

Legal Analysis: The place of “Social Criteria” in Public Procurement Policies for Legal and Sustainable Timber

This briefing outlines key principles of the law governing public procurement in the European Union and explains why it is appropriate to include criteria relating to social aspects of sustainable forest management as technical specifications and award criteria in Member State timber procurement policies.

Summary of Findings

The aim of Directive 2004/EC/18 (the Procurement Directive) is to eliminate Member State policies that present a hindrance to trade in the public procurement market by ensuring compliance with the principles of equal treatment, transparency, and proportionality. The legal basis for the Procurement Directive does not provide grounds for EU regulation of the substantive objectives of Member State procurement policies, including the balance between horizontal objectives and other procurement policy objectives. (pages 7-9).

Under EU public procurement law, contracting authorities can include criteria focused on the production characteristics of procured supplies with the aim of procuring supplies from more sustainable sources. (pages 12-14).

Sustainable development includes social, economic and environmental components. (pages 5-6). Criteria relating to the social aspects of sustainable forest management are properly understood as sustainability criteria. (pages 2-4). Under the case law of the European Court of Justice, such criteria should be analogized to the sustainability criteria at issue in *EVN-Wienstrom*, not the social policy criteria at issue in *Beentjes*. (pages 12-15).

Introduction

Public procurement policy can provide a powerful tool for pursuing environmental objectives by compelling market operators to provide more environmentally sound goods and services. Global deforestation is driven, in part, by demand for timber. Policies requiring that timber products purchased by public authorities be legally sourced from sustainably-managed forests can play a significant role in addressing this problem.

It is broadly agreed that sustainable forest management must take into account social aspects of forest management. Accordingly, Member States of the European Union (EU) have included in timber procurement policies aimed at procuring only legal and sustainable timber criteria relating to, for

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example, the rights and interests of forest-dependent communities. But these efforts to incorporate so-called “social criteria” in timber procurement policies have been controversial due to a lack of legal clarity about how such criteria can be incorporated in a manner compliant with Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (the Procurement Directive).¹

Public procurement policy 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.² In response to an Impact Assessment conducted by the European Commission in 2008 on “Public Procurement for a Better Environment,” stakeholders emphasized their need for legal clarity regarding the extent to which contracting authorities can include in their tender documents criteria relating to production processes³ and specifically called for legal clarity regarding the procurement of legal and sustainably-harvested wood and wood products.⁴ To date, however, guidance from the Commission on these issues remains unclear and, at times, at odds with the Procurement Directive and governing case law.

With this legal briefing, ClientEarth seeks to bring greater clarity to these issues and discussions around them. Section I highlights the importance of including criteria relating to social aspects of sustainable forest management in public procurement policies for legal and sustainable timber and the need to understand these criteria as *sustainability criteria* and *part of the production process for sustainable timber* rather than as social policy. Section II explains the nature and role of horizontal objectives in public procurement policies. Section III provides ClientEarth’s legal analysis of the Procurement Directive and governing case law, in particular the landmark cases of *Concordia Bus Finland v. Helsingin Kaupunki*⁵ (*Concordia Bus*) and *EVN AG v Austria*⁶ (*EVN-Wienstrom*). And, finally, Section IV considers European Commission guidance on “social criteria” in timber procurement policies and evaluates it against the legal analysis provided here.

I. The Importance of Including Criteria relating to Social Aspects of Sustainable Forest Management in Timber Procurement Policies

A. Social Aspects of Sustainable Forest Management

The World Bank estimates that, worldwide, more than 1.6 billion people—almost a quarter of the total global population—depend on forests for their livelihoods. In developing countries, about 1.2 billion rely directly on agroforestry farming systems. Forest industries provide employment (both formal and informal) for approximately 50 million people. At least 60 million indigenous people are highly dependent on forest resources for their livelihoods.⁷ Forests also provide cultural, spiritual, and recreational functions. Their management impacts on, and can involve, local communities and civil society groups as well as government and the private sector.

Global deforestation and degradation continues at an alarming rate. Around 13 million hectares of forest were converted to other uses or lost through natural causes each year in the last decade.⁸ Forest degradation is much harder to measure, but tends to be particularly egregious where lack of clear land tenure creates disincentives for long-term sustainable forest management. While there has been an increase over recent years in the amount of forests covered by sustainable forest management plans addressing the seven thematic elements summarized above,⁹ demand-side policies such as sustainable timber procurement policies are required to encourage and reinforce this trend.

The idea 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. The Forest Principles agreed at UNCED state that “[f]orest resources and forest lands should be sustainably managed to meet the social, economic, ecological, and cultural and spiritual needs of present and future generations.”¹⁰ Specifically in relation to the consumption and trade of forest products, the Forest Principles state: “Incorporation of environmental costs and benefits into market forces and mechanisms, in order to achieve forest conservation and sustainable development, should be encouraged both domestically and internationally.”¹¹

Various national and international bodies have subsequently elaborated definitions of sustainable forest management, and there is general acceptance that the sustainable management of forests contains seven key thematic elements. These have been summarized by the 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.¹² Social aspects of sustainable forest management are encompassed in the sixth and seventh elements, which are further elaborated as:

Socio-economic function: Forest resources contribute to the overall economy in many ways such as through employment, values generated through processing and marketing of forest products, and energy, trade and investments in the forest sector. They also host and protect sites and landscapes of high cultural, spiritual or recreational value. This theme thus includes aspects of land tenure, indigenous and community management systems, and traditional knowledge.

