



22 November 2010

Legal briefing

The Proportionality Principle and Sustainable Timber Procurement Policies

This briefing explains how the proportionality principle has been applied by the European Court of Justice in the context of public procurement cases. It also discusses how European Courts would be likely to apply the proportionality principle to policies for the procurement of legal and sustainable timber under European Union law.

Executive Summary

Member State public procurement policies are required to comply with the principle of proportionality.

Determination of whether the principle of proportionality has been complied with in a given instance requires a two-step enquiry: (1) whether the measure at issue is appropriate for attaining the objective pursued and (2) whether the measure at issue goes beyond what is necessary to achieve the objective.

European courts will allow policymakers broad discretion to determine appropriate measures where the objectives pursued entail political, economic, and social choices, calling upon the policymaker to undertake complex assessments. The legality of a measure adopted in such a sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.

To be effective, the sustainable timber procurement criteria will need to define the terms by which timber can be ascertained as legally harvested from a sustainably managed forest. These issues call for complex assessments entailing political, economic, and social choices.

Provided that the criteria in question constitute recognized means of pursuing sustainable forest management, EU courts will grant policymakers charged with the duty of ascertaining these questions broad discretion to determine appropriate criteria for the procurement of legal and sustainable timber. The Court is unlikely to engage in second-guessing the complex assessments involved in such judgments, but will instead defer to competent authorities' exercise of discretion except where the measure in question is manifestly inappropriate.

November 2010

Table of Content

1.	Introduction	3
2.	Public procurement policies must comply with the proportionality principle	4
3.	The principal of proportionality and policies requiring complex assessments	4
4.	Applying the proportionality principle to sustainable timber procurement policies	5
4.1	Whether a criterion is appropriate	5
4.2	Whether a criterion goes beyond what is necessary	7
5.	Common ways of construing arguments about proportionality	8
5.1	Proportionality is not based on a sliding scale	8
5.2	Concerns about micro-management	9
5.3	Cumbersome criteria are not necessarily disproportionate	9
6.	Conclusion	9

November 2010

1. Introduction

Public procurement policy provides a powerful tool for pursuing environmental objectives by compelling market operators to provide more environmentally sound goods and services. It has been recognized as an important tool for addressing growing concerns about the sustainability of consumer goods and the impact of unsustainable consumption on, among other things, forests, climate, and sustainable development.¹ The ability to promote sustainable production and consumption through public procurement policies—by advancing *sustainable* public procurement policies over *unsustainable* ones—can provide a policy bridge between voluntary sustainability standards and mandatory, market-wide measures. Sustainable public procurement policies can therefore serve as an important first step toward achieving a larger societal objective.

Public procurement criteria must comply with the general principles of EU law, including the principle of proportionality. In this legal briefing, ClientEarth explains the principle of proportionality as elucidated by the jurisprudence of the European Court of Justice (ECJ). We then suggest how the Court would likely apply the proportionality principle to sustainable timber procurement criteria. Finally, we discuss some common ways of construing arguments about proportionality.

¹ See, e.g., European Commission, Communication from the Commission to the European Parliament, the Council, and the European Economic and Social Committee of the Regions on the *Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan*, COM(2008) 397 final (Brussels, 16 July 2008) at 7; European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Mainstreaming Sustainable Development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development*, COM(2009) 400 final (Brussels, 24 July 2009).

November 2010

2. Public procurement policies must comply with the proportionality principle

Member State public procurement policies must comply with the principle of proportionality. The European Court of Justice (ECJ) has consistently defined the principle of proportionality as “one of the general principles of [EU] law” which “requires that measures implemented through [EU] provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it.”² As it is a general principle of EU law, Member States are bound by the principle of proportionality in the same way as the EU itself when implementing directives.³ Therefore, the principle of proportionality can be applied to challenge the legality of state action which falls within the sphere of application of EU law.⁴ Moreover, Recital 2 of the Procurement Directive specifically calls for the award of contracts in the Member States to comply with the principle of proportionality.⁵

3. The principal of proportionality and policies requiring complex assessments

The ECJ has clarified that the principle of proportionality does not call for a balancing test between two competing interests. Rather, determination of whether the principle of proportionality has been complied with in a given instance requires a two-step enquiry: (1) whether the measure at issue is appropriate for attaining the objective pursued and (2) whether the measure at issue goes beyond what is necessary to achieve the objective. With regard to judicial review of these conditions, ECJ jurisprudence indicates that a policymaker should be allowed broad discretion to determine appropriate measures where the objectives pursued “entail[] political, economic, and social choices” calling upon the policymaker to undertake “complex assessments.”⁶ The legality of a measure adopted in such a sphere “can be affected only if the measure is manifestly

² Case No. C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR (*British American Tobacco*) at paragraph 122; see also cases cited therein.

