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## **Aligning policy and legal frameworks for supporting smallholder farming through public food procurement: the case of home-grown school feeding programmes**

**Luana F. J. Swenson,**

Food and Agriculture Organization of the United Nations (FAO)



Food and Agriculture  
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**International Policy Centre for Inclusive Growth (IPC-IG)**

SBS, Quadra 1, Bloco J, Ed. BNDES, 13º andar  
70076-900 Brasília, DF - Brazil  
Telephone: +55 61 2105 5000

[ipc@ipc-undp.org](mailto:ipc@ipc-undp.org) ■ [www.ipcig.org](http://www.ipcig.org)

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# **ALIGNING POLICY AND LEGAL FRAMEWORKS FOR SUPPORTING SMALLHOLDER FARMING THROUGH PUBLIC FOOD PROCUREMENT: THE CASE OF HOME-GROWN SCHOOL FEEDING PROGRAMMES<sup>1</sup>**

Luana F. J. Swensson<sup>2</sup>

In the past few years, various countries, regions and cities from low-income to high-income economies have been developing a range of food procurement initiatives designed to use the regular demand for food on the part of government entities as a policy instrument targeting broader development objectives.

These initiatives—also referred to as Institutional Food Procurement Programmes (IFPPs)<sup>3</sup>—are based on the premise that public institutions, when using their financial capacity and purchasing power to award contracts, can go beyond the immediate scope of responding to the state's procurement needs by addressing additional social, environmental or economic needs that contribute to the overall public good of the state (McCrudden 2004; De Schutter 2014; Kelly and Swensson 2017).

In particular, public food procurement initiatives have been recognised, especially in low-income economies, as a potential policy instrument to support local and smallholder farmers and to help integrate them into markets. They are thus recognised as a potential driver of the transformative development of local food systems (Morgan and Sonnino 2008; Sumberg and Sabates-Wheeler 2010; Gelli and Lesley 2010; Foodlinks 2013; De Schutter 2014; 2015; Fitch and Santo 2016; HLPE 2017; Kelly and Swensson 2017; UNSCN 2017).

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2. Food and Agriculture Organization of the United Nations (FAO).

3. Institutional food procurement programmes (IFPPs) are initiatives that are designed intentionally to link an institution's demand for food to broader development objectives (Kelly and Swensson 2017). This terminology refers to the initiatives of public as well as other types of institutions, such as those of the World Food Programme (WFP). This paper focuses instead on initiatives that are operated under national public procurement regulation and therefore opted to employ the terminology of 'public food procurement initiatives'. This terminology—including IFPPs—encompasses a variety of programmes, such as those for school feeding, that do not necessarily have the procurement and distribution of food as their primary objective.

A key example of public food procurement initiatives is offered by home-grown school feeding programmes. Although the definition of 'home-grown' may vary, this type of programme may be understood as a school feeding model that is designed to provide children in schools with safe, diverse and nutritious food, sourced locally from smallholders (FAO and WFP 2018).<sup>4</sup> Other relevant examples of public food procurement initiatives include ones linked to strategic food reserves and broader food security programmes.

Various studies, as well as development projects, have analysed the key challenges involved in developing inclusive public food procurement initiatives that target smallholder farmers and their organisations, the reforms needed to bring these about, and the lessons to be learned from the current situation. Among the key lessons learned, there is an increasing recognition of the importance of a conducive and aligned public procurement policy and regulatory framework<sup>5</sup> (Morgan and Sonnino 2008; Sumberg and Sabates-Wheeler 2010; Brooks et al. 2014; Swensson 2015; FAO 2013; Kelly and Swensson 2017; Swensson and Klug 2017). This includes, in particular, the alignment of public procurement laws, regulations and related practices.

Indeed, just like any type of public purchase, public food procurement initiatives are operationalised and regulated by specific and detailed rules. These rules govern the entire procurement process, shaping and limiting the choices available to governments regarding (i) what food to purchase; (ii) how to purchase it; and (iii) from whom to purchase. As a result, the objectives and implementation of any food procurement initiative are intrinsically linked to the existing public procurement regulatory framework.

Despite this intrinsic connexion between the public procurement regulatory framework and food procurement initiatives, little has been discussed in the literature of rural development about the challenges that unaligned public procurement rules and practices may pose for the implementation of public food procurement initiatives which aim to support smallholder farmers. In particular, very little has been said about how such an alignment can be achieved, or about the various tools and legal mechanisms that can be used to do this.

A comparable discussion, however, does exist in the legal literature dedicated to the analysis of the promotion of socio-economic or 'horizontal' policies through public procurement. This literature explores the role of law in this context as well as the various legal mechanisms available for implementing broader development policy objectives in the procurement system (Watermeyer 2004; McCrudden 2007a; Arrowsmith 2010; Quinot 2013). Nevertheless, there is still a lack of dialogue between (i) this literature and related analysis of these legal mechanisms and (ii) the literature of public food procurement for rural development.

This paper aims to help build this dialogue, bringing to the food procurement and rural development literature an analysis of the various legal mechanisms that can be used to align the regulatory framework in pursuit of broader development goals by means of public procurement in the form of home-grown school feeding programmes.

## **Structure and methodology**

This paper is organised into three main sections:

**Section one** aims to frame the problem, exploring through a literature review and country experiences how and why standard public procurement rules and practices may represent a barrier to the implementation of public food procurement initiatives designed to support smallholder

farmers and their organisations. Building on the increasing recognition by the literature and international regulatory regimes of the use of public procurement to achieve broader development goals, this section provides evidence for recognising the need for alignment and adaptations.

**Section two** discusses how such alignments can be made, focusing on the use of preferential procurement schemes (i.e. reservation, preferencing and indirect procurement) as well as considering contract lotting. It presents the key generic schemes identified by the legal literature and maps their implementation in four different countries within those countries' school feeding programmes. The countries under investigation are Brazil, the United States of America (US), Paraguay and France. A brief overview of the Ghana experience is also provided.

**Section three** provides a comparative analysis of the experiences of the various countries. This analysis strives to identify lessons that may help other governments in the development of an aligned public procurement regulatory framework for implementing public procurement initiatives that target smallholder farmers.

Due to the limited data and evidence currently available, it is beyond the scope of this paper to assess the impact of the various legal mechanisms used for the implementation of public food procurement initiatives in the countries under discussion.

This study employs a qualitative and comparative analytical approach. It uses data from both primary and secondary sources. It combines a desk review of relevant literature, reports and case studies on the subject with primary data and expert opinions from some of the country experiences. These opinions were collected mainly via semi-structured interviews with key informants.<sup>6</sup>

## 1 FRAMING THE ISSUE

### 1.1 BACKGROUND

The term 'public procurement' refers to the overall processes by which governments acquire goods, works and services to fulfil a public function. It is, therefore, by means of public procurement that public institutions acquire food—as well as catering services—to respond to their institutional food requirements.

This overall process encompasses three different phases: (i) procurement planning (including identification of the goods or services needed, participation requirements, relevant standards and specifications, award criteria and the choice [when available] of the procurement procedure [i.e. the method to be used]); (ii) the selection process (including the publication [i.e. advertising] of the tender notices, selection of the supplier and the award of the contract); and (iii) contract administration (including all dealings between the parties from the time the contract is awarded until such time as the goods and/or services have been delivered, payment has been made, evaluation has been conducted, and any disputes have been settled) (Arrowsmith 2011; ITC 2014).

As mentioned in the introduction, one of key characteristics of public procurement is that all the aforementioned phases of the procurement process are governed and regulated by specific and detailed rules. This means, therefore, that governments—unlike private parties—are not free to decide exactly how and from whom they will purchase the goods and services they need.

These rules are in place in practically all countries in the world to ensure that public procurement is performed so as to achieve a set of goals (Arrowsmith 2011). Various goals can be identified that are shared by many systems of public procurement. A key one found in virtually all countries of the world is best value for money in the acquisition of required goods, works or services (*ibid.*). The definition of 'value' may range from a narrow interpretation, limited to one defined by the lowest cost, to a broader one, encompassing other social, environmental and economic values. The former definition gained currency especially in the 1980s, under the influence of neo-liberal reforms. It is still very common in many procurement regimes. The latter interpretation, by contrast, has been gaining recognition in the past two decades (De Schutter 2015; McCrudden 2007a). Other goals include (i) integrity of the system (i.e. avoiding corruption and conflicts of interest); (ii) accountability (i.e. ensuring that the system provides the means for interested parties to establish whether the government is meeting its objectives); (iii) equal opportunities and equal treatment for all suppliers (i.e. ensuring that all tendering individuals and organisations have an equal chance to benefit from the opportunities offered by the award of public contracts); (v) fair treatment of suppliers (i.e. ensuring procedural fairness or 'due process'); and (vi) efficiency in the procurement process (i.e. ensuring that the process is carried out without unnecessary delays or wastage of resources) (Arrowsmith 2011; Quinot and Arrowsmith 2013). Hereinafter, these goals will be referred to as the 'traditional' public procurement objectives. The realisation of these objectives is supported by public procurement principles. The most common ones are transparency, competition and equal treatment.<sup>7</sup> These are not objectives in their own right: they are, rather, ends to achieve different means—namely, the objectives outlined above (Quinot and Arrowsmith 2013).

These traditional public procurement objectives and related principles are of key importance as they will shape public procurement rules and practices (*ibid.*). This includes in particular the rules on the tender procedure (i.e. the procurement method); the criteria for the award of contracts (the tender evaluation criteria); and the relevant administrative arrangements (related to the terms of payment, the procedures for publishing tender opportunities, the participation requirements, the size of contracts, and so on).

One example is the standard open-tender procedure (also known as 'formal tendering' or 'the bidding process'), which is often considered the most appropriate method for ensuring the traditional objectives of public procurement in the public procurement of goods. Open tender is designed on the basis of the principles of open competition and the equal treatment of suppliers (meaning that any qualified person will have their tender considered and treated in the same way) and the principle of transparency (imposing certain formalities and limited discretionary power on procuring entities). These are considered key instruments for achieving the objectives of best value for money, equal opportunities for all suppliers, and integrity of the system (Arrowsmith 2011), as described in Box 1.

The main issue for the implementation of public food procurement initiatives targeting smallholder farmers is that, most often, these standard procurement rules and practices—imposed or shaped by public procurement regulations—are inappropriate in view of the actual characteristics and capacities of smallholder suppliers and their organisations. They may in fact hinder the participation of smallholder suppliers in public markets and thus constitute an important barrier to the implementation of public food procurement initiatives which aim precisely to support these actors, and to facilitate their integration into markets. An increasing number of studies attest to the reality of this situation.

## BOX 1

**How the open tendering procedure contributes to the pursuit of value for money and other traditional public procurement objectives**

The possibility in open tendering for any qualified person to have a tender considered makes:

- a. For the maximum possible number of tenders, which may increase the chances of the procuring entity benefiting from the best supplier operating on the market and hence improve value for money;
- b. Induces suppliers to put forward the best offer they can make because of the need to beat the offers of many other suppliers in order to win the contract—again enhancing value for money;
- c. Reduces the risk of collusion between suppliers, since collusion is more difficult with a large number of bidders, once again enhancing value for money;
- d. Ensures that any interested party has access to government business—an important objective in its own right for certain procurement systems;

Furthermore, the absence of a process by which the procuring entity selects which suppliers will and will not be permitted to submit tenders reduces the possibility of the abuse of discretion to favour particular suppliers, to the benefit of both value for money and the integrity of the process.