Legal, policy and institutional framework: Legal, policy and institutional arrangements—including participatory decision-making, governance and law-enforcement, and monitoring and assessment of progress—are necessary to support sustainable forest management. This theme also encompasses broader societal aspects, including fair and equitable use of forest resources, scientific research and education, infrastructure arrangements to support the forest sector, transfer of technology, capacity-building, and public information and communication.¹³

These thematic elements, including the social aspects of sustainable forest management, have also been included in EU legislation aimed at promoting the conservation and sustainable management of forests in developing countries.¹⁴

Given the integral nature of the social aspects of sustainable forest management, Member States seeking to procure only legal and sustainable timber and timber products have included criteria relating to the social aspects of sustainable forest management in their timber procurement policies.

B. Criteria relating to Social Aspects of Sustainable Forest Management in Member States’ Timber Procurement Policies

Belgium, Denmark, the Netherlands, and the UK have sought to incorporate criteria relating to social aspects of sustainable forest management in their timber procurement policies.¹⁵ Considered together, these policies can be summarized as covering twenty-one different social aspects of sustainable forest management, which are listed in Table 1 under the general headings of legality, rights and interests of

stakeholders in forest management, protection of workers' rights and conditions, and participation in standard-setting and certification processes.¹⁶ Member State timber procurement policies include criteria relating to social aspects of sustainable forest management as technical specifications, award criteria, and contract performance conditions.

Table 1

- A. Legality
 - 1. Legal use rights to forest
 - 2. Compliance with national law
 - 3. Compliance with relevant international agreements
 - 4. Payment of royalties and taxes
 - 5. Law enforcement
- B. Right and interests of stakeholders in forest management
 - 6. Respect for property, land tenure, and use rights
 - 7. Explicit respect for rights of indigenous peoples
 - 8. Explicit recognition of customary rights
 - 9. Rights to participation by stakeholders
 - 10. Right to free, prior, and informed consent before property and use rights are affected
 - 11. Transparency of information
 - 12. Access to dispute resolution
 - 13. Protection of cultural values
 - 14. Contribution to community facilities
- C. Protection of workers' rights and conditions
 - 1. Health and safety
 - 2. Workers' fundamental rights
- D. Participation in standard-setting and certification processes
 - 1. Conformity with international standard-setting processes
 - 2. Rights to participation: balanced representation and input
 - 3. Balanced decision-making processes
 - 4. Transparent process and standards
 - 5. Certification system transparency, access, and dispute resolution

We consider in the following sections whether, in principle, such criteria should be considered permissible under the Procurement Directive and relevant case law. As discussed in section I.C., the first step in this analysis is understanding the criteria at issue as *sustainability criteria*, due to their integral part in the sustainable management of forests. Accordingly, these criteria must also be understood as relating to *production characteristics* of timber—and, more specifically, environmental externalities resulting from the timber production process—as discussed in section III.B.2.

It is beyond the scope of this briefing to provide a detailed analysis of any particular criterion of the timber procurement policies summarized in Table 1 as to whether or not the criterion in question is rightly classified as integral to the sustainable management of forests and thus as a production characteristic of timber. We concede that, on close examination, some criteria currently included in Member State timber procurement policies may be found to fall outside the scope of these classifications. However, we also assert that most of the criteria in question can be properly understood

as integral to the sustainable management of forests and thus relate to production characteristics of timber appropriately evaluated under procurement policies for sustainable timber. This forms a working assumption upon which the following legal analysis is based.

Of course, all public procurement criteria must also comply with the general requirements of equal treatment, transparency, and proportionality, as noted in section II.B. Given the broad scope of issues encompassed by the social aspects of sustainable forest management, it can be challenging to formulate relevant criteria in a manner that meaningfully addresses the issues concerned and also complies with transparency and proportionality requirements. A determination of whether any specific criterion related to social aspects of sustainable forest management is formulated in a manner that complies with these general requirements requires a detailed analysis of the specific criterion in question, as would be the case for any other procurement criterion.

C. Understanding Social Aspects of Sustainable Forest Management within the Framework of Sustainable Development and the Integration Principle

The integration principle provides that the objectives of *sustainable development* should be integrated into all the laws and policies of the EU and its Member States. The Lisbon Treaty affirms the role of sustainable development at the heart of EU objectives, including through its external relations. The consolidated version of the Treaty of the European Union resulting from the Lisbon Treaty states in Article 3, paragraph 2 that the EU shall “establish an internal market” and further states, in the same paragraph, that the EU shall pursue the sustainable development of Europe in terms of all three pillars (economic, environmental, and social). Paragraph 5 of Article 3 goes on to state that, in its relations with the wider world, the EU shall contribute to “the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights.” Also, in Article 11 of the Treaty on the Functioning of the European Union, the Lisbon Treaty maintains the provisions of Article 6 of the Treaty of the European Community (TEC), promoting the implementation of the principle of sustainable development in the definition of all other policies and activities. Article 6 of the TEC is cited in the Procurement Directive, as noted below.¹⁷

That the integration principle requires EU policies and activities to integrate *sustainable development* objectives—and not just environmental objectives, social objectives, and economic objectives standing alone—has significant ramifications. The comprehensive concept of sustainable development interweaving economic, environmental, and social components connotes that, if environmental factors are not taken into consideration in the formulation and implementation of policies that regulate economic activities and other forms of social organization, a model of development that can be environmentally sustainable over the long term cannot be achieved. In turn, environmental sustainability must also be understood in terms of the increasing interaction between the policy agendas of environmental protection, economic growth, and social development. In other words, the principle of sustainable development incorporates economic and social policy components into environmental policy. So, whereas the production and consumption of timber might be understood as primarily an economic activity, the principle of sustainable development requires an understanding of “environmentally sustainable production” of timber to include social policy components.