³ See, e.g., *Karlsson* C-292/97 [2000] ECR I-2737 at paragraph 37.

⁴ Craig and de Burca, *EU Law*, 3rd edition, (Oxford: OUP, 2002) at page 372.

⁵ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts (the “Procurement Directive”), Recital 2.

⁶ *British American Tobacco* at paragraph 123 and cases cited therein.

November 2010

inappropriate having regard to the objective which the competent institution is seeking to pursue.”⁷

4. Applying the proportionality principle to sustainable timber procurement policies

The procurement criteria at issue here have as their objective the procurement of legal and sustainable timber. This objective is, in turn, motivated by a broader policy objective of reducing consumption pressures on forests as one way to reduce global deforestation and the negative climate, biodiversity, and other ecosystem services consequences of deforestation. To be effective, the timber procurement criteria will need to define the terms by which timber can be ascertained as legally harvested from a sustainably managed forest. Thus, to determine whether a timber procurement criterion infringes the principle of proportionality, it must first be determined (1) whether the criterion is appropriate for defining terms for the legal harvesting of timber and/or the sustainable management of forests and (2) whether the criterion goes beyond what is necessary to achieve these objectives. These issues call for complex assessments entailing political, economic, and social choices. Thus, policymakers charged with the duty of ascertaining these questions should be allowed broad discretion to determine appropriate criteria for the procurement of legal and sustainable timber. ECJ jurisprudence makes clear that the Court will not engage in second-guessing the complex assessments involved in such judgments, but will instead defer to competent authorities’ exercise of discretion except where the measure in question is manifestly inappropriate.

4.1 Whether a criterion is appropriate

The ECJ has reasoned, in the context of assessing whether a measure alleged to violate proportionality is appropriate for the objective pursued, that where the measure in question constitutes a “recognized means” of pursuing the identified objective, the first part of the proportionality test will be satisfied.⁸ It would be hard to argue that using public procurement as a tool for advancing sustainable development goals is “manifestly inappropriate.” Changing consumer demands for commodities driving deforestation to consume only those products that can be verified as sustainably produced is a widely-endorsed strategy for reducing deforestation and promoting sustainable development.

⁷ *Ibid.*

⁸ *Compare British American Tobacco* at paragraph 131 (deeming that measures removing national barriers against requiring cigarette packets to contain health warnings are appropriate measures for attaining a high level of health protection where such warnings constitute a recognized means of encouraging consumers to reduce their consumption of tobaccos products known to endanger health).

November 2010

Indeed, using public procurement as a tool for advancing sustainability objectives has plainly and repeatedly been endorsed by the European Union.⁹

For similar reasons, it would also be hard to argue that criteria designed to ensure the procurement of only legal and sustainable timber and timber products are “manifestly inappropriate” as criteria aimed at fulfilling the horizontal procurement objective¹⁰ of sustainable development. Such criteria will typically aim to require forest management practices that are widely accepted as essential components of sustainable forest management. The concept of sustainable forest management has become widely accepted since the United Nations Conference on Environment and Development (UNCED) in 1992, which first saw international commitment to the concept of sustainable development.¹¹ The Forest Principles agreed at UNCED state that “forest resources and forest lands should be sustainably managed to meet the social, economic, ecological, and cultural and spiritual needs of present and future generations.”¹² Various national

⁹ See, e.g., European Commission, Communication from the Commission to the European Parliament, the Council, and the European Economic and Social Committee of the Regions on the *Sustainable Production and Consumption and Sustainable Industrial Action Plan*, COM(2008) 397 final (Brussels, 16 July 2008) at 7; European Commission, Commission Staff Working Document accompanying the Communication from the Commission to the European Parliament, the Council, and the European Economic and Social Committee of the Regions, *Public Procurement for a Better Environment, Impact Assessment*, SEC(2008) 2124 (Brussels, 16 July 2008) at section 2.2.2 and Annex 2. See also Directive 2004/18/EC of the European Parliament and Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Recital 5 (stating “[t]his Directive [] clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development and citing the Integration Principal).

¹⁰ For a general discussion of horizontal procurement objectives, see ClientEarth, *Legal Analysis: The place of “Social Criteria” in Public Procurement Policies for Legal and Sustainable Timber* (18 June 2010), available at <http://www.clientearth.org/reports/climate-and-forests-clientearth-briefing-on-social-criteria-in-timber-procurement-policies.pdf>.