Source: Arrowsmith 2011.

## 1.2 PUBLIC PROCUREMENT REGULATION AND THE PARTICIPATION OF SMALLHOLDER PRODUCERS IN PUBLIC MARKETS

Various studies and surveys reveal the challenges that standard public procurement rules and practices pose for the participation of small-scale suppliers in public markets in both developing and developed economies (Fee and Henninga 2002; Smith and Hobbs 2002; European Commission 2004; 2008; 2010; 2014; Loader 2005; 2011; Burgi 2007; Karjalainen and Kemppainen 2008; De Schutter 2014; Trybus 2014; Saastamoinen et al 2017).

The main obstacles identified which are linked to public procurement regulations and practices include (i) overly complex and burdensome tender procedures; (ii) over-emphasis on price as the awarding criterion (to the detriment of quality and other socio-economic values); (iii) disproportionate and onerous participation requirements; (iv) incompatibility between contract size and the supply capacity of small-scale operators; (v) lack of information (regarding tender opportunities and notices of contract awards); and long payment periods. A number of further challenges have also been identified. These, however, are more directly linked to suppliers' own constraints, lack of skills, and attitudes towards public procurement (Saastamoinen et al. 2017). They are therefore beyond the remit of the present analysis.

Although some of these aspects of the process of public procurement may also affect large suppliers, it is widely recognised that they affect small-scale suppliers more acutely. Due to their size and superior resources, large suppliers find it easier to comply with these requirements than do smallholders (Brooks et al. 2014; Trybus 2014; World Bank Group 2017). For instance, large suppliers are in a position to wait longer for payments due to their more extensive resources and better access to private finance (Burgi 2007; Trybus 2014).

The obstacles that standard public procurement regulations and practices pose to smallholder suppliers are also magnified by a narrow definition of what constitutes 'value for money' in public procurement regimes, which is often limited to one based on the lowest price (European Commission 2008; Morgan and Sonnino 2008; De Schutter 2014; 2015; Smith et al. 2016).<sup>8</sup>

Although most of those studies focus on small and medium enterprises (SMEs), there has been an increasing number of studies analysing these challenges also in the specific context of smallholder farmers and public food procurement. (Brooks et al. 2014; Fonseca et al. 2014; De Schutter 2014; 2015; FAO 2013; 2015; Kelly and Swensson 2017; Swensson and Klug 2017). Considering the socio-economic conditions of smallholder farmers (who are among the poorest people in the world) and their predominantly informal style of business, it is easy to imagine how the challenges imposed on small-scale suppliers by standard public procurement regulations and practices act even more severely within this specific context.

In Latin America, for instance, a FAO study on school feeding and the possibilities of direct purchasing from family farming concluded that in the eight countries analysed (Bolivia, Colombia, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay and Peru), the complexity of procurement procedures and the requirements of public procurement law “impose serious obstacles for small-scale producers and their organisations” and “greatly hinder” their access to public food markets (FAO 2013). Similar findings were also reported for El Salvador by Fonseca et al. (2014).

For the African continent, too, a recent FAO publication on “Leveraging institutional food procurement for linking small farmers to markets” (Kelly and Swensson 2017) offers similar findings. The key challenges identified as hindering smallholder farmers’ access to institutional food markets include—analogue with the analysis undertaken by the literature on SMEs— the complexity and cumbersomeness of the standard open tender procedure; disproportionate and costly participation requirements; over-emphasis on price and other non-smallholder-friendly awarding criteria; long payment periods. These challenges were similarly observed by the SNV project on Procurement Governance for Home-Grown School Feeding (PG-HGSF), which was implemented in Mali, Kenya and Ghana. According to the findings of this project, public procurement regulations and practices that did not factor in the situation of the region’s smallholder farmers constituted one of the main reasons why those countries were not fully successful in sourcing produce obtained from local smallholders within their school feeding programmes (Brooks et al. 2014). Similar conclusions were presented also for Mozambique in a study on the impact of the policy, institutional and legal enabling environment for the implementation of decentralised food procurement programmes developed within the Purchase from Africans for Africa Project (PAA) (Swensson and Klug 2017).

All these studies provide evidence that standard procurement regulations and practices can constitute a barrier to the participation of smallholder farmers and their organisations in public markets. These regulations and practices may consequently be an important obstacle to the implementation of public food procurement initiatives which aim, precisely, to use public food procurement as an instrument to achieve broader socio-economic objectives by supporting local smallholders and their integration into markets. Indeed, a common conclusion of all these studies is the recognition of the need for alignment between public procurement legislation and practices on the one hand and the policy aim of using public procurement to support these actors on the other. As stated by FAO (2013), this alignment means having a legal and regulatory framework for public procurement that not only allows but also facilitates the inclusion of smallholder farmers in the public food procurement process.



### 1.3 RECOGNISING THE IMPORTANCE AND NEED FOR ALIGNMENT BETWEEN PUBLIC PROCUREMENT LEGISLATION AND PRACTICES

From a more theoretical perspective, the rationale for why standard public procurement regulation in most countries may hinder the implementation of public food procurement initiatives, and may consequently require alignment, lies in that fact that these rules were designed to achieve, and are shaped by, the traditional public procurement objectives presented above.

Public food procurement initiatives represent a 'new' type of policy instrument which aims to use public procurement to achieve 'new' policy objectives. These objectives far exceed the scope of simply responding to the state's procurement needs at lowest cost. This approach calls for a broader interpretation of what constitutes 'best value' in public procurement. It also requires a consideration of various more wide-ranging social, economic and/or environmental factors that influence the understanding of what is 'best value'.

This idea that public procurement can go beyond the immediate scope of simply responding to the state's procurement needs and may be used to address additional social, environment or economic goals is actually not new, as described in Box 2.

#### BOX 2

##### **The use of public procurement to achieve broader social, economic and environmental goals**

In many countries, such as the United States, England and France, the practice of using public procurement to address additional social, environmental or economic goals that contribute to the overall public good of the state dates back to the 19th century (McCrudden 2004; Quinot 2013).

Nevertheless, this type of practice lost significant force, especially during the 1980s, as a consequence of the economic constraints imposed by globalisation and the influence of neo-liberalism (McCrudden 2007a; De Schutter 2014; Melo 2016). During that period, the use of public procurement to implement horizontal policies came to be seen as a source of financial inefficiency. Procurement norms were built around neoliberal ideologies, which meant that the role of the state needed to be reduced and that public services would either be more efficiently delivered by the private sector or, in cases where this was not possible, delivered by the public sector operating under the rules of the private market (McCrudden 2007b; Melo 2016). In this period, for instance, a range of countries developed cost-based contracting cultures that systematically favoured 'low-cost' options by stressing value for money in a limited sense (De Schutter 2014).

The use of public procurement as a tool for achieving other policy goals represents therefore almost a 'return'. Such a return is driven by the prevalence of new political and economic ideologies and the increased importance that horizontal policy objectives and sustainable development issues have acquired in regional and international policy debates.

Nevertheless, this topic has been receiving a renewed attention and recognition in the past two decades, both by the literature (Watermeyer 2004; McCrudden 2004; Thai 2008; Preuss 2009; Sumberg and Sabates-Wheeler 2010; Arrowsmith 2011; Quinot 2013; Smith et al. 2016) and by the international regulatory frameworks.

In the literature, these policies are often referred to as 'horizontal policies', 'secondary policies', 'socio-economic policies' or 'collateral policies'. This is because they are not directly linked to the functional purpose of the goods, works or services acquired via the procurement process (Arrowsmith 2010). Examples include the use of public procurement as a tool to promote fair labour conditions, improve environmental quality, encourage equal opportunities

between men and women, promote local and regional development, and support the economic development of disadvantaged social groups (such as smallholder farmers and small and medium enterprises) (Arrowsmith et al. 2000; McCrudden 2004; 2007a).

In the specific case of food procurement, there is increasing recognition of the potential that public food procurement initiatives have to address a range of social and economic, as well as environmental, goals (Morgan and Sonnino 2008; Bundy et al. 2009; Espejo et al. 2009; Foodlinks 2013; De Schutter 2014; 2015; FAO 2015; Global Panel 2015; 2016; Fitch and Santo 2016; Smith et al. 2016; UNSCN 2017; Tartanac et al. 2018). Examples include the support of agro-ecological and climate-sensitive agriculture production; the promotion of local and regional production; and the support of specific vulnerable producer groups (most often, smallholder farmers, but also women and small and medium food enterprises and indigenous peoples) through their integration into public food markets. This potential is reinforced by the potential that food procurement initiatives have to influence patterns of food production as well as food consumption, and thus to contribute to further nutrition and health outcomes (Morgan and Sonnino 2008; Foodlinks 2013; De Schutter 2014; Global Panel 2015; 2016; Fitch and Santo 2016; IPES-Food 2016; UNSCN 2017).

The idea of using public procurement as a policy instrument to support horizontal policy objectives has recently received increasing recognition within international regulatory frameworks as well. This includes, in particular, the 2014 revision of the European Union (EU) Directive on Public procurement and the 2011 United Nations Commission for International Trade Law's (UNCITRAL) Model Law on public procurement. In this latest version, the EU Directive expressly recognises the use of public procurement "in support of common societal goals", as well as the consideration of social and environmental values in the selection process. Similarly, the UNCITRAL Model Law recognises the implementation of socio-economic policies through public procurement, defining these as "environmental, social, economic and other policies", and accommodating their pursuit through a range of mechanisms.

This idea is also endorsed by the United Nations (UN) Sustainable Development Goals (SDGs), which include the target to "promote public procurement practices that are sustainable [i.e. which include environmental, economic and social aspects], in accordance with national policies and priorities" (Target 12.7). Sustainable public procurement is therefore recognised as a key prerequisite for achieving more sustainable patterns of consumption and production (UNEP 2017).

All the foregoing arguments and experiences foster the understanding that the issue is not really whether social, economic and/or environmental goals should or should not be pursued by means of public procurement. Rather, it is a question of how these goals should be implemented, i.e., how to translate these new policy objectives into appropriately adapted procurement rules and practices.

In the case of public food procurement initiatives, the main challenge is that in many countries, the recognition of these new objectives is not usually accompanied by appropriately adapted public procurement rules and practices. As mentioned at the beginning of this section, these remain tailored to the pursuit of the traditional objectives of public procurement, and they may not be suitable for the pursuit of these new policy objectives.

Despite the importance of this issue, and notwithstanding the fact that the need for alignment is recognised within the context of public food procurement (Brooks et al. 2014; FAO 2015; Aboah et al. 2016; Kelly and Swensson 2017), little has been written about how to address it. In this regard, the legal literature on public procurement may offer a valuable contribution.

## **2 ALIGNING PUBLIC PROCUREMENT RULES AND PRACTICES: LITERATURE AND PRACTICE**

### **2.1 POSSIBLE MECHANISMS**

There are various mechanisms and tools that can be used to align public procurement rules and practices for implementing the policy objective of supporting smallholder farmers (or other vulnerable producers) and their organisations through public food procurement (Watermeyer 2004; UNCITRAL 2014).

