. But as alluded to above, the distribution is quite skewed with just a small number of high value contracts, issued by a small number of contracting authorities, accounting for the lion's share of this.

Chart 1:  
**Trend growth in Social Clause usage**



42 It should be noted that where local authorities are concerned there are problems with the identifiable trend as more limited disclosure of information meant that sometimes the total value of contracts were provided, but without a corresponding year of signing, meaning values could not be assigned to a given year as part of the trend, but are included in the overall total listed in table 1.

## Qualitative analysis

It's not enough to look at the value of social clause contracts, we need to understand the nature of these clauses and what value they propose to add.

Table 2 separates these clauses by area of concern, which are categorised as environmental, social and existing rights. The former two seek to achieve some kind of environmental and/or social objective, whilst the latter just reaffirms that contracts must adhere to existing legal obligations. Such obligations include the likes of the minimum wage, employment law, basic health/safety, etc.

Table 3:  
**Breakdown Contracts by type of Social Clause**

2018-2020	Environmental	Social	Existing Rights
Number of contracts identified w/clause	216	97	142
Total value of contracts	€394.6 million	€185 mill	€114 million
Top 3 areas of concern	1. Energy Efficiency 2. Waste Management 3. Recycled Materials	1. Promoting Marginalized Groups (32) 2. Promoting SMEs (18) 3. Labour activation: employment & apprenticeships (12)	N/A

### Environmental Concerns

Environmental considerations take up the lion's share of social clause usage. This places this state in line with our EU peers, where environmental considerations have proven to be the most frequent social clause provision. In terms of the subdivision/ranking of these environmental considerations they are as follows: (1) energy efficiency,<sup>43</sup> (2) waste management and (3) recycled materials being the top three environmental considerations.

There are some notable successes here. The Department of Foreign Affairs has installed solar panels for some of its embassies and purchased electric vehicles. Local authorities have used clauses to improve energy efficiency through deep retrofits (Offaly County Council), offering clients the option of 100% renewable energy (Galway County Council), and the instillation of solar water heating systems (Kerry County Council).

Public bodies like the NTMA used a clause which required the provider of its records management system to run on 100% renewable energy, whilst the Marine Institute had one clause requiring the contractor have 'eco friendly vehicles'.

<sup>43</sup> Examples of clauses related to energy efficiency would be the Department of Foreign Affairs having installed solar panels on a number of its embassies and the purchase of electric vehicles. Fingal County council has also purchased Electric Vans and Monaghan County Council has installed solar panels. Bodies like the National Treasury Management Agency required the energy supplier of its records management system to be 100% renewable.

Despite the above successes, there are many instances of environmental clauses which are much weaker in terms of their added social value. For example, numerous contracts were identified where the social clause provision was the requirement for a 'CE Mark', products were of 'EU standard', or contained 'eco-labelling'.

## Existing Rights Concerns

The reaffirming of existing rights was the second most popular type of clause to include. We consider these to be the weakest form of social clause provision, if it can be considered a social clause at all. Recall that a social clause must provide some kind of *added social value*.

One local authority issued 60 contracts in 2020 that contained social clauses valued at €29.7 million. Each of the clauses contained in the contract was just a reaffirmation of already existing rights. So, suppliers are required to abide by the laws governing the minimum wage, health and safety, maximum working hours, etc.<sup>44</sup>

If a social clause is designed to provide *additional* social value, then it should go beyond what's already in place. So rather reaffirming that contractors should abide by the minimum wage legislation (which they're already required to) but obligating them to provide a living wage does provide added value as it helps to raise wage standards.

This confusion likely arises from the OGP's circular which states that '*social considerations already included in public procurement processes and contracts as a result of statutory requirements*'. For example, some local authorities which did not disclose any information in their survey responses, just stated that all contracts they issue contain social clauses. We assume these are the 'existing rights' type clauses.

## Social Concerns

Social concerns were the least frequently used type of contract clause. Within that category the top three concerns were for (1) the promotion of marginalised groups, (2) promoting SME participation and (3) labour activation (employment/apprenticeships).

There were 32 social clause contracts identified which sought to promote marginalised groups. This came through things like disability access, place for asylum seekers and gender balance. At the departmental level, examples include the use of accessibility audits (Department of Housing)<sup>45</sup> and promoting rural female entrepreneurial development (Department of Agriculture).<sup>46</sup>

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44 Employment Equality Acts 1998-2011, Equal Status Acts 2000-2011, National Minimum Wage Act (2000) as amended, Organisation of Working Time Act 1997 as amended, Safety, Health and Welfare at Work Act 2005 and Safety, Health and Welfare at Work (General Application) Regulations 2007, Disability Act 2005. Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, the Data Protection Act, 2018

45 Accessibility audits must comply with National Disability Authority guidelines on the subject.

46 In 2020, my Department has awarded two contracts for (1) a Social Farming Network and (2) a Programme

Local authorities like Leitrim and Longford used them for the creation of sensor facilities in local libraries to support those with autism and visual impairment, whilst public bodies like the National Museum of Ireland have done similar things in their own regard.

Promoting SME participation was the second most common social concern (18), which was done through the likes of consortium bids and breaking up contracts into smaller lots. Given that SMEs accounted for around 99% of active enterprises in this state and 65% (over one million) of total employees, it seems significant improvements can be made here.