¹¹ Non-legally Binding Authoritative Statement on Principles for a Global Consensus on the Management, Conservation, and Sustainable Development of all Types of Forests (the “Forest Principles”), 1992, paragraph 2(b); available at <http://www.un.org.documents/ga/conf151/aconf15126-3annex3htm> (accessed 20 May 2010)

¹² The Forest Principles elaborate upon the integration of social aspects of sustainable forest management, noting in particular that sustainable forest management requires “participation of interested parties, including communities and indigenous people, industries, labour, non-governmental organisations and individuals, forest dwellers and women, in the development, implementation, and planning of forest policies.” Non-legally Binding Authoritative Statement on Principles for a Global Consensus on the Management, Conservation, and Sustainable Development of all Types of Forests (the “Forest Principles”), 1992, paragraph 2(d); available at <http://www.un.org.documents/ga/conf151/aconf15126-3annex3htm> (accessed 20 May 2010), and that “forest policies should recognize and duly support the identity, culture and rights of indigenous people, their communities and other communities and forest dwellers” and “[a]ppropriate conditions should be promoted for these groups to enable them to have an economic stake in forest use, perform economic activities, and achieve and maintain cultural identity and social organisation, as well as adequate levels

November 2010

and international bodies have subsequently elaborated definitions of sustainable forest management. For its part, the European Community addressed these issues at the 1998 Lisbon Ministerial Conference on Protection of Forests in Europe and outlined measures to promote the conservation and sustainable management of tropical forests and other forests in developing countries in Regulation EC/2494/2000.¹³ There is general acceptance that the sustainable management of forests contains seven thematic elements. These have been summarized by the United Nations Food and Agricultural Organization (FAO) to include (1) extent of forest resources, (2) biological diversity, (3) forest health and vitality, (4) productive functions of forest resources, (5) protective functions of forests, (6) socio-economic functions, and (7) legal, policy, and institutional framework.¹⁴ Sustainable timber procurement criteria that aim to incorporate these seven thematic elements in order to identify timber sourced from forests that can reasonably be assessed to be sustainably managed are in line with widely accepted understandings of what it means to be a sustainably managed forest.

4.2 Whether a criterion goes beyond what is necessary

Once it has been established that the measure in question is appropriate for attaining the objective pursued, the second part of the proportionality enquiry requires the party challenging the measure at issue to show that alternative measures would be sufficient to fully attain the objective.¹⁵ This is consistent with the Court's reluctance to second-guess competent authorities' policy judgments calling for complex assessments entailing political, economic, and social choices.¹⁶ Moreover, even where it can be shown that the measure in question is not a perfect or complete solution to the problem posed, this will be insufficient to prove an allegation that the proportionality principle has been infringed. Rather, so long as the measure in question is "likely to make an effective

of livelihood and well-being through, inter alia, those land tenure arrangements which serve as incentives for the sustainable management of forests." *Ibid.* at 5(a).

¹³ Regulation EC/2494/2000 of the European Parliament and of the Council of 7 November 2000 on measures to promote the conservation and sustainable management of tropical forests and other forests in developing countries, L 288/6, Official Journal of the European Communities, 15 November 2000.

¹⁴ Food & Agricultural Organization, *State of the World's Forests 2007* (FAO, 2007) at 3. For further discussion of the importance of including criteria relating to social aspects of sustainable forest management in timber procurement policies, see ClientEarth, *Legal Analysis: The place of "Social Criteria" in Public Procurement Policies for Legal and Sustainable Timber*, *supra* note 9.

¹⁵ See, e.g., *British American Tobacco* at paragraph 130 (noting that Applicants had failed to establish that alternative measures would, in the circumstances, be enough to attain the objectives pursued by the contested provision).

¹⁶ *Ibid.* at paragraph 123 and cases cited therein.

November 2010

contribution” to the objective pursued, the competent authority opting for such a measure will not have overstepped its bounds of discretion.¹⁷

5. Common ways of construing arguments about proportionality

5.1 Proportionality is not based on a sliding scale

Allegations of disproportionality are sometimes leveled against procurement criteria where a criterion is perceived as requiring “too much.” Proportionality is not determined on the basis of a sliding scale, however. Analysis of such an allegation must proceed in terms of the two-step enquiry outlined above, which focuses squarely on whether the criterion is justified in order to pursue the objective of the procurement policy. It should not be based on an arbitrary or subjective judgment of when requirements become “too much.” The first part of the enquiry asks whether the measure at issue is appropriate for attaining the objective pursued. The second part requires the party alleging that the criterion is disproportionate to show that the criterion goes beyond what is necessary to achieve the objective.