These may include interventions at the administrative level which aim to adapt the practices of procuring entities<sup>9</sup> and to address operational issues of the procurement process that generally constitute a barrier for smallholder farmers. Examples include measures to improve the communication of contract opportunities (i.e. tender notices); aligning terms and conditions of payment; increasing the time available to respond to tenders; adapting the size of contracts; and rationalizing requirements (Brooks et al. 2014; ITC 2014).

Interventions may also include specific legal mechanisms. These mechanisms allow the procuring entities to reserve contractual opportunities or to adapt the selection process and the related rules in order to give a competitive advantage to target suppliers or to contractors who will in turn source from the targeted beneficiaries.

Unlike administrative adjustments, which do not necessarily require a legislative intervention for their implementation, legal mechanisms require a legal underpinning (UNCITRAL 2014; WTO, n.d.).

Administrative adjustments and legal mechanisms can be adopted either jointly or individually. They can also be complemented by supply-side measures, based on the provision of targeted assistance to smallholder farmers and their organisations to facilitate their access to public markets (Watermeyer 2004; UNCITRAL 2014). Examples of the latter include support to obtain access to financial instruments to deal with long payment periods; providing support with preparing tender documents and proposals; and capacity-building to enhance production, organisational and marketing skills.

Although recognising the importance of administrative adjustment and of supply-side measures for supporting smallholder farmers in gaining access to public markets, the present analysis focuses on the use of legal mechanisms. This instrument has been the subject of extensive discussion in the legal literature and is considered of fundamental importance for facilitating the implementation of different horizontal policy objectives through public procurement (Watermeyer 2004; McCrudden 2007a; Arrowsmith 2010; Quinot 2013;). Nevertheless, very little has been said regarding the implementation of this instrument for promoting horizontal policies for agricultural and rural development. Nevertheless, legal mechanisms are currently being adopted in various countries for aligning public procurement rules and practices with the policy objective of using public food procurement as an instrument to support local and/or smallholder farmers. This is the case for Brazil, Paraguay, France and the US in the context of their respective school feeding programmes.

## 2.2 THE LITERATURE

There are various legal mechanisms assessed and described in the legal literature for aligning public procurement regulatory frameworks for the pursuit of horizontal policy goals which could be used to support the implementation of public food procurement initiatives targeting smallholder farmers (Watermeyer 2004; McCrudden 2007a; Arrowsmith 2010; Quinot 2013).

The literature categorises these legal mechanisms into three main generic schemes for using procurement to attain socio-economic objectives. These are: (i) reservation; (ii) preferencing, and (iii) indirect (Watermeyer 2004).<sup>10</sup> Table 1 provides an overview of these generic schemes, which will be discussed in greater detail in the following sections. This paper will refer to them generically as “preferential procurement schemes.”

TABLE 1

### **Preferential procurement schemes for using procurement to attain socio-economic objectives**

<b>Reservation</b>	Contracts, or portions thereof, are reserved for contractors (i.e. suppliers) who satisfy certain prescribed criteria.
<b>Preferencing</b>	Although all contractors who are qualified to undertake the contract are eligible to tender, competitive advantages are granted to those contractors who satisfy prescribed criteria or who undertake to attain specific goals in the performance of the contract.
<b>Indirect</b>	Although public institutions do not procure directly from target beneficiaries, procurement requirements are used to promote policy objectives by obliging contractors to attain specific goals in the performance of the contract (e.g. requiring contractors to source at least a percentage of their products from target beneficiaries).

Source: Adapted from Watermeyer 2004.

These mechanisms can be used to support different types of supplier (i.e. target beneficiaries) according to individual policy priorities as well as the specific social, economic and/or environmental objectives that governments target through public procurement. Target beneficiaries include smallholder farmers and their organisations.

According to the legal literature, these legal mechanisms are of key importance to facilitate the realisation of horizontal policies through public procurement—i.e. to incorporate the achievement of the horizontal policy objectives in the public procurement rules. As stated by Quinot, although the law does not play a significant role in decisions to use public procurement for horizontal policy purposes, “it plays a significant role in the way these policies are implemented, in other words, in designing the mechanisms used to implement those policies” (Quinot 2013).

Importantly, this literature also recognises and addresses the fact that the pursuit of socio-economic goals through public procurement and the adoption of these mechanisms may create tensions with the traditional objectives and principles of the public procurement regime, in that different rules aimed at achieving different objectives may be in conflict with each other (Watermeyer 2004; Quinot 2013; Arrowsmith and Quinot 2013). These tensions, however, can be managed within the legal regime by establishing conditions and safeguards for the implementation of the preferential procurement schemes. The design and implementation of the legal mechanisms is aimed therefore not only to facilitate the implementation of the policy objective through public procurement. It is also conceived so as to manage the trade-offs with the traditional objectives and principles of public procurement.

Indeed, the use of public procurement as an instrument to achieve social, economic and/or environmental goals cannot mean the simple overlaying of these objectives, at any costs or consequence, upon all the other objectives and principles of public procurement. As stated by Sumberg and Sabates-Wheeler in the analysis of home-grown school feeding programmes in Africa, "It is not realistic or appropriate to assume that stimulating agricultural development can or should be the primary objective of an HGSF procurement system" (Sumberg and Sabates-Wheeler 2010). Primary concerns regarding the undermining of traditional procurement objectives when using procurement as an instrument of socio-economic policy include the risk of: losing economies of scale and fostering inefficiencies in procurement; reducing competition; treating suppliers unequally and unfairly; excluding certain eligible tenderers from competing for contracts; and also reducing transparency (Watermeyer 2004; UNCITRAL 2014).

The challenge, therefore, is to use preferential procurement schemes for aligning public procurement rules to the new policy objectives and fostering their achievement, while at the same time maintaining an appropriate balance with the traditional principles and objectives of the public procurement regime and avoiding misuses and abuses.

The following section presents the three main preferential procurement schemes for using public procurement to attain socio-economic objectives, analysing their implementation in different countries for the specific context of food procurement and the support of local and/or smallholder production. The analysis includes the instruments used to manage trade-offs with the traditional public procurement objectives and principles and to avoid misuse. The analysis also encompasses the contract-lotting mechanism. Contract lotting means defining the size of the contracts (i.e. dividing a large contract into smaller individual lots) to suit the capacity of smaller actors in order to facilitate their access to the public market. Although it is also referred as an administrative adjustment (ITC 2014), specifically in the case of smallholder farmers it can be considered an important legal mechanism to help them obtain access to public food markets. It requires legislative underpinning and may result in a modification of the procurement procedure to assist this particular category of suppliers.

## 2.3 THE IMPLEMENTATION OF LEGAL MECHANISMS FOR THE PURSUIT OF SOCIO-ECONOMIC OBJECTIVES WITHIN THE FOOD PROCUREMENT CONTEXT: THE EXPERIENCE OF BRAZIL, THE US, PARAGUAY AND FRANCE AND THEIR SCHOOL FEEDING PROGRAMMES

### 2.3.1 Reservation

Reservation is the legal mechanism that allows government to reverse certain procurement opportunities (such as the supply of food to school feeding programme) to specific categories of suppliers who satisfy certain prescribed criteria linked to the designated policy objective.

While, according to standard public procurement rules, any qualified supplier is eligible to tender for a given contract, this mechanism creates an exception. It allows only the target beneficiaries of the horizontal policies to participate in the selection process and, therefore, to be eligible for the award of the contract. Competition will occur, but only among the type of suppliers the programme aims to benefit, thereby guaranteeing—or at least facilitating—their access to those markets.

On the one hand, this scheme offers procuring entities excellent possibilities for reaching target beneficiaries (as procurement opportunities are reserved to them specifically) and,

therefore, for implementing the individual policy objective linked to those beneficiaries (Quinot 2013; Watermeyer 2004). On the other hand, reservation may create tension vis-a-vis other public procurement objectives and principles, in particular considerations of competition and equal treatment, therefore requiring particular instruments to manage the trade-offs and prevent abuse.

## **Brazil**

A well-known example of reservation for the procurement of food targeting smallholder farmers is the case of Brazil and its National School Feeding Programme (PNAE).

Brazil employs a reservation scheme to implement the policy aim of using its school food procurement as an instrument to support sustainable development through the promotion of local food procurement from smallholder producers (i.e. family farmers and family rural entrepreneurs) (Law No. 11.947/2009; FNDE Resolution No. 23/2013).

Reservation is established by the aforementioned law, which requires that at least 30 per cent of the federal budget allocated for the purchase of food for school feeding must be reserved for contracts with family farmers and family rural entrepreneurs. Reservation is therefore mandatory. Based on a decentralised implementation model, procuring entities (education departments of municipalities, regions, and federal schools) may refrain from applying it only under specific conditions established by law. These conditions are: (i) incapacity of family farmers to provide a regular and constant supply; (ii) incapacity of family farm suppliers to issue the necessary tax invoices; and (iii) inadequacy of suppliers' sanitary conditions. Through the reservation scheme, only smallholder producers can participate in the tender process, competing only among themselves.

Data from 2016 shows that of the BRL 3,882.673.284 transferred by the federal government to the various procurement entities for the purchase of food, approximately BRL 858,777,000 were used through the reservation scheme for the procurement of food directly from family farmers and family rural entrepreneurs (FNDE website).<sup>11</sup>

In order to manage the trade-off with the traditional public procurement principles and objectives, the regulation provided some conditions and safeguards for applying the reservation scheme. These are:

- i. Purchases must be made directly from the eligible beneficiaries or their formal organisations. These beneficiaries are the family farmers and family rural entrepreneurs. This means that the procuring entities cannot purchase from intermediaries who resell the produce of the target beneficiaries. One key characteristic of the Brazilian regime is that these beneficiaries are defined by a federal law (Law No. 11.326/2006) which provides clear and unified criteria as well as a certification instrument, i.e. the PRONAF Eligibility Declaration (DAP).<sup>12</sup> These instruments facilitate identification of the target beneficiaries and implementation of the programme. They also facilitate a broader interaction and coordination between different public policies and programmes (such as the ones providing access to technical assistance and finance) that all target these same beneficiaries (Swensson 2015).
- ii. Food has to be produced by the eligible beneficiaries and, just as any food purchased by the state or made available commercially, it has to comply with the quality and safety requirements established by the appropriate regulatory framework. This requirement is aimed at ensuring that the programme supports local and smallholder production, not

allowing target beneficiaries to merely buy and sell products from other (non-target) beneficiaries. It also demonstrates the priority given to the safety and quality aspects of the food that is to be served at schools.

- iii. Prices must be compatible with those in local markets and will be established by the procuring entity in the call for tender. On the one hand, this requirement is aimed at ensuring economic efficiency, as prices are set at actual market levels. On the other, as competition is not based on prices offered by suppliers but rather on prices which are given by the buyer based on markets, it allows the selection of suppliers based on other awarding criteria. These criteria are: (i) the locality of production (giving preference to the nearest locality of production based on the administrative division of the country [municipality, neighbouring municipalities, other municipalities within the same state, neighbouring states and other states within the national territory, in this order]); (ii) specific vulnerable groups (land reform settlers and indigenous peoples, among others); (iii) organic or agro-ecological products; (iv) formal groups (i.e. producers' cooperatives or associations), in this specific order. This reinforces the possibility of using public procurement to achieve broader social, economic, and environmental goals, translated into the support not only of smallholder producers, but also of local production, other socially disadvantaged groups, organic and agro-ecological production, and promoting the development of cooperatives and associations.
- iv. The law No. 11.947/2009 expressly requires that the public administration principles established by the Brazilian Federal Constitution, and replicated in the Law No. 8666/93 on public procurement, (i.e. legality, impersonality, morality, publicity and efficiency) must be observed when implementing the reservation scheme. This means that the pursuit of the use of public procurement as an instrument to achieve social, economic and/or environmental goals cannot entail the simple overlaying of those objectives upon all the other objectives and principles of public procurement. A balance with the other objectives and principles of public procurement is therefore requested.