This understanding of sustainable development has been elaborated and endorsed by European Union institutions and Member States. For example, in the conclusions to its June 2005 session, the European Council approved a “Declaration on the Guiding Principles for Sustainable Development.” The Council elaborated key objectives for sustainable development to require, among other things, that EU activities

respect the limits of the planet's natural resources . . . promote sustainable production and consumption . . . break down the link between economic growth and environmental degradation . . . promote a democratic, socially inclusive, cohesive, healthy, safe and just society with respect for fundamental rights and cultural diversity that creates equal opportunities and combats discrimination in all its forms . . . encourage the establishment and defend the stability of democratic institutions across the world . . . actively promote sustainable development worldwide and ensure that the European Union's internal and external policies are consistent with global sustainable development and its international commitments.¹⁸

Generally, the social component of sustainable development comprises a wide and diverse range of issues, affecting people and their communities and cultures in many different ways. It overlaps with economic development and with cultural and political issues, such as rights of participation in decision-making. As such, it can be challenging to determine precisely how to incorporate social pillar objectives into specific public policies in a manageable way.

The European Commission distinguishes “sustainable public procurement” from “green public procurement” noting that “Sustainable Public Procurement means that contracting authorities take into account *all three pillars* of sustainable development when procuring goods, services or works at all stages of the project” whereas “Green Public Procurement means that contracting authorities take into account *environmental elements* when procuring goods, services or works at all stages of the project and within the entire life-cycle of procured goods.”¹⁹ Parsing out environmental elements might avoid the complexities entailed by incorporating social aspects of sustainable development into procurement policies, but it fails to fully comply with the integration principle, which calls specifically for the incorporation of “sustainable development” objectives which, as explained above, requires policy that recognizes the interwoven nature of all three pillars.

D. Understanding Social Aspects of Sustainable Forest Management as Production Characteristics of Timber

Member State timber procurement criteria relating to social aspects of sustainable forest management pertain to the production processes and methods of the procured timber, in that they require procured timber products to be legally-harvested from sustainably-managed forests. Timber is a harvested product, not a manufactured product. Thus, defining a sustainable production process for timber necessarily entails consideration not only of harvesting methods, but also whether the timber is being harvested in a sustainable manner. This, in turn, requires consideration of whether the timber is being harvested from a sustainably-managed forest. As elaborated above, sustainable forest management is widely understood to include social aspects and, under the framework of sustainable development and the integration principle, these must be understood as integrally related to environmental and economic components of sustainable forest management.

II. The Nature and Role of Horizontal Policies in Procurement

A. The Equal Status of Functional and Horizontal Objectives in Public Procurement Policies

Public procurement is the process whereby governmental bodies purchase from the market goods, works, and services they need. So, for example, when governments purchase the construction of bridges, cleaning services for government offices, or paper clips, government officials authorizing the purchase (“contracting authorities”) are participating in the public procurement market.

Any purchase made by a contracting authority will obviously have a functional objective. For example, a transportation authority might procure the construction of roads, bridges, and bus services in order to perform the governmental function of facilitating public transport. Public procurement can also be used to promote social, environmental, and other societal objectives that are not necessarily connected with the procured items’ functional objectives. For example, a contracting authority may choose to honour human rights obligations through a policy prohibiting the purchase of supplies produced using child labour, to advance social cohesion by requiring public works contractors to employ ethnic minorities or long-term unemployed persons in the contracted work, or to pursue environmental objectives by requiring publically-procured paper to have a minimum recycled-fibre content. This briefing uses the term “horizontal objectives” to refer to these sorts of procurement policy objectives.²⁰ One commentator illustrates the relationship between functional and horizontal procurement policies by considering the specific functions of public authorities as organised into vertical “silos,” with societal objectives envisaged as involving cross-cutting “horizontal” policies that, while not necessarily arising from the particular function of a specific public authority, might nevertheless be advanced through the way in which it conducts its functions.²¹

Horizontal procurement policies are sometimes referred to as “secondary policies,” implying that the primary objective of procurement is the purchase on competitive terms of a product or service meeting a particular functional need, and that factors relating to horizontal policies are “secondary” in the sense that they do not relate directly to this need. The term “secondary policies” also connotes that such policies are of secondary *importance*. However, horizontal considerations can be as important as, or even more important than, the functional objectives served by the procurement, particularly where horizontal objectives relate to such vitally important matters as protecting human health and safety, promoting human equality and dignity, or preventing climate change. Thus, an important principle informing the analysis of public procurement law is the *equal status of horizontal policies and the functional objectives served by procurement*. As explained further below, this understanding of the relative status of horizontal and functional procurement objectives is consistent with the integration principle as well as the European Court of Justice’s jurisprudence on EU procurement law.