According to the OGP's latest Spend and Tendering analysis (2018), around half of public procurement spending (53%) was on SMEs. This is a fall of 22% from 2013 when the spending on SMEs was 75%.<sup>47</sup> In countries like Sweden spending on SMEs is around 86% so its clear this state seems to be heading in the wrong direction, if promoting SME participation is indeed a policy goal.<sup>48</sup>

From discussions with SME representative groups, one issue which came up was the lack of an independent adjudicator for SMEs in dispute with the contracting authority. The cost of appearing in the High Court can be prohibitive for many SMEs. The other main avenue available is the Tendering Advice Service (TAS) located within the OGP, but there were concerns over a lack of independence of the TAS.<sup>49</sup> As such the need for a Public Procurement Ombudsman similar to what Canada has was raised, and is worth considering.

Labour activation/apprenticeship clauses were the third most frequent social concern identified (12). Considering that *'Construction and Civils Works'* account for the largest share (€5.3 billion) of the *'total estimated contract value of published tender notices'*, it would seem like there is much room for improvement here.<sup>50</sup>

The state has outlined spending commitments of €116 billion over the next ten years as part of the National Development Plan. Labour activation and apprenticeship clauses should be in all state construction contracts. Such clauses could even play a countercyclical role whereby the number of places reserved for people to be taken off the live register increases during a downturn and decreases at time of full/near full employment.

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for Nascent Rural Female Entrepreneurial Development. Funding for these projects comes from the Rural Innovation Development Fund.

47 <https://www.oecd.org/gov/ethics/Corruption-Public-Procurement-Brochure.pdf>

48 <file:///C:/Users/DoyleCi/Downloads/The%20Swedish%20procurement%20monitoring%20report%202018.pdf>

49 TAS is located with the OGP, however all of the staff serve other functions within the OGP, see PQ response

50 Public Service Spend and Tendering Analysis (2018)

## Key Recommendations

The government must adopt a 'mission orientated' approach to procurement spending, which clearly tries to coordinate spending to achieve policy objectives.

The introduction of a Social Value act which can act as a reference point and requirement which for contracting authorities, looking to add social value through the inclusion of social clause provisions in public contracts.

Improve data collection, analysis and review of social clause use in public contracts, through an amendment to SI 284/2016, or by expanding on the data collection on environmental clauses that are part of Green Public Procurement reporting.

Have the Minister for State (Procurement) collate an annual Progressive procurement report based on this data collection, which would be laid before the Budgetary Oversight Committee and the Dail. This report would outline how public procurement spending has been used to support the public good, show what additional social value has been created, what has been the outcomes and who has benefited.

Have this improved e-procurement data collection linked to other public administrative databases to improve interoperability, aid economic planning, reduce risks (bid rigging, exclusions, bogus self-employment and cost overruns), highlight good CSR practices, etc.

Adopt a Community Wealth Building (CWB) approach to regional development, which attempts to use public spending by 'anchor institutions' to support spending, local jobs and communities.

Make labour activation clauses, both the hiring of the people off the live register and the creation of apprenticeships/ educational opportunities, mandatory for all contracts for capital works projects above a certain threshold.

Have labour activation clauses play a countercyclical role, whereby a quota system for the number of people required to be hired from the live register and the number of apprenticeships created, should be put in place and increased/decreased depending on the current state of the economic cycle.

Continue to use social clauses to promote employment of marginalized groups and those who are distant from the labour market.

**Instigate mandatory training in the use of social clause provisions for the procurement officers of contracting authorities. The OGP's most recent client satisfaction survey notes that lower levels of satisfaction with the procurement process are driven by things like the need to *'reduce complexity for the users via education, consistency/alignment of approaches and availability of direct, qualified support for users where feasible.'*<sup>51</sup>**

**Run training for local councilors in how to intervene constructively during the various stages of their local authority's procurement process.**

**Consider placing the OGP on a statutory footing so that it could introduce statutory instruments and play more of a regulatory role.**

**Consider the establishment of Public Procurement Ombudsman that support SME participation, by acting as an adjudicator for disputes between contractors and the contracting authorities. The Ombudsman could be given a role in drawing up framework agreements to support SMEs participation.**

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51 file:///C:/Users/DoyleCi/Downloads/2020-OGP\_Client-Satisfaction-Survey-Results.pdf

## Conclusion

In order to maximise the social value that public procurement spending can create, a 'mission orientated' approach is required by government. One that seeks to align policy objectives with procurement spending priorities, by taking a more co-ordinated approach.

By harnessing the state's capacity as the largest purchaser within the economy, spending can be used to raise environmental/labour standards, promote the participation of SMEs and marginalised groups, create jobs and apprenticeships.

Social clause provisions in public contracts are a sure-fire way to do this. However, as this report has demonstrated, this state still has some way to go before it's in a position to really capitalise on these opportunities and maximise the potential from progressive procurement.

Some of these issues raised relate to deficiencies in data collection, analysis and review, and the failure to maximise the potential for interoperability by connecting public procurement data to other public registries.

Other problems arise from misinterpretation of social clauses with EU/national procurement law, a lack of legislation like a Social Value act to provide a clear definition for contracting authorities, the absence of a statutory footing for the OGP and the general neglect of previous governments toward social clauses usage.

Nevertheless, as legal expert Deirdre O'Halloran points out, the main barrier to a more progressive approach to procurement, is a political one. So, a change in political direction, offers the chance of a new approach to procurement spending.

# TOWARDS A NEW STRATEGY FOR PROGRESSIVE PROCUREMENT



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