The conditions imposed by the PNAE regulatory framework therefore define the limits of the application of the reservation scheme, giving little discretionary power to the procuring entities. The implementation of the scheme is also supported by specific guidelines with a detailed ten-step procedure which is to be followed by the procuring entities for the procurement of food directly from family farm producers (MDA, n.d.).

Furthermore, the reservation scheme in Brazil is also accompanied by an alternative competitive procurement method (i.e. the 'public call' [*chamada pública*]), in which most of the conditions and requirements are adapted to suit the characteristics and capacities of smallholder farmers and their organisations (Swensson 2015; Kelly and Swensson 2017). Adaptations include the supporting documents required for participation; advertising methods; and the time available to respond to the call for tender. For instance, instead of requiring producers to prove their legal, technical, economic and financial status as well as their compliance with tax and labour obligations by means of a series of documents (as required in the standard open tendering procedure), individual producers are only required to present their fiscal and personal documents and the DAP. Procuring entities are also requested to advertise the call for tenders through local family farming organisations and entities responsible for technical assistance and rural extension, thus facilitating target beneficiaries' awareness of the tender opportunities.

### 2.3.2 Preferencing

Preferencing is the legal mechanism that allows government to give a competitive advantage to a defined category of suppliers within a fully competitive procurement process.

In contrast to the reservation scheme, the selection process is open to any interested supplier, who may compete with the targeted beneficiaries for the contract opportunities. Nevertheless, preferential treatment will be given to those suppliers who satisfy prescribed criteria (e.g. qualify as smallholder farmers) or who undertake specific goals in performance of the contract (e.g. caterers who commit to buy from local smallholder farmers) linked to the policy objective that government is targeting (Watermeyer 2004; ITC 2014).

There are different types of preference that can be given to target suppliers. One of the most common is to increase (only for the purposes of evaluation) the price of non-preferred suppliers by a set number of percentage points (e.g. 10 per cent.)<sup>13</sup> Another form of the preferencing scheme includes the awarding of a number of evaluation points for products when these comply with the preferencing eligibility criteria, which will be added to other points awarded based on a range of selection criteria (e.g. price, quality specification, etc.).

Preferencing can therefore be a key instrument to mitigate, in particular, barriers imposed by the lowest-price award criteria. Nevertheless, preferencing may run counter to some of the traditional principles and objectives of public procurement. These include full and open competition and the equal treatment of suppliers. Preferencing represents, indeed, an important exception to the latter, as it allows procuring entities to discriminate among suppliers and not treat them all in the same way. It can also create tension with the traditional objective of 'best value for money'—if this is understood as the lowest price—as contracts may not be awarded to the lowest price offer.

Like reservation, a preferencing scheme may therefore require a specific legislative intervention, especially to manage the trade-offs, to ensure an appropriate balance between the different public procurement objectives, and to prevent abuse.

## US

One interesting example of the implementation of a preferencing scheme within the public food procurement and school feeding context is the US.

In 2008, the regulation governing school food programmes was amended to allow for entities receiving funds through the child nutrition programmes (CNP)<sup>14</sup> to apply an optional geographic preference when procuring unprocessed locally grown or locally raised agricultural products, with the objective of supporting local agriculture production (Law 110-246/2008 – 'Farm Bill' – and Code of Federal Regulations).

Through these regulations, procuring entities can apply an exception to the traditional principle of equal treatment of suppliers and may open up the competition to give a defined advantage to products that meet the eligibility criteria defined as 'local'. One of the key characteristics of the US system is that these regulations give the procuring entities the power and discretion to define 'local' and, as such, to accommodate within this definition various types of beneficiaries, including smallholder farmers and their organisations, as will be discussed below.

This preferencing scheme allows for (and encourages) procuring entities to offer a competitive advantage to a selected category of suppliers, who, although competing with other non-preferred suppliers, will enjoy better chances of being awarded the contract.

In contrast to the Brazilian experience, the preferencing scheme adopted in the US is neither obligatory nor linked to a target. Procuring entities participating at the CNPs have



the discretionary power to apply a preference in the procurement of agricultural products for schools to the maximum extent practicable and appropriate.

The procuring entities additionally have the discretionary power to choose the amount (e.g. 5 per cent or 10 per cent price preference) and also to determine the type of preference to apply (e.g. a price preference rather than a point preference). The USDA guide on “Procuring Local Foods for Child Nutrition Programs” (USDA 2015) provides nine different examples of preference types that the procuring entities can implement, illustrating the great variety of choices available. As the US school feeding programme is based on a decentralised operational model, this discretionary power given to the procuring entities leads to a great variety of implementation approaches and (presumably) results.

In general, the USDA’s Farm to School Census showed that in the school year 2013–2014, school districts spent nearly USD800 million on locally and regionally-sourced food,<sup>15</sup> representing a 105 per cent increase over school year 2011–2012 (USDA website).<sup>16</sup> Nevertheless, no data could be found to indicate that these procurements were made using a preferencing scheme specifically, or other available legal and/or administrative mechanisms. There is also a lack of reliable data on purchases made from smallholder farmers.

To facilitate the implementation of broader development goals through public procurement and to manage trade-offs with the traditional principles and objectives of public procurement, the relevant regulations provide certain conditions and safeguards for applying the preferencing scheme. These are:

- i. The preferencing scheme may be used only by school food authorities participating and receiving funds from the CNPs, or by state agencies making purchases on behalf of such school food authorities.
- ii. Food purchased must be unprocessed or minimally processed (i.e. must consist of agricultural products that retain their inherent character). This requirement limits the extent of the implementation of the preferencing schemes, excluding among its beneficiary producers of processed food. Clear parameters are also provided by legislation for defining which products can be considered as unprocessed or minimally processed, and which cannot.
- iii. Food must be locally grown, and livestock locally raised.

As mentioned above, a distinctive characteristic of the US experience is that federal rules do not define the term ‘local’, leaving it to the respective authority to define what is meant by ‘local’ directly for the procuring entity (i.e. the school food authorities). Each procuring entity has the discretion to create its own definition of ‘local’ that serves its particular needs and policy goals, and to define its own eligibility criteria.

On the one hand, this discretionary power allows for greater flexibility, permitting the procuring entity to tailor procurement and the preferencing scheme according to its specific social, economic and/or environmental goals. This includes the support not only of local farming, but of smallholder farming more specifically. The possibility of adopting a definition of ‘local’ that includes a limitation on farm size is expressly recognised by the USDA guidelines on how to procure local foods for CNPs (USDA 2015).

On the other hand, this possibility also means that the success of the implementation will be highly dependent on the capacity of the procuring entity both to identify its particular needs and policy goals and to tailor its definition of ‘local’ accordingly. It will be also

dependent on sound oversight and control mechanisms that include safeguards to avoid favouritism and other types of misuse (OECD 2016).

This discretionary power given to the procuring entities in defining the eligible criteria, however, is not unlimited:

- i. Eligibility criteria may not unnecessarily restrict free and open competition. The criteria applied must guarantee that an appropriate number of qualified suppliers are available to compete for the contract, dependent on the nature and size of the procurement involved (USDA 2015). If, on the one hand, the preference must be sufficient to provide a competitive advantage to target suppliers to fulfil the objectives of the preferential policy, on the other, the preferencing scheme may not provide too much of an advantage, excluding all competition, and reserving the market only for target suppliers (USDA 2015).
- ii. To ensure transparency, the selection and preference eligibility criteria must be clearly defined and specified in all solicitation materials. This means that, despite of the type of preference used (i.e. by points or percentages), the solicitation document must clearly outline how the proposals will be evaluated, allowing all participants to know in advance the conditions of applicability of the preferencing scheme (USDA 2015).

Finally, while in the Brazilian case the reservation scheme was combined with an adapted procurement method, this was not the case in the US experience. The procurement methods to be used remain the same. Nevertheless, although the default method is the open tendering one, the system also provides for alternative procurement methods, including the 'Small Purchase' procedure. This alternative procedure can be used in special circumstances, including when the value of the purchase falls below the applicable procurement threshold. Due to its greater simplicity and flexibility and its smaller number of requirements, this procedure is generally more adaptable to the characteristics and capacities of smallholder farmers (ICN 2015). Nevertheless, to guarantee the objectives and principles of the public procurement regime while adopting the alternative procurement method, the regulatory regime also imposes certain conditions and safeguards, as described in Box 3.

#### BOX 3

##### **Safeguards of the Small Purchase procurement method in the US procurement system**

To guarantee the principles of public procurement while not using the standard procurement method (i.e. the open tender), the US system imposes certain safeguards for the use of the Small Purchase procurement method.

- The procurement process shall be conducted in a manner that maximises free and open competition.
- It shall be monitored under a contract administration system to ensure that vendors perform in accordance with the requirements of their contracts.
- It shall document records that detail the history of the procurement process.
- It shall use a solicitation that clearly describes the product or service to be procured, without restricting competition.
- Price or rate quotations shall be obtained from an adequate number of qualified sources.
- The law prohibits the breaking-up of bids into smaller units (i.e. contract lotting) to keep purchases under the small purchase threshold in order to avoid the default open tender procedure.
- Contracts shall be awarded only to responsible respondents with the ability to perform successfully.
- Contracts may not be awarded on the basis of a cost plus percentage of cost or percentage of contract.
- Contracts may not be awarded using a geographical preference except in those cases where applicable federal statutes expressly mandate or encourage geographic preference (i.e. as in the case of the 2008 Farm Bill).

Source: Adapted from ICN 2015 and from Code of Federal Regulations (No. 7, Part 3016.36).

### 2.3.3 Indirect

The indirect scheme is the mechanism which allows for the government to use public procurement to pursue horizontal policy goals and support a specific category of supplier, even if it does not purchase products or contract services directly from these target beneficiaries.

In the case of school feeding programmes, the indirect scheme allows government to support specific types of supplier (such as smallholder farmers) even if the implementation model is based in a third-party one, i.e. when the procurement and food preparation activities are not performed in-house, but rather by a contracted third party. Through the indirect scheme, procuring entities can award contracts to caterers to buy food, prepare it, and serve it to schools, and can require as a contractual condition that a percentage of the food used in preparation is to be purchased from smallholder farmers (or from any other type of target beneficiaries the policy aims to support).

The indirect scheme means, therefore, that only suppliers who commit to the contractual conditions can participate in the procurement process or and enjoy preference in the selection phase. As with the other schemes, indirect procurement may therefore create tensions with the traditional objectives of open competition and equal treatment of suppliers.

One particularity of this scheme is that its design within the regulatory regime must take into consideration not only the direct relationship between the procuring entity and the contractor, but also the relationship between the contractor and the targeted beneficiaries.

An interesting, although recent, example of the indirect scheme is Paraguay's school feeding programme.