The pursuit of horizontal objectives through purchasing behavior, whether by public or private purchasers, is normal market behavior and contributes to the effective functioning of the market. It requires market providers to better meet consumers’ complex matrix of demands. This is illustrated by, for example, the growing demand for more sustainable and fair trade products over recent decades. When a consumer opts to purchase coffee that has been certified as compliant with fair trade principles over otherwise equivalent and lower-priced coffee, she is opting to purchase not only coffee but also the contribution her purchase makes towards the economic development objectives of coffee growers and a more equitable global trading regime. When she purchases recycled paper over otherwise equivalent paper, she is opting to purchase not only paper but also the contribution her purchase makes towards limiting the disposal of waste paper and the relatively higher use of resources that go into

producing paper from virgin fibres. Such options allow consumers to incorporate horizontal values into their consumption choices.

In the case of the public procurement of supplies, horizontal policies aimed at increasing demand for more sustainable products—thereby shaping the broader market for the goods at issue—can have significant impacts beyond the government’s functional use of the goods procured. For example, demanding higher energy-efficiency standards for publicly-procured products can profoundly shift market standards and overall energy use by a class of goods in the public and private sectors alike. In 1993 the US federal government decided to purchase only Energy Star-compliant computer equipment. The US federal government purchases more computers than any other single purchaser in the world, and it is estimated that this decision played a significant part in shifting the vast majority of computer equipment on the global market towards Energy Star compliance. The environmental benefits of this policy have been calculated at 200 billion kWh of electricity saved since 1995, which equates to 22 million tones of CO₂.²² Likewise, given the amount of timber products procured by public authorities, policies demanding that timber be legally sourced from sustainably-managed forests can have a significant effect on shifting forest management practices towards greater sustainability generally.

Integration of sustainability objectives into public procurement policies is consistent with the integration principle set out in the Treaty establishing the European Community (TEC), which requires that sustainable development objectives be integrated into all EU policies and activities. Indeed, Recital 5 to the Procurement Directive cites the Integration Principle:

Under Article 6 of the Treaty [establishing the European Community], environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of that Treaty, in particular with a view to promoting sustainable development. *This Directive therefore clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contract.*²³

Moreover, the recitals further state:

Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life, or the preservation of plant life, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty.²⁴

Thus, the Directive is clearly intended to preserve Member States’ discretion to define the content and scope of their procurement policies including, in particular, horizontal procurement objectives to promote sustainable development.

B. Member State Discretion and EU Competence to Regulate Public Procurement

Regulators should not consider horizontal objectives in public procurement policies as inherently suspicious or illegitimate. Rather, a procurement criterion promoting horizontal objectives should be considered permissible unless there are special reasons to curtail it. In EU law, such special reasons are

found in the tendency for governments to favour national industry for reasons that are directly contrary to the single market. Beyond this, however, any restraints need to be carefully considered.

The functioning of the internal market in public contracts is implemented mainly through directives which require authorities to award contracts using specific transparent procedures. The relevant directive for timber procurement policies is Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (the Procurement Directive).²⁵

To properly interpret the Procurement Directive, it is important to clarify the scope of the EU's legal competence to regulate public procurement policies of Member States. As an initial matter, Member States have broad discretion to define their horizontal procurement policies. This is consistent not only with their role as purchasers, as discussed above, but also with the subsidiarity principle. The subsidiarity principle requires that political power be exercised by the smallest or least central unit of government. Under this principle, the EU should regulate only where it can provide better regulation than the Member States, for example due to the scale or transnational nature of the relevant issues.

The legal basis for the Procurement Directive, as specified in the Directive, is Article 47(2), Article 55, and Article 95 of the TEC.²⁶ These articles authorize the adoption of measures which have as their objective the establishment and functioning of the internal market. The Procurement Directive is best understood as an effort towards negative harmonization, in that its aim is to eliminate Member State policies that present a hindrance to trade in the public procurement market. However, it is *not* an objective of the Procurement Directive to regulate the balance between horizontal objectives and other procurement policy objectives. Such direct regulation of Member States' procurement policy objectives is not something the EU is competent to pursue on the basis of Articles 47(2), 55, or 95 of the TEC.

Accordingly, the Procurement Directive is not concerned with *what* contracting authorities buy, but with *how* they buy it. In short, a contracting authority must act fairly in the course of public procurement. Acting fairly means following the principle of *equal treatment* (or non-discrimination), which means that all competitors should have an equal opportunity to compete for the contract. To ensure this level playing field, the principle of *transparency* must also be applied. The transparency provisions set out in the Procurement Directive essentially require contracting authorities to use objective, qualitative, and quantifiable criteria, and to explain the criteria and how they will be used to evaluate the tenders in the tender notice. These requirements are procedural, rather than substantive. The contracting authority is free to define the substance of the contract in any way that meets the public's needs, including through criteria promoting horizontal policies. The procurement directives are not intended to restrict the subject matter of a contract, but rather to ensure that the principles of equal treatment and transparency are fully complied with in the course of procuring the contract. In addition, EU procurement rules are concerned to remove certain other restrictions on access to the market—even non-discriminatory restrictions—that are considered disproportionate in light of their objectives, in general keeping with the *proportionality* principle, which requires that government should not take any regulatory action beyond that which is necessary to perform the objective of the regulatory action.