For example, allegations of disproportionality have been alleged against timber procurement criteria that require the timber harvester to transfer money or other in-kind benefits to the local community, in addition to per-volume payments for timber harvested. Because the objective of the criterion is to ascertain whether or not the timber has been legally harvested from a sustainably managed forest, the criterion should be deemed appropriate provided that it is in line with widely-accepted understandings of what it means to be a sustainably managed forest. Payments made to the forest community as a whole may be considered an appropriate sustainable forest management measure depending upon the nature of the forest tenure (where forest tenure is vested in a forest community rather than titled to individuals, for example). These issues call for complex assessments entailing political, economic, and social choices. Thus, the Court will defer to competent authorities’ exercise of discretion except where the measure in question is manifestly inappropriate. As for whether the criterion goes beyond what is necessary to achieve the objective, so long as the measure in question is “likely to make an effective contribution” to the objective pursued, the competent authority opting for such a measure will not have overstepped its bounds of discretion.¹⁸

¹⁷ *Ibid.* at paragraph 129.

¹⁸ *British American Tobacco* at paragraph 129.

November 2010

5.2 Concerns about micro-management

Many allegations of disproportionality essentially assert that the measure under consideration engages in micro-management, rather than setting out a general objective which might be satisfied equally well through a range of means that could vary according to circumstances. Examined through this lens, the question of whether a criterion goes beyond what is necessary to achieve the objective, even when formulated in more liberal terms as whether the measure in question is likely to make an effective contribution to the objective pursued, might be answered in the negative. By specifying a narrow and particular means for satisfying a given objective, a criterion might disqualify tenderers who might satisfy the objective equally well through alternative means. So, returning to the example offered above, a contracting authority would do better to include a criterion calling for adequate compensation of forest communities appropriate to community tenure arrangements, leaving open the means by which this criterion might be satisfied rather than prescribing a specific forest management measure to achieve this objective.

5.3 Cumbersome criteria are not necessarily disproportionate

Allegations of disproportionality are sometimes based on the perception that a criterion will be too cumbersome to implement or assess. Whether or not a criterion is overly cumbersome is a valid concern, but it is a management question relating to how resources should be allocated in accordance with policy priorities. It is not a legal question relating to whether the principle of proportionality has been infringed. Contracting authorities retain discretion over defining the subject matter of their procurement.¹⁹ Likewise, they retain discretion over prioritizing their objectives, selecting the policies through which to pursue their objectives, and allocating resources to implement the selected policies.

6. Conclusion

In applying the two-part proportionality enquiry to procurement criteria for sustainable timber, EU courts are unlikely to find that a criterion violates the principle of proportionality unless the criterion is manifestly inappropriate and unlikely to make an effective contribution to sustainable forest management. Moreover, courts will grant broad discretion to policymakers charged with the duty of ascertaining appropriate criteria because assessing the factors relevant to sustainable forest management calls for complex assessments entailing political, economic, and social choices.

¹⁹ For a detailed discussion of Member States' discretion over their procurement policies, see ClientEarth *Legal Analysis: The place of "Social Criteria" in Public Procurement Policies for Legal and Sustainable Timber*, *supra* note 9.

November 2010

ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

As legal experts working in the public interest, we act to strengthen the work of our partner organisations. Our work covers climate change and energy system transformation, protection of oceans, biodiversity and forests, and environmental justice.

ClientEarth is funded by the generous support of philanthropic foundations and engaged individuals, with operational support from the European Commission's Life+ programme.

ClientEarth

Brussels

4^{ème} Etage
36 Avenue de Tervueren
Bruxelles 1040
Belgium

London

274 Richmond Road
London E8 3QW
UK

Paris

50 Avenue de Ségur
75015, Paris
France

Warsaw

Aleje Ujazdowskie
39/4
00-540 Warszawa
Poland

ClientEarth is a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 2-6 Cannon Street, London EC4M 6YH, with a registered branch in Belgium, N° d'entreprise 0894.251.512, and with a registered foundation in Poland, Fundacja ClientEarth Poland, KRS 0000364218

www.clientearth.org

22 November 2010

For further information, please contact:

Janet Meissner Pritchard

t +44 (0) 20 7749 5970
m +44 (0) 7588 543 803
jpritchard@clientearth.org

Tim Grabiell

t +44 (0)20 3030 5957
m +33 0(6) 32 76 77 04
tgrabiell@clientearth.org