Box 4 (see page 23) also presents the experience of SNV, an international not-for-profit development organisation, and its project to implement 'Procurement Governance for Home-Grown School Feeding' in Ghana. Although not a national experience, this project offers insights into interesting features of the development of an indirect preferencing scheme to support the inclusion of smallholder farmers in the Ghana School Feeding Programme (SFP). Ghana SFP was developed under the New Partnership for Africa's Development (NEPAD) Home-Grown School Feeding initiative and has among its objectives to increase domestic food production and the incomes of poor rural households (Government of Ghana 2011).

### Paraguay

Since 2013, Paraguay has had a specific regulation that recognises the need to align public procurement rules and practices for the purposes of using public food procurement as an instrument to *"strengthen and support the development and consolidation of the rural sector and improve the quality of life of the population represented by family farming"* (Decree 1056/13 and Decree 3000/15). To achieve this objective, the decree provides for a range of tools that procuring entities are free to use. These include a mechanism for direct procurement (i.e. the simplified process for the purchase of agricultural products from family farming) and an indirect scheme. The latter was recently regulated by the National Directorate for Public Procurement (DNCP Resolution 2915/2015).

According to key informant interviews, the recent regulation of the indirect scheme represents an attempt to increase use of the available mechanisms to support family farming producers through public procurement. Although a direct mechanism and a related special

procedure have existed since 2013, the implementation of this mechanism has been very low in recent years (interviews with key informants). One of the many reasons for its low utilization is the current practice of decentralised procurement entities to opt for a third-party implementation modality. The indirect scheme is currently implemented by the Ministry of Education (MEC) in the schools of the capital city, partly in an effort to set an example to other procuring entities (i.e. the municipality), who are free to decide on both the implementation modality and whether or not to use the available mechanisms to support family farming producers through public procurement (interview).

Through the indirect scheme, the procuring entity can require as an eligibility condition the purchase of a minimum percentage of the food used to prepare the school meals from family farmers and their organisations. Only the enterprises that commit to this minimum percentage (or a higher one) will be eligible to participate in the selection process. The percentage of procurement from the target beneficiaries is also used as a complementary awarding criterion. Price remains the main awarding criterion, however when two or more potential contractors offer the same price, the offer with a higher percentage of procurement from the target beneficiaries will have priority over the others.

Procuring entities are free to choose the minimum percentage to which the contractor will have to commit in order to be eligible to participate in the selection process. This discretionary power, however, is not unlimited. The regulations impose certain conditions and safeguards to limit this discretion and to manage the trade-offs with the other principles and objectives of public procurement.

- i. The choice of the minimum percentage may not be arbitrary. The regulation requires that the choice of the minimum percentage must be done taking into consideration the object of the contract, the products, their availability, the effects of seasonality and the quantity required, as well as the availability of producers. The choice must also be justified and such justification sent formally to the DNCP.
- ii. The resolution expressly requires that the choice of the minimum percentage must be made with "strict observance" of the principles (and objectives) of public procurement established by the public procurement law (Law No. 2051/03): economy, efficiency, equality, open competition, transparency, and publicity. Although not many further details are provided, this means, as with the US case, that the definition of the percentage cannot be used to unreasonably limit competition or to favour specific suppliers. The percentage must be sufficient to ensure the pursuit of the policy objective, but it cannot be too high. It is up to the procuring entity to make this calculation, taking into consideration the elements prescribed by the regulation and mentioned above. This requirement, as in the case of the Brazilian system, shows a clear recognition of the fact that the pursuit of horizontal policy objectives through public procurement cannot mean the overlaying of these objectives upon all the other objectives of public procurement, but that it instead requires the management of trade-offs to ensure an appropriate balance among them.
- iii. As an instrument to ensure transparency, the tender documents must expressly include information about the minimum percentage required, which must be available in advance to all interested suppliers.
- iv. Purchasing must be done from family farming producers, who must be registered with the Ministry of Agriculture and Livestock (MAG), comply with eligibility criteria

established by regulation, and receive technical assistance from a recognised entity. One distinguishing characteristic of the Paraguayan system is that, as with the system in Brazil, the target beneficiaries and eligibility criteria are clearly defined in the regulatory framework. (Law No. 2.419/2004 and 2010 Operative Manual of the National Register of Family Farming [RENAF]). This is designed to ensure that contractors will purchase produce from precisely those producers that the government aims to support through public procurement. The register to be consulted by interested suppliers (i.e. the caterers and/or enterprises) in order to ascertain the number of family farming producers in the region and to plan the procurement process accordingly. This requirement allows contractors to obtain key information about the target beneficiaries' production, and to plan the percentage to be procured from them accordingly. It is important to note, however, that this possibility will be highly dependent on the good maintenance of the register and the regularity with which its information is updated.

- v. The Paraguay system imposes one more requirement: family farmers must receive technical assistance from the MAG or another recognised entity in order to be eligible to participate in the programme. On the one hand, this requirement, which was introduced in 2015, is in line with the understanding that technical assistance is key for supporting family farmers in overcoming the barriers they traditionally face when striving to meet the requirements of formal buyers and to obtain access to formal markets. On the other hand, however, it may face potential challenges to its implementation. In the case of Paraguay, for instance, although technical assistance should theoretically be available to all family farmers, the limited coverage of the programme has been reported as an important challenge to compliance with this requirement (interviews with key informants).

As already mentioned, one of the distinctive characteristics of the indirect scheme is the need to take into consideration not only the direct relationship between the procuring entity and the contractor, but also the relationship between the contractor and the targeted beneficiaries. To be effective, regulation of the indirect scheme must therefore provide mechanisms to ensure the contractor's compliance with its commitment to purchase from the target beneficiaries. This means creating specific mechanisms to foster, monitor, certify and control that the contractor purchases: (i) from the target beneficiaries; (ii) in the correct percentage; and (iii) in an inclusive way (i.e. benefitting the target beneficiaries in terms of timely and fair payment, fair access, etc.). It also involves the application of penalties in the case of non-compliance.

To achieve these aims, the DNCP regulation provides some key tools:

- i. In order to participate in the selection process, contractors must formally commit to purchase from the target beneficiaries at least the minimum percentage required by the procuring entity. The percentage committed must be congruent with the reality and the actual availability of smallholder supply in the region. As mentioned above, the regulation requires the contractor to consult the family farming registry, with the aim of ensuring such congruency. Furthermore, the regulation also requires the MAG to issue a list with the name of the family farming producers, their products and their potential production (DNCP 2915/2015; MAG Resolution No. 1263).
- ii. The price to be paid by the direct supplier to the family farming producers must take into consideration the reference price published by the MAG. This request is aimed at ensuring that the indirect procurement is carried out in an inclusive way, i.e. one that

effectively favours the target beneficiaries with a reasonable price. This requirement, however, does not mean that contractors are obliged to pay the reference price; rather, it means that they should take the reference price into consideration when negotiating with the target beneficiaries. No further instrument of control or penalty is provided.

- iii. As a control mechanism, the regulation requires that the procuring entity is permitted to pay the contractors only against the presentation of invoices that prove actual procurement from the target beneficiaries. The regulation also gives the procuring entity the possibility to carry out random checks and to verify *in situ* the delivery of the products by the family farmers to the contractor and the condition of the family farmers, as well as other factors related to the execution of the contract. Furthermore, in the event of non-compliance with the committed percentage (for reasons attributable to the contractor), the regulation requires that procuring entities inform the DNCP to take appropriate action. No specific penalty is, however, established in the regulation.

It is interesting to note that the indirect scheme implemented in Paraguay does not include the use of an adapted procurement method for the selection of the supplier. As the direct contractual relationship is between the procuring entity and the enterprise, the procurement method does not have a direct impact on the target beneficiaries and on their access to these specific market opportunities. Instead, the MEC has been implementing matchmaking events [*roda de negócios*] as an additional administrative instrument. This instrument is aimed at enhancing access to information and linkages between the contracted party and the target supplier, and ultimately supports the indirect access of smallholder farmers to public markets.

The Paraguay experience with the indirect scheme is very recent, as it was first introduced by the MEC only in the 2016–2017 procurement call for the schools in the capital. An analysis was therefore only possible based on the text of the regulations and data gathered from key informants, as there is still very little information on its results and the effectiveness of controlling instruments.

## BOX 4

**SNV project—proposed indirect scheme in Ghana**

Despite the aims of the government to link the Ghana SFP with local and smallholder agriculture and to purchase at least 80 per cent of food from local smallholder farmers, the SNV project assessed that there was no instrument in place within its procurement system and decentralised third-party implementation model to (i) formally require that contracted caterers should purchase a percentage of their primary products from the target beneficiaries, or (ii) to give preference to traders who do this. There was also no instrument in place to guide caterers in their procurement or to monitor, evaluate and certify whether procurement from smallholder farmers was carried out effectively (i.e. at what percentage and conditions). These gaps were also aggravated by the flow of funds in place, through which caterers were paid only after they had served the food. This was often with a long delay that constrained them to a pre-finance procurement and encouraged their reliance on large suppliers (traders) who, unlike smallholders, are in a position to sell products on credit (Aboah et al. 2016; Drake et al. 2016).

To overcome these challenges, SNV proposed and tested an indirect procurement scheme, according to which:

- Caterers are obliged to use at least one-fifth of their food budget to purchase produce from local smallholder farmers;
- A preferencing scoring system is used for the selection of contractors (i.e. caterers), whereby 25 per cent of the scoring is assigned to the caterer's capacity to source from smallholder farmers and another 25 per cent to the caterer's proximity to the school;
- Target beneficiaries (smallholder farmers and their organisations) are defined according to clear eligibility criteria. Due to the lack of existing certification or registration systems, eligibility is to be proven through self-declaration in the case of individual farmers, and by legal statement on the part of the board of directors—validated by a government authority—in the case of farmer organisations;
- The capacity of caterers to supply from local smallholder farmers is to be validated on the basis of copies of their past purchasing records or the purchase agreements into which they have entered with farmer organisations; and
- A "Monitoring and Evaluation Framework for the Performance of Caterers in Ghana" was developed to measure local farmer involvement in the sourcing of food products as well as the performance of caterers in terms of food quantity and quality, hygiene, timeliness, and the frequency of food being served.

To support the scheme, the project organised matchmaking events to enable caterers and farmers' organisations (FOs) to exchange information and to facilitate deal-making (Karg et al. 2015). The project additionally introduced a series of administrative adjustments that include an adapted means of communication using local radios to disseminate the tender notices, as well as translating the tender into local languages. As a complementary measure, the project also piloted a loan mechanism with special conditions for caterers, to address the pre-financing gap.

The SNV project ended in 2016 with positive results, including an important increase in the number of producers' organisations participating in the school feeding market by means of sales to caterers (Vera et al. 2016). Participation increased from one direct sale of FOs in 2012, to 2, 70 and 617 direct sales in 2013, 2014 and 2015 respectively (Commandeur et al. 2016).

### 2.3.4 Contract lotting

Contract lotting is the mechanism which allows (or requires) government to determine the size of individual contracts (i.e. to divide a large contract into smaller lots) to suit to the capacity of smaller actors, thereby facilitating their access to the public market. While the other mechanisms could be used to pursue different policy goals, contract lotting is used more specifically to support small-scale suppliers.

The rationale is that dividing a single contract and the related tender process into separate contracts (i.e. contracts defined by product or sector) and/or smaller contracts creates an opportunity for smaller and more specialised producers to participate in the tender process and to be awarded a contract (Trybus 2014). Based on these characteristics, contract lotting can be a very useful tool for supporting smallholder farmers through public food procurement, particularly in more centralised procurement systems characterised by larger demand.