III. The Place of Timber Procurement Criteria relating to Social Aspects of Sustainable Forest Management under EU Public Procurement Law

The Procurement Directive does not squarely address the question of whether criteria relating to the social pillar of sustainable development—such as timber procurement criteria relating to social aspects

of sustainable forest management—should be allowed as technical specifications, award criteria, or contract performance conditions. Nor has the European Court of Justice (ECJ) squarely addressed this question. However, the Procurement Directive plainly allows for *production processes and methods* to be included as technical specifications²⁷ (and, accordingly, also as award criteria), and the ECJ has elaborated upon this in *EVN-Wienstrom*.

In this section, we argue that the Procurement Directive should be read on its face to allow technical specifications and award criteria relating to social aspects of sustainable forest management. Such criteria are also wholly consistent with the ECJ's jurisprudence in *EVN-Wienstrom*. In *EVN-Wienstrom*, the court held that sustainability criteria that assign value to the environmental performance of the goods procured at the production stage *are sufficiently related to the subject matter of the contract* to be used as technical specifications or award criteria. Timber procurement criteria relating to social aspects of sustainable forest management should be understood as sustainability criteria pertaining to the production stage of timber, and thus are permissible under *EVN-Wienstrom*. Accordingly, such criteria should, in principle, be allowed unless it can be shown that a specific criterion at issue does not comply with the principles of equal treatment, transparency, or proportionality.

A. The Structure of the Procurement Process under the Procurement Directive

As a preliminary matter, it is useful to briefly describe the structure of the procurement process under the Procurement Directive. The process entails five key stages:

1. **Definition of the subject matter of the contract:** What is to be purchased? This is a very important stage in the procurement process, as it sets out the scope of the procurement contract's content to be addressed in the remaining stages. For example, if a contracting authority seeks to procure *legal and sustainable timber* rather than merely *timber*, this will have important implications for the content of the technical specifications and award criteria.
2. **Technical specifications:** These are used to define the subject matter of the contract more specifically. Ability to meet the technical specifications is a prerequisite for being considered a candidate for the contract.
3. **Selection criteria:** Otherwise eligible candidates can be excluded on the basis of circumstances described in the Directive, including former convictions or other grave misconduct or failure to demonstrate technical capacity to execute the contract.²⁸
4. **Award criteria:** The contracting authority can choose between eligible bids on the basis of price alone or on the basis of "the most economically advantageous tender."²⁹ If the latter, the tender notice must set forth how award criteria will be evaluated and weighed. Award criteria are the same sorts of things that might be listed as technical specifications. But, rather than requiring all award criteria to be met in absolute terms as a precondition for candidacy, award criteria enable a contracting authority to award extra points to those candidates that go beyond minimum requirements to achieve additional advantages. The use of award criteria are sometimes preferred over technical specifications to enable the contracting authority to compare the relative advantages of different combinations of criteria without requiring them all in absolute terms, to reward those candidates who strive furthest beyond the minimum requirements set, or to otherwise differentially weigh various horizontal objectives along with the price to determine the "most economically advantageous offer."³⁰

5. **Contract performance conditions:** Requirements that relate to how the contract is to be performed can also be included in the contract, but must always be clearly specified in the tender notice.³¹ In the context of a supply contract, such terms might include specifications such as a requirement that products be delivered in bulk rather than in separate containers or be delivered using a specified mode of transport.

The remainder of this briefing focuses on the use of criteria relating to social aspects of sustainable forest management as technical specifications and award criteria.

B. European Court of Justice Jurisprudence on Horizontal Procurement Policies

1. General Recognition of Horizontal Environmental Objectives: *Concordia Bus*

The European Court of Justice held in its 2002 decision in *Concordia Bus* that, under the procurement directives in force at the time, a contracting authority organizing a tender procedure for the operation of city bus services could include, among the award criteria for awarding the contract on the basis of the “economically most advantageous tender,” criteria that take into account the nitrogen oxide emissions and noise level of the bus fleet offered by parties seeking the tender.

The relevant Community directive, Directive 93/38/EEC, provided in Article 34(1) that:

the criteria on which the contracting entities shall base the award of contracts shall be:

- (a) the most economically advantageous tender, involving various criteria depending on the contract in question, such as: delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments with regard to spare parts, security of supplies and price; or
- (b) the lowest price only.³²

The Complainant contended that the criteria for the decision must, in accordance with the wording of the relevant Community directive, always be of an economic nature. The Complainant argued that, if the objective of the contracting authority is to satisfy environmental or other considerations, recourse should be had to regulatory mechanisms other than a public tender procedure.³³ In contrast, the contracting authority, along with Member States submitting observations to the court, argued that it is permissible to include environmental criteria in criteria for the award of a public contract, noting that the factors listed in Article 34(1)(a) of Directive 93/38/EEC were merely examples and not exhaustive of the factors that could be taken into consideration; that Article 6 of the TEC (the integration principle) requires environmental protection to be integrated into the other policies of the Community; and that the court’s previous case law had affirmed contracting authorities’ discretion to choose the criteria regarded as relevant for assessing tenders.³⁴ The European Commission supported the Complainant’s contention that award criteria for assessing the “economically most advantageous tender” must be of *direct economic advantage* to the contracting authority.³⁵

Thus, the question before the court was whether a contracting authority could include horizontal procurement criteria promoting environmental policy objectives, even if these criteria did not

contribute to the direct economic advantage of the contracting authority. The Court held that it could. The contracting authority could take into consideration environmental criteria such as toxin and noise pollution levels of the procured bus services provided that the criteria complied with the general requirements of equal treatment and transparency and did not “confer an unrestricted freedom of choice on the authority.”³⁶ The Court further held that where, as in *Concordia Bus*, additional points are awarded to tenders that meet certain specific and objectively quantifiable environmental requirements, this does not confer an unrestricted freedom on the contracting authority.³⁷

Moreover, the court held that award criteria must be “linked to the subject-matter of the contract.”³⁸ The Commission and others who continue to try to restrict horizontal procurement policies attempt to construe what is “linked to the subject-matter of the contract” as limited to *functional* objectives of the contract only. Significantly, however, the court held in *Concordia Bus* that “criteria relating to the level of nitrogen oxide emissions and the noise level of the buses . . . must be regarded as linked to the subject-matter of a contract for the provision of urban bus transport services.”³⁹ This clarifies that to be “linked to the subject-matter of the contract” is *not* limited to the functional objectives of the contract (in *Concordia Bus*, the provision of bus services), but can also encompass *environmental externalities* arising from the procured goods or services (in *Concordia Bus*, the pollution effects of the procured bus services).

Although *Concordia Bus* was decided in 2002, prior to the revision of the procurement directives in 2004, the new Procurement Directive expressly incorporates the court’s jurisprudence in *Concordia Bus*: “This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area”⁴⁰

Article 53 of the 2004 Procurement Directive provides in relevant part that

- (1) . . . the criteria on which the contracting authorities shall base the award of public contracts shall be either:
 - (a) when the award is made to the tender most economically advantageous *from the point of view of the contracting authority*, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or
 - (b) the lowest possible price only.⁴¹

In amending the previous directive to include the language “from the point of view of the contracting authority,” the Community legislature underscored Member States’ discretion to define the criteria by which to determine the tender that it finds most economically advantageous, taking into consideration horizontal and well as functional policy objectives.

2. Criteria based upon Production Characteristics: *EVN-Wienstrom*

Technical specifications in public contracts are governed by Article 23 and Annex VI of the Procurement Directive. Paragraph (1)(b) of Annex VI provides:

(b) “technical specification” in the case of public supply or service contracts means a specification in a document defining the required characteristics of a product or service, such as quality levels, *environmental performance levels*, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labeling, user instructions, *production processes and methods* and conformity assessment procedures.⁴²

If the Community legislature had intended to limit the scope of technical specifications to functional characteristics or consumption characteristics demonstrated through the products’ use, it would not have also included “production processes and methods” on the list of characteristics that can comprise technical specifications.

Member State timber procurement criteria relating to social aspects of sustainable forest management pertain to the production processes and methods of the procured timber, in that they require procured timber products to be legally-harvested from sustainably-managed forests. As an essential component of sustainability, they furthermore relate to the environmental performance of these production characteristics. Thus, on its face, the Procurement Directive can be read to allow timber procurement criteria relating to social aspects of sustainable forest management as technical specifications.

That the Procurement Directive intends such a result is further bolstered by the Directive’s reference to the use of eco-labels to define appropriate technical specifications for environmental characteristics.⁴³ Eco-label systems involve products being voluntarily tested against criteria concerning the life cycle of products of that kind, including their environmental performance at the production stage and other production characteristics.

In *EVN-Wienstrom*, the court extended its jurisprudence in *Concordia Bus* to hold that the Procurement Directive allows award criteria differentiating tenders based upon the production characteristics of supplies procured. The court held that EU public procurement law does not preclude a contracting authority from applying, in the context of a contract for the supply of electricity, an award criterion with a weighting of 45% in favour of electricity produced from renewable energy sources.⁴⁴ Noting that the promotion of electricity produced from renewable energy sources is a high Community priority,⁴⁵ the court emphasized that the fact that the criterion does not necessarily serve to achieve the functional objective pursued by the procurement is irrelevant.⁴⁶ *EVN-Wienstrom* makes clear that award criteria to advance environmental objectives are not limited only to *consumption characteristics* (the environmental performance of the goods during use), but can also include *production characteristics*, including externalities resulting from the goods’ or services’ production processes and methods. According to *EVN-Wienstrom*, criteria pertaining to the procured goods’ production characteristics are *sufficiently related to the subject-matter of the contract* to be permitted as award criteria.⁴⁷

EVN-Wienstrom also reconfirmed the court’s settled jurisprudence on horizontal policies in EU procurement law more generally. The court emphasized a contracting authority’s discretion to define criteria for determining the most economically advantageous tender, and that a criterion chosen by a contracting authority can be struck down only where it is shown to violate the principles of equal treatment, transparency, or proportionality, and not merely upon a contention that the contracting authority’s balance between various horizontal and functional policy objectives should be struck

differently. In relation to whether it was lawful to give the criterion favouring renewable electricity a weighting of 45%, the court held that “contracting authorities are not only free to choose the criteria for awarding the contract but also to determine the weighting of such criteria,”⁴⁸ emphasizing that “given the discretion enjoyed by the contracting authority in its identification of the most economically advantageous tender, only a weighting which resulted in an unjustified distortion would be unlawful.”⁴⁹