Contract lotting can also be a useful instrument to increase competition, with the higher number of participants in the procurement process helping improve value for money (Trybus 2014; Smith 2017). Nevertheless, it may also compromise some of the traditional objectives and principles of public procurement. This includes in particular the risk of increasing the costs, complexity and management of a public contract. Table 2 presents an overview of the pros and cons of contract lotting.

TABLE 2  
**Positive and negative aspects of contract lotting**

Positives	Negatives
Lotting may achieve a more competitive procurement process, leading to improved value for money.	Lotting may reduce competition. In certain circumstances (such as in a market dominated by large suppliers), splitting a requirement into small lots might make it unattractive to all or many of the existing suppliers.
Lotting may stimulate the long-term market for a product or service, with positive results for the buyer and the private citizen. Lots may well mean that more suppliers can win business, which may lead to a more dynamic market.	The cost of procurement is likely to be higher than in the case of a single-competition process.
Lotting may spread the risk. Splitting the contract and using multiple suppliers may (depending how the lotting is done) build more resilience into the system, with the possibility of other suppliers stepping in if a particular one has problems.	The cost of contract management is likely to be higher, as managing multiple suppliers is likely to require more resource, time and effort than managing a single supplier.
Lotting may support social objectives, such as development of a diverse supply base and support for SMEs or local firms.	Lotting may introduce costs and/or risks into the delivery phase of the contract.
Lotting enables contracting authorities to experiment, to try different solutions and approaches. A single supplier will generally deliver in a single manner; multiple suppliers will have different approaches, and the user can examine which works best, with obvious potential benefits.	Lotting may involve the loss of potential economies of scale and therefore of value to the contracting authority (therefore representing a counter to the argument for creating more competition in a market).

Source: Adapted from Smith (2017).

The potential negative effects of contract lotting can lead to controversies when it is adopted. For instance, contract lotting was fully recognised and regulated in the EU Directive as a default mechanism for supporting the implementation of horizontal policy goals only in 2014, and not without controversies (Trybus 2014). Implementing contract lotting requires the management of trade-offs and the establishment of conditions and safeguards to ensure that it achieves an appropriate balance between the various objectives and principles of public procurement.

One example of the adoption of the contract lotting mechanism for food procurement from local smallholder farmers within the school feeding context is provided by France.

## France

France applies contract lotting as an instrument to implement its policy objective of using its institutional food markets [*restauration collective*]<sup>1</sup>—including the national school feeding programme—to support the local agriculture production through the promotion of food



procurement from local smallholder farmers (MAAF 2014). The government expressly recognises the important role and potential of public food procurement to drive social and economic development and to influence patterns of food production and food consumption alike (MAAF 2014).

In line with the EU Directive, contract lotting is regulated by French legislation as a general instrument to support the access of any type of small-scale suppliers to public markets (Ordinance No. 899/2015 and Decree No. 360/ 2016). According to this regulatory framework, the procuring entity is to divide public contracts into small lots, establishing the number, size and object of the lots.

In the case of food procurement, the use of contract lotting is addressed by a specific government guide on “Promoting local and quality supply in public catering” [*Favoriser l’approvisionnement local et de qualité en restauration collective*] (ibid.). As with the US system, this guide provides practical advice to procuring entities on how to use contract lotting—as well as other legal instruments—to facilitate the access of local and smallholder farmers to public markets.

According to this guide, contract lotting is a useful mechanism with the potential to (i) facilitate the access of small and/or specialised suppliers (including SMEs and farmer organisations) to public contracts; (ii) create real competition between suppliers, regardless of their size; (iii) support the use of quality, environmental or social awarding criteria in the selection of suppliers.

In order to ensure the achievement of its objectives and to guarantee an appropriate balance with the other principles and objectives of public procurement, the regulations impose certain conditions and safeguards:

- i. In order to promote its use, contract lotting is a requirement in France. Nevertheless, it is not an obligatory one. Procuring entities can choose not to implement it when its use is likely to reduce competition, to make the execution of the contract technically too difficult or excessively costly, or in the case when the procuring entity’s inability to coordinate the multiplicity of lots could undermine the proper execution of the contract. These requirements show the recognition of the pros and cons of contract lotting (see Table 2), and give the procuring entity the task of evaluating its use according to their capacity, needs and against public procurement principles and objectives.
- ii. Although procuring entities can decide not to implement contract lotting, they must communicate their decision to the public procurement authority, and explain their reasons for not doing so. This requirement is aimed at enhancing the application of the mechanism by forcing the procuring entity to at least pause to consider the possibility of a division into lots and not to decide automatically for the easiest and habitual option of not using it (Trybus 2014). The communication of the justification presented by the procuring entity will be in the public domain, making it possible for any interested party to check the justifications provided.

Once procuring entities decide to use the mechanism, further conditions and safeguards apply:

- iii. Procuring entities can decide to allow suppliers to compete either for just one lot or else for several lots. They can also limit the number of lots that can be awarded to a single contractor. On the one hand, this measure aims at ensuring competition and avoiding

the situation whereby, despite the division of a contract into smallholder lots, one single supplier could be awarded all or most of the lots. This possibility would indeed not be in line with the purpose of the division into lots, undermining the effectiveness of the instruments (*ibid.*). On the other hand, preventing suppliers from competing for more than one lot could, in certain circumstances (such as in market dominated by large suppliers) also severely restrict competition and/or other objectives of public procurement (see Table 2). In the French case, it is up to the procuring entity—based on the characteristics of the markets—to weigh up these factors and decide on how many lots any single supplier may compete for. It is in this context that the guidelines state that it is crucial that the procuring entity should have a deep understanding of the local market and of its actors when applying the contract-lotting mechanism (MAAF 2014).

- iv. When suppliers are allowed to compete for more than one lot, they cannot offer a price for a single lot and a different (lower) price for the case that they may be awarded a combination of lots. In other words, French regulation prohibits a rebate when multiple lots are awarded to the same supplier. The reason for this prohibition is that such a rebate would favour large companies, undermining contract lotting's objective of supporting small-scale suppliers. This requirement also illustrates the tensions between the objective of value for money (as a rebate means a lower price) and the objective of supporting small -suppliers through public procurement (Trybus 2014). In this case, the legislator opted to adopt a more wide-ranging interpretation of best value for money, going beyond the lowest price, and taking into consideration broader socio-economic values. Economies of scale may be limited in order to favour socio-economic values through supporting small-scale suppliers and their access to public markets.

One of the key, and most controversial, characteristics of the contract-lotting mechanism is that, due to the smaller value of the individual lots, it may fall below the thresholds of alternative procurement procedures. As mentioned above, most public procurement regimes impose the open tender as the default procurement procedure and consider it the most appropriate one for pursuing traditional public procurement objectives in the purchase of goods. Nevertheless, in some specific cases, other, more simplified, procedures are allowed. This is the case when the value of the spend is relatively low.

French legislation is clear in affirming that, even if the total value of all the lots is higher than the alternative procedure thresholds, this procedure can be used for separated lots. In this way, procuring entities can treat separate lots as separate contracts, waiving the default tender procedure and applying alternative procurement methods. As with the US case, these alternative procurement methods are simpler, involve fewer requirements, and are more easily adaptable to the characteristics and capacities of smallholder farmers.

It is interesting to note that other public procurement regulatory regimes, such as the US one, expressly prohibit this (see Box 3). This prohibition is based on the concern that it could be used to artificially push the contract value below the threshold with the sole intention of waiving the application of the open tender procedure—which, as mentioned before, is allowed only under specific circumstances regulated by law.

Nevertheless, the possibility of bypassing the default procurement procedure is not absolute in France, and specific safeguards are imposed. Small lots may be treated as separate contracts and alternative procurement methods used only if:

- i. The estimated value of each lot is below EUR80,000 (net of taxes) in the case of products and services; and
- ii. The value of the group of lots which bypass the default procurement procedure does not exceed 20 per cent of the value of the entire contract (sum of all the lots).

### **3 COMPARATIVE ANALYSIS AND LESSONS LEARNED**

Analysis of the different country experiences permits the identification of key lessons that may be useful for supporting other governments in aligning public procurement regulatory frameworks to the policy aim of using public food procurement as an instrument to support local and smallholder agriculture.

#### **3.1 CHOOSING THE MOST SUITABLE INSTRUMENT**

Analysis of the different country experiences and of the literature demonstrates that when it comes to adapting public procurement regulatory frameworks for achieving broader development goals, there is no 'one-size-fits-all' solution. There are various instruments and legal mechanisms that can be used for this purpose. The choice of the most suitable one(s) for the implementation of public procurement programmes targeting smallholder farmers will depend of a range of factors. These include the inherent characteristics of the relevant instruments, as well as external factors.

A comparative analysis of the various country experiences shows that the different legal mechanisms have different inherent characteristics and strengths in facilitating the pursuit of the socio-economic objectives, but that they also impose a range of tensions with traditional public procurement principles and objectives and different costs (Quinot 2013). For instance, reservation schemes—such as the one analysed in the Brazilian context—allow only target suppliers to participate in the tender process. This means, at least theoretically, that is easier for this group of suppliers to access the public markets compared, for example, with the case of preferencing schemes. Nevertheless, this scheme will also impose greater tension with the principles of equal treatment of suppliers and of competition compared with the preferencing one, requiring therefore different types of trade-off. The costs the various legal mechanisms may impose on the system (in the form of additional administration costs, for instance) may also vary, and must be taken into consideration.

Despite the differences between the various legal mechanisms, a common characteristic of all country experiences is the recognition of the need to manage these trade-offs. This includes the recognition that the use of these mechanisms and the pursuit of these new policy objectives cannot simply overlay the traditional objectives and principles of public procurement, at any cost or consequence.

The choice of the most appropriate legal mechanism (or a combination of them) should therefore take into consideration its characteristics and potential, but, very importantly, also the trade-offs that it requires.

The analysis of the various country experiences shows also that the choice of the most appropriate legal mechanism(s) should be made taking into consideration other external

factors as well. These factors include (i) the existing legislative framework and (ii) the programme characteristics and implementation context.

Regarding the existing legislative framework, all international documents are clear in recognising that the preferential procurement schemes, as well as the contract-lotting mechanism, need a legal underpinning. This means that their development and implementation cannot be based on policy instruments alone, but are to be recognised through a legislative intervention. As a result, the choice of the relevant legal mechanism will depend on the legislative framework, on what it already provides, or on the possibility of amending it.

In this regard, the analysis of the different experiences shows that in some cases, as in the case of Brazil, the most appropriate solution may be the development of an *ad hoc* scheme specifically for the procurement of food from smallholder farmers. In the case of Brazil, this possibility was allowed by the Federal Constitution and created through a federal law which regulates the national school feeding programme.

In other cases, as in France, the choice may be based on already existing tools. These tools, although not created with the specific purpose of supporting smallholder farmers through public food procurement, could also be used for that purpose. This is the case of the contract-lotting experience in France. This mechanism was introduced by the legislative framework for any kind of procurement, and has since been adopted to support smallholders' access to public food markets within the school feeding context.