As in the case of timber procurement criteria relating to social aspects of sustainable forest management, the award criteria at issue in *EVN-Wienstrom* had to do with the *sustainability* of the supplies procured. The sustainability criteria at issue in *EVN-Wienstrom* pertained to manufacturing processes and methods for electricity. Some might argue that the Procurement Directive’s reference to “production processes” should be limited to manufacturing processes and methods. However, there is nothing in either the Directive or relevant case law that supports such a limited understanding of “production processes.” On the contrary, the overarching aims of the Procurement Directive, in particular its express incorporation of the integration principle, supports a broader understanding of “production processes and methods” that encompasses social aspects of sustainable forest management. As explained in section II.A., enabling Member States to pursue horizontal policies advancing sustainable development objectives is an aim of the Procurement Directive. Sustainable development is principally concerned with the pursuit of economic development objectives in a manner that does not exhaust the planet’s natural resources. The over-harvesting of limited supplies of natural resources at a rate greater than that at which the resources can be renewed is a key threat to sustainable development. Given this fact, it would be absurd to interpret the Directive’s reference to “production processes and methods” as limited to manufacturing production processes and methods only. Public procurement policies for supply contracts define the terms of government purchase and consumption of resources. Defining sustainable consumption can hardly be limited to sustainable manufacturing processes, since such a limitation would foreclose a Member State’s ability to define its sustainable purchase and consumption of raw materials that are not subject to a manufacturing process.

Accordingly, *EVN-Wienstrom* should be read to allow technical specifications and award criteria relating to social aspects of sustainable forest management in Member State timber procurement policies, unless it can be shown that the criterion in question fails to comply with the principles of equal treatment, transparency, or proportionality.

3. Distinguishing Sustainability Criteria based on Production Characteristics from Horizontal Objectives to Promote Social Policies: *Beentjes*

Article 26 of the Procurement Directive provides that additional requirements may be imposed through “conditions for performance of contracts”:

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.⁵⁰

The procurement of timber and timber products happens through supply contracts. Even within a public works or services contract, specifications pertaining to the timber or timber products used to perform the works or services are properly considered as a supply contract within a larger works or services contract. The scope of contract performance conditions for supply contracts for warehoused goods will

be limited to things such as payment and delivery arrangements. It should generally be considered inappropriate to include criteria relating to the social aspects of sustainable forest management as contract performance conditions.

Inclusion of social criteria at the contract performance stage suggests that the goods are being harvested-to-order. Because timber and timber products are generally supplied from warehoused stocks, however, a contracting authority procuring timber is not going to be able to monitor the *performance* of the contract to ensure that criteria relating to social aspects of sustainable forest management are complied with. Rather, they must be able to verify that the warehoused supplies from which the order is filled have been legally-harvested from sustainably-managed forests. Accordingly, the criteria in question are more appropriate as technical specifications (i.e., is the timber supplied *legal* and *sustainable* timber?) than to contract performance conditions.

The Commission has suggested that contract performance conditions may be the only or the most appropriate form for criteria relating to social aspects of sustainable forest management to take, attempting to align such criteria with the social policies at issue in *Gebroeders Beentjes BV v. Netherlands (Beentjes)*.⁵¹ *Beentjes* had to do with procurement criteria requiring that long-term unemployed persons be employed in the performance of a public works contract. Unlike the criteria at issue in *EVN-Wienstrom* and criteria relating to social aspects of sustainable forest management, the horizontal procurement objectives the contracting authority in *Beentjes* sought to pursue had nothing to do with the sustainability of procured supplies. Accordingly, we distinguish *Beentjes* from the questions at issue here.

The fact that criteria relating to social aspects of sustainable forest management might also be construed as social policies benefiting forest-dependent communities does not provide any counter-argument to the sustainability framework presented in this briefing. The issues addressed by social aspects of sustainable forest management might be analyzed through various frameworks. For example, many of the criteria at issue might also be analyzed through a human rights framework. However, this briefing analyzes timber criteria relating to social aspects of sustainable forest management through a sustainability framework and considers how they should be regarded under EU procurement law when properly understood as sustainability criteria pertaining to the production characteristics of timber. Thus, the relevant question is whether it is appropriate to consider the criteria in question as sustainability criteria relating to the production characteristics of timber, regardless of whether or not they might also be analyzed through alternative frameworks. Alternative frameworks for analyzing procurement criteria are not mutually exclusive.

IV. Commission Guidance on Horizontal Procurement Policies

European Commission guidance has generally advanced a restrictive approach to horizontal policies in procurement, over-reaching the EU's limited competency to regulate public procurement and encroaching on Member State discretion to determine the subject matter of their procurement contracts and the content and scope of their horizontal procurement policies.

Commission guidance does not provide legally-definitive statements on the basis of which Member States could securely develop their public procurement policies. Indeed, in key respects, the Commission's restrictive interpretation of horizontal procurement policies set forth in 2001 have since been rejected by the European Court of Justice. During the legislative process for the 2004 procurement directives, launched in May 2000, the Commission produced two parallel Communications on horizontal

policies in procurement. These were the Commission interpretative Communication on the Community law applicable to public procurement and possibilities for integrating environmental considerations into public procurement⁵² (Communication on environmental considerations), published in July 2001, and the Commission interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement⁵³ (Communication on social considerations), published in October 2001. The Communication on environmental considerations stated, with regard to the possibilities for taking into account externalities, that “as a general rule, externalities are not borne by the purchaser of a product but by society as a whole and therefore do not qualify as award criteria.”⁵⁴ This supposition was clearly rejected by the Court in *Concordia Bus* and *EVN-Wienstrom*.⁵⁵ Likewise, the Communication on social considerations sought to limit award criteria to the functional objectives and corresponding consumption characteristics of the procured goods, works, or services, stating that the criteria “should generate an economic advantage for the contracting authority” and “must allow the intrinsic qualities of a product or service to be assessed”⁵⁶—two more positions squarely rejected in *Concordia Bus* and *EVN-Wienstrom*.⁵⁷

With regard to timber procurement criteria relating to social aspects of sustainable forest management, the Commission has asserted in a 2004 publication that criteria relating to the protection of forest-dependent people cannot be included as technical specifications, alleging that such criteria would not be sufficiently related to the subject matter of the contract.⁵⁸ However, the Commission fails to argue how this allegation squares with ECJ case law, particularly *Concordia Bus* and *EVN-Wienstrom*.⁵⁹

The Commission’s reluctance to accept criteria relating to social aspects of sustainable forest management as technical specifications or award criteria appears to be a hold-over of its long-standing assertion that technical specifications must focus on the specific features of a product in terms of the product’s consumption characteristics as they relate to the functional objectives of the procurement. This position fails to recognize the equal status of horizontal and functional objectives in public procurement policies and has been squarely rebuked by the Court of European Justice in *Concordia Bus* and *ENV-Wienstrom*.

The Commission has persistently sought to ascribe a narrow reading to *EVN-Wienstrom*, attempting to construe the requirements for green electricity in that case as permissible because of some “invisible” consumption characteristics of green electricity.⁶⁰ However, it is simply not tenable to say that requirements for green electricity are permitted because of some “invisible” consumption characteristics. Instead, such a specification is in principle permissible for the simple reason that nothing in the Procurement Directive prevents Member States from assigning value to the environmental performance of the product concerned at the *production stage*.

Like the sustainability-promoting award criteria in *EVN-Wienstrom*, timber procurement criteria relating to social aspects of sustainable forest management are pertinent to the sustainable production of the goods procured. “Legally-sourced timber” and “sustainably-managed forests” are complex concepts that are hard to define. However, as explained in section I, it is broadly agreed that legal and sustainable management of forests must take into account social aspects of forest management. This is consistent with the more general principle of sustainable development which must be integrated into all EU policies and activities in accordance with the Integration Principle.

Procurement policies that include horizontal objectives to promote the sustainable management of forests will typically define the subject matter to include sustainability concerns, calling for the procurement of *legal and sustainable timber* rather than merely *timber*. Commission guidance that

technical specifications and award criteria relating to social aspects of sustainable forest management are impermissible essentially attempts to regulate *what* Member States procure rather than simply *how* they procure supplies. As explained above, the Procurement Directive maintains Member States' discretion to define the subject matter of their procurement and the EU has only limited competence to regulate Member State procurement policies to ensure that the policies do not hinder the internal market. Thus, Commission guidance on so-called "social criteria" in timber procurement policies overreaches EU competence to regulate Member States' public procurement policies and encroaches on Member State discretion to define the subject matter of procurement, including the horizontal as well as functional policies linked thereto.

Conclusion

Neither the Procurement Directive nor ECJ case law squarely addresses how public procurement criteria relating to the social pillar of sustainable development should be understood in EU procurement law. Timber procurement criteria relating to social aspects of sustainable forest management are essentially sustainability criteria, and should be treated in a similar fashion to other sustainability criteria pertaining to the production characteristics of the goods procured, such as that at issue in *EVN-Wienstrom*. That case, along with the overarching principles governing EU procurement law and the language and history of the Procurement Directive clearly suggest that timber procurement criteria relating to social aspects of sustainable forest management are permissible as technical specifications and award criteria.

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¹ Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 No. L134/114. At the same time, the Community Legislature also issued a companion directive governing public procurement in the utilities sector, see Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport, and postal services sectors, (Utilities Procurement Directive), OJ 2004 No L134/1. To the extent that the Utilities Directive may be relevant to the arguments made herein, its provisions are similar to

the Public Sector Procurement Directive but reference to “the Procurement Directive” in this briefing refers specifically to 2004/18/EC only.

² 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).

³ European Commission, Commission Staff Working Document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Public Procurement for a Better Environment, Impact Assessment*, SEC(2008) 2124 (Brussels, 16 July 2008) at section 2.2.2.

⁴ *Ibid.*, Annex 2.

⁵ Case C-513/99, *Concordia Bus Finland v. Helsingin Kaupunki* [2002] ECR I-7213.

⁶ Case C-448/01, *EVN AG v Austria* [2003] ECR I-14527.

⁷ All figures: World Bank, *Forests Sourcebook* (June 2008); available at

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTARD/EXTFORESTS/EXFORSOUBOOK/0,,menuPK:3745501~pagePK:64168427~piPK:6418435~thesitePK:3745443,00.html> (accessed 26 May 2010).

⁸ Food & Agricultural Organization, *Global Forest Assessment 2010, Key Findings* (FAO, 2010) at 3, available at <http://foris.fao.org/static/data/fra2010/KeyFindings-en.pdf> (accessed 18 June 2010).

⁹ *Ibid.* at 9.

¹⁰ 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/aconf15126-3annex3.htm> (accessed 20 May 2010). The Forest Principles elaborate upon the integration of social aspects of sustainable forest management, further noting that

2(d) Governments should promote and provide opportunities for the participation of interested parties, including communities and indigenous people, industries, labour, non-governmental organizations and individuals, forest dwellers and women, in the development, implementation and planning of national forest policies.

...

3(c) All aspects of environmental protection and social and economic development as they relate to forests and forest lands should