What can be learned is that, in each case, it is very important to have an assessment of the existing regulatory frameworks in order to be aware of the different possibilities already available, as well as of those that might be developed in line with the existing legal framework. Legislative reforms, especially in important areas such as public procurement (often regulated at constitutional level), may constitute an important cost for the system. It is therefore crucial that choices regarding the most appropriate legal mechanism to be adopted should be made with a full awareness of this possibility.

Regarding the possibility of using existing instruments, many countries have already legislated preferential procurement schemes for the support of micro, small and medium enterprises which may favour smallholder farmers and their organisations. Nevertheless, it is important to highlight the fact that these mechanisms may not be readily applicable to smallholder farmers and their organisations, and that they most often require adaptations. This is, among other reasons, because farmers may not conform individually with the basic characteristics of the definition of 'enterprises'. For instance, smallholder farmers are generally not registered as commercial enterprises, nor do they work within the tax structure of their applicable jurisdiction (Aboah et al. 2016; Brooks et al. 2014). On the other hand, when organised in FOs, they may have a size and volume of transactions that exceed the eligibility criteria established for the definition of micro, small and medium enterprises in terms, for instance, of their annual sales or number of employees (Aboah et al. 2016; Brooks et al. 2014). It is therefore important that these differences should be taken into consideration and that the necessary adaptations should be adopted when building on existing instruments targeting SMEs to support also smallholder farmers and their organisations.

Another key factor to be taken into consideration is the characteristics of the school feeding (or another) programme and the context of its implementation. This includes the programme's procurement operational model and, in particular, whether the procurement of food (and other activities) is performed in-house or by third parties (Gelli et al. 2012).

The Paraguay and Ghana cases are very informative in this regard. In a country where the prevalent implementation modality is based on a third-party model, mechanisms based on direct procurement may find limited implementation and hence a reduced likelihood of success. These programmes require the indirect scheme to be able to ensure that procurement from target beneficiaries is performed by the third party in an inclusive and transparent manner. Similarly, programmes based on operational modalities of direct procurement require different types of instruments able to facilitate the direct access of target beneficiaries to public markets, such as reservation, preferencing and contract-lotting mechanisms. As such, the focus and the instruments adopted are significantly different in the two cases, as explored in the respective country examples.

### 3.2 DEFINING TARGET BENEFICIARIES

Preferential procurement schemes can be used to tailor public procurement regulation to support different types of beneficiaries according to the specific social, economic and/or environmental policy objectives targeted by governments through public procurement. The focus will depend on the policy choice, which should be reflected in the regulatory framework in terms of defining the eligible criteria for benefitting from the scheme. In this analysis, we have focused on smallholder farmers.

Based on the principles of transparency and equal treatment of suppliers, when some advantage is given to a defined category of beneficiaries—whoever they may be—it is essential that the criteria for category membership for those receiving that advantage should be well defined (Brooks et al. 2014). Clear eligibility criteria are crucial to ensure the transparency and fairness of the systems. The importance of these criteria is, indeed, largely recognised by all country experiences analysed in this publication.

From a practical point of view, clear eligibility criteria allow the identification of the targeted beneficiaries and, when this is easily known by both implementers and suppliers, also facilitate the implementation of the programme. Clear eligibility criteria additionally provide the baseline for monitoring and evaluating the results and impacts of the initiative and related policy—a factor that is considered of key importance for the sustainable development of public procurement initiatives that pursue broader development goals (UNEP 2017; UNEP and 10YFPP 2016).

Despite its importance, however, the definition of the target beneficiaries is often reported as an area of difficulty in the case of smallholder farmers (Brooks et al. 2014; FAO 2013). As reported by FAO (2013) “In many countries, the lack of frameworks or regulations that establish clear typologies and criteria for identifying the family farmer, and the lack of a national registration system for these actors, hinders the correct identification of family farmers and their subsequent integration into public policies targeted at this sector.” This is one aspect that should be taken into careful consideration when adopting a preferential procurement scheme, as has been observed in the different country experiences.

There are various instruments that can be used to define target beneficiaries. The experiences of Brazil and Paraguay analysed in this paper provide interesting examples for the specific case of smallholder farmers. In both countries, the eligibility criteria are established at the national level by a regulatory framework that provides clear and unified criteria for identifying family farming producers which are to be used by all public policies, programmes and initiatives. The definition is accompanied by certification and registration instruments to support the identification of these producers and the implementation of the food procurement programme.

A unified definition of small (or family) farmers adopted at legislative level has the advantage of facilitating the articulation of different policies and programmes targeting the same type of beneficiaries (such as technical assistance and access to finance). As such, it also supports the elaboration of a broader and inter-sectorial policy strategy aimed at their development (FAO 2013; Swensson 2015). Nevertheless, it is important to mention that other types of instruments can also be used to define the target beneficiaries. A national definition provided by legal and/or regulatory rules is not the only option, and its absence does not preclude the implementation of public food procurement initiatives targeting smallholder farmers.

In the absence of unified national definitions, the initiative can build on definitions provided by other regulatory frameworks, policies and/or programme documents, or can even create its own specific eligibility criteria. What is important is that a definition should be provided with clear criteria and that it should be supported by an instrument to identify target beneficiaries. Although a definition can be created specifically for the implementation of the food procurement initiative, it is recommended that it be coordinated with already existing definitions adopted by national supply-side policies and programmes. This is crucial to support the synergy of public procurement with those programmes.

Registration systems with specific requirements for the classification of smallholders, such as the one adopted in Paraguay, can be an effective supporting instrument. This system obviates the need for individual procuring entities to determine on a case-by-case basis whether a tender is eligible for preferential treatment. It also allows for the procuring entity (as well as third-party contractors) to obtain key information about smallholder production in the region, and, as a consequence, to plan procurement more effectively. Nevertheless, it is important to note that such a registration system may lose its benefits (and may even prevent target suppliers from participating in the registration process) if it is too burdensome, complicated or costly, or if it is not kept properly updated (ITC 2014, interviews with key informants).

### 3.3 CLEAR RULES

As part of transparency principle, clear rules are one of the key prerequisites of any public procurement system. This principle entails (i) publicity for contract opportunities; (ii) publicity for the rules governing each procedure; (iii) a principle of rule-based decision-making that limits the discretion of procuring entities; and (iv) the possibility for verifying that the rules have been followed, and for enforcement in cases where they have not been (Arrowsmith et al. 2000; Quinot and Arrowsmith 2013).

As recognised by the broad literature, the objectives of public procurement (such as efficiency, value for money, and integrity) can only be achieved in public procurement systems if procurement is conducted according to a set of clear rules (Arrowsmith et al 2000; Quinot 2013). This holds true for the traditional objectives of public procurement. It is also true of the case of horizontal policy objectives, as demonstrated by the literature as well as by the various case studies.

What can be learned from the literature and the various country experiences is that if public procurement is to be used to achieve a social, economic and/or environmental goal, it is essential that such policy objectives in procurement should be translated into clear public procurement rules which are accessible to both buyers and suppliers. As has been observed from the different country experiences, these rules regard in particular (i) definition of the target beneficiaries (i.e. those who will receive the established advantages); (ii) the conditions in which the preferential procurement

schemes can be adopted and the standard procurement rules overtaken; and (ii) the safeguards which guarantee the trade-off with the traditional principles and objectives of public procurement.

All country experiences analysed in this study demonstrate a recognition of the need for these rules and related criteria to be clearly defined and available in advance to all interested suppliers. This recognition is also in line with what has been established by the UNCITRAL Model Law. Indeed, while the Model Law does not restrict the type of socio-economic policies that government may pursue through public procurement, it applies rigorous transparency requirements, with the aim of ensuring that the manner in which the policies will be applied in the procurement process is clear to all participants (UNCITRAL 2014).

In some cases, the rules and specific criteria are defined within the regulatory framework, and are therefore accessible to any interested party. This is the case, for instance, for the definition of the target beneficiaries in the Brazil and Paraguay examples. In other cases (such as for the minimum percentage requirement in the Paraguay case), these criteria—which may change from case to case—must be clearly defined and specified in the tender documents that are made available to all interested suppliers.

Clear rules also imply that procuring entities are not awarded wide discretionary powers, i.e. that decisions are rule-based. In this regard, the various case studies provide interesting and distinct experiences.

In the US and French systems, procuring entities have broader discretionary power than in the Brazilian or the Paraguay system. This is evident, for instance, in the freedom provided to procuring entities in defining the target beneficiaries in the US case. Discretionary power can also include the choice of whether or not to implement the available legal mechanism. While in Brazil, procuring entities are obliged to implement the reservation scheme (with a few exceptions for justifying non-compliance), in France and the US, procuring entities are free to decide whether or not to implement it. In both cases, this freedom is not unlimited.

On the one hand, a certain amount of discretionary power offers more flexibility for adapting existing instruments and, in a general sense, for using public procurement to achieve broader development goals. On the other, it also adds more subjectivity as well as complexity to the process, giving greater emphasis to the capacity, experience and motivation of the procuring entity to achieve successful and effective implementation. Furthermore, broader discretionary power may also open the door to misuse of the instruments, facilitating favouritism or even corrupt practices, especially if not countered by appropriate safeguards and an effective monitoring and control system.

What can be gathered from analysis of the diverse country experiences is that providing procuring entities with some discretionary power can be a feasible possibility in certain country contexts, especially in those of developed countries with higher institutional local capacity accompanied by adequate monitoring and control mechanisms, although this is not universally the case. In the US case, for instance, the system benefits from extensive experience of a decentralised school food programme and decades of an existing strong movement—such as Farm to School, which for a long time has been advocating and experiencing the use of public procurement to support local and smallholder farmers. The US also possesses established monitoring and control mechanisms for public procurement, as well as anti-corruption measures. These factors may not be present in all country contexts, however. Governments, especially those in developing countries, should view this possibility with particular caution, considering the characteristics of the country contexts.

### 3.4 ALTERNATIVE PROCUREMENT PROCEDURES

Analysis of the various country experiences shows that preferential procurement schemes, as well as the contract-lotting mechanism, do not necessarily imply the development of a new and adapted procurement procedure (i.e. method). Nevertheless, the use of alternative procurement procedures may be of high importance. As mentioned in section one, various studies have identified the complexity and burdensome nature of standard open-tender procedures as an important impediment to the access of small-scale suppliers to public markets and, as such, to the implementation of public food procurement initiatives targeting those actors.

In the Brazil case, the need for a new procurement procedure tailored to the needs and capacity of smallholder farmers was expressly articulated. The regulatory framework recognises that the standard open-tender procedure—due to its often-high level of complexity, formality and cost—may pose important challenges to smallholder supply. As a result, it allows for the waiving of this default procedure and provides for an *ad hoc* competitive procedure tailored to the needs of smallholders. The same recognition is shared also by the Paraguay regulatory framework for what regards the direct procurement of food from family farmers.

In the US case, by contrast, the preferencing scheme is not coupled with a new and adapted procurement procedure. Nevertheless, this does not mean that procuring entities will necessarily use the standard open-tender procedure. The implementation of the preferencing scheme can instead make use of alternative competitive procurement procedures already recognised by the regulatory framework. These procedures—such as the ‘Small Purchase procurement method’ in the US system and the *Marché à procédure adaptée* in France—are simpler and, although not specifically tailored to smallholder supply, are more easily adaptable to this type of supplier. These alternative procurement methods are recognised by UNCITRAL Model Law on Public Procurement and are available in most public procurement regulatory regimes. They are based on the recognition that, despite the importance of standard open-tender procedures, in certain circumstances (such as in the case of low-value purchases) their costs may outweigh their benefits, and they may not be the most effective instrument for achieving public procurement objectives.

In the US case, this choice is directly supported by the Child Nutrition Resource Manual, which aims to provide guidance to procuring entities in the use of geographic preference, as well as other instruments, for the pursuit of broader development goals through food procurement within the school feeding context (ICN 2015). In this case, the adoption of alternative procurement procedures is possible also because the school feeding programme adopts a decentralised operational model, which may allow the value of the purchases to fall under the applicable small-purchase threshold.<sup>17</sup> Also in France, this possibility is recognised and particularly supported within the contract-lotting mechanism, as discussed in section two.

It is important to mention, however, that in both countries the procuring entities have the choice of whether or not to adopt these alternative procurement methods. As such, the considerations made regarding the descriptive power of procuring entities apply equally here. Furthermore, in countries where the implementation model is based on a centralised approach and which implies higher purchase values, such alternative procurement methods may not be applicable.

What is important to highlight, and what has been observed in the different country experiences, is that—just like the preferential schemes themselves—both the new and the existing alternative procurement procedures will require the management of trade-offs.



The open-tender procedure is recognised in most countries as the default procedure due to its recognised potential for ensuring the traditional principles of public procurement (i.e. competition, transparency and equal treatment of suppliers) in the purchase of goods. Although exceptions to open-tender procedures are recognised, it is key that clear conditions and safeguards are provided to guarantee continued compliance with the principles of public procurement. Box 3 on the US case provides a good illustration of this.

### 3.5 GOING BEYOND THE REGULATORY FRAMEWORK

Although the focus of this paper is on the legal mechanisms, its analysis recognises that this type of instrument may not of itself be enough to ensure the alignment of public procurement practices for the pursuit of social, economic and/or environmental objectives through public procurement. Although legal instruments have a crucial role to play, different levels of intervention may be required. This includes soft law instruments (i.e. non-binding instruments such as guidelines) as well as interventions aimed at enhancing the implementation capacity of procuring entities.

Guidelines can play a key role in helping orient procuring entities in the implementation of the legal mechanisms, building a bridge between legislation and practical implementation. As has been observed through the different country experiences, guidelines, such as the ones established by Brazil, the US and France mentioned in this study, can play an important role in guiding procuring entities on how to use the instruments available and how to tailor these to their specific policy objectives within the context of food procurement. Although these instruments are very useful in all contexts, they can play a crucial role especially when the legal mechanisms were not created with the specific purpose of supporting smallholder farmers through public food procurement, but can be used also for this purpose, as demonstrated in the US and French cases.

Furthermore, guidelines can be also crucial for fostering administrative adjustments aimed at adapting the practices of procuring entities and addressing operational issues of the procurement process. Operational issues (such as poor communication of contract opportunities, long payment periods, large scale of contract, etc.) may constitute important barriers to the participation of smallholders in public markets. In contrast to the legal mechanisms, these administrative adjustments do not necessarily require a legislative intervention. Although soft law instruments are not binding, they can still play an important role here.

One example involves the communication of contract opportunities—recognised as a key barrier to small-scale suppliers seeking access to institutional markets (see section one). Legislation generally requires that contract opportunities should be communicated through official instruments, such as official journals (which are difficult for smallholder farmers to access), but this may not prevent procuring entities from advertising such opportunities also through more smallholder-friendly channels (such as through FOs and entities of technical assistance, as well as online). This operational bottleneck can be addressed by legislation (as in the Brazil case), but it can also be addressed by developing appropriate guidelines, raising awareness, and guiding procuring entities in how to adapt their procurement practices.

Directly linked with the important role of guidelines and their potential role in raising awareness and guiding the practices of procuring entities, there is the issue of training. Procuring entities require training in order to understand and comply with preferential procurement policies and to account for their implementation (ITC 2014). They must also be

sensitised to the barriers and challenges faced by the target beneficiaries (*ibid.*). It cannot be ignored, indeed, that the implementation of preferential procurement schemes generally requires an important change in the habitual practices of procuring entities, often compounding complexity, responsibilities and workloads. If procuring entities are not sensitised to, and fail to fully understand, the preferential procurement policies and the related regulatory framework, it may be very difficult to ensure that these will be implemented. This is particularly true in cases—such as in Paraguay—in which procuring entities are completely free as to whether or not they implement the available mechanisms.

## 4 CONCLUDING REMARKS

The literature review and the country experiences analysed in this study underscore the understanding that the issue is not really whether social, economic and/or environmental goals should or should not be pursued through public procurement, but rather how to translate these new policy objectives into adapted and aligned procurement rules and practices.

Building on the existing literature on public procurement, this paper has attempted to contribute to this discussion by analysing the key legal mechanisms that can be used to support the alignment of policy and legal frameworks for the implementation of public food procurement initiatives targeting smallholder farmers. Although these mechanisms (*i.e.* reservation, preferencing, and indirect schemes, as well as contract lotting) have long been discussed in the legal literature, they have rarely featured in the literature of food procurement and rural development.

The analysis conducted in this paper supports the understanding that these legal mechanisms play a key role in incorporating horizontal policy objectives—including the support of smallholder farmers—into the rules of public procurement. Nevertheless, this paper also recognises that the use of these mechanisms may create internal tensions in the public procurement system and that their application requires careful design.

The experiences of the various countries and of their school feeding programmes provide some insights in this regard. These lessons may be helpful to assist government in the choice and design of the relevant legal mechanisms and in aligning policy and legal frameworks for the support of smallholder farming through public food procurement.

First, the diverse experiences discussed here demonstrate that there is no ‘one-size-fits-all’ solution and that the choice of the most suitable legal mechanisms for implementation will depend not only on the individual mechanism’s inherent characteristics, but also on the programme and country contexts. This particularly involves the specific characteristics of the country’s own legal system, as well as the operational aspects of the public procurement programme. A good assessment and understanding of these is fundamental and is the first step towards making an informed choice.

Secondly, the design of any type of legal mechanism should be based on clear rules that establish the relevant conditions, eligibility criteria and safeguards, balancing the trade-offs with the key principles of public procurement regulation. This should also include a clear definition of that legal mechanism’s target beneficiaries. Decisions should be ruled-based, and the level of discretionary power given to procuring entities should be carefully balanced, taking into consideration the country context, including the existence of adequate

monitoring and control mechanisms and anti-corruption measures, as well as the skills and experience of the relevant procuring entities.

Finally, despite the fundamental importance of legal mechanisms, these are not enough in themselves. They need to be accompanied by compatible procurement procedures, administrative adjustments aimed at addressing operational barriers for the inclusion of smallholder farmers, and adequate institutional capacities. This includes procuring entities that are appropriately trained and sensitised. This highlights the importance of developing specific guidelines and training to support procuring entities with the implementation of the legal mechanisms.

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## NOTES

4. Even if only a percentage of food is purchased locally from smallholder farmers, a school feeding programme can still be considered as 'home-grown', provided that local purchases are designed to support and foster local agriculture and food markets, and that these objectives are taken into consideration during programme design and implementation and institutionalised in related policies and regulations (FAO and WFP, 2018).
5. The term 'regulatory framework' used in this publication comprises all public procurement laws and regulations, legal texts of general application, binding judicial decisions and administrative rulings made in connection with public procurement (World Bank 2017).
6. Key informants interviewed: (i) Doria Baranda (FAO—Paraguay), Focal Point of the Project "Fortalecimiento de los Programas de Alimentación Escolar en el ámbito de la Iniciativa América Latina y Caribe Sin Hambre 2025"; (ii) Juliana Concepción Gamarra Lovera (Ministry of Agriculture—Paraguay), Technical Assistant of the Technical Office of the Vice-Ministry of Agriculture; (iii) Juan Carlos Manevy (Ministry of Education—Paraguay), Director General of the Social Management and Educational Equity; Dick Commandeur (SNV—US/Ghana), Former SNV Senior Technical Advisor for the Procurement Governance for Home-Grown School Feeding Project.
7. Equal treatment in public procurement may have two different aspects. It may serve as a means to achieve other objectives of the public procurement system (such as value for money) or else as an objective of the procurement process on its own right (Arrowsmith 2011).
8. As described by the former United Nations Special Rapporteurs on the right to food, a limited interpretation of what constitutes 'best value' based on the lowest cost has favoured traders, intermediaries and large-scale corporate agri-food companies that enjoy bundled purchasing power. This has enabled them to exert downward pressure on the prices they pay to farmers (De Schutter 2015). However, the author emphasises that 'cheapest' is not necessarily 'best value' when broader social, environmental and economic considerations are taken into account, including the support of small-scale suppliers (De Schutter 2015).
9. Procurement entity means any governmental department, agency, organ or other unit, or any subdivision or multiplicity thereof, that engages in procurement (UNCITRAL 2011).
10. There is also a fourth category, the so-called supply side. This category encompasses the provision of general assistance to target suppliers to overcome barriers to competing for tenders or for participating in procurement processes within the supply chain. This scheme does not require a legal underpinning or entail a modification in the actual procurement process and will not be object of specific investigation of this publication (Watermeyer 2004).
11. See: <<http://www.fn-de.gov.br/programas/pnae/pnae-consultas/pnae-dados-da-agricultura-familiar>>.
12. DAP is a document which certifies that a farmer or rural entrepreneur complies with all the criteria established by law to qualify for classification as a family farmer or family rural entrepreneur.
13. In such case, if a non-preferred supplier submits, for instance, an offer of USD100 and a preferred one of USD105, with an increase of 10 per cent, the non-preferred offer will be evaluated as if it was for USD110. Therefore, the offer of the preferred supplier (of USD105) becomes the one with the lowest price. Assuming that both bids are technically acceptable and that the tender provides for award to the lowest price, the contract would be awarded to the preferred supplier.
14. In the US, public procurement is regulated by a set of statutes, regulation and court decisions, at both federal and local levels. In the case of the CNPs, rules are provided at federal level by the Code of Federal Regulations (CFR). This includes the Title 2, Part 200 on "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards", as well as specific regulation for each of the CNP programs in Title 7, i.e. the National School Lunch Program (NSLP), the Child and Adult Care Food Program CACFP, the Summer Food Service Program (SFSP) and the Food Distribution Program (FDP).
15. The definition of 'local' included one of the following options: (a) produced within a 50-mile radius; (b) produced within a 100-mile radius; (c) produced within a 200-mile radius; (d) produced within a day's drive; (e) produced within the state; (f) produced within the region; and (g) geographic along with other restrictions (USDA website).
16. See: <<https://farmtoschoolcensus.fns.usda.gov/farm-school-works-stimulate-local-economies>>.
17. In the US, the small-purchase threshold is set at USD150,000, while in France it is set at EUR134,000 (tax-free).

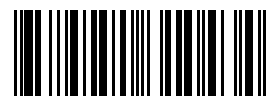


**International Policy Centre for Inclusive Growth (IPC-IG)**

SBS, Quadra 1, Bloco J, Ed. BNDES, 13º andar  
70076-900 Brasília, DF - Brazil  
Telephone: +55 61 2105 5000

[ipc@ipc-undp.org](mailto:ipc@ipc-undp.org) ■ [www.ipcig.org](http://www.ipcig.org)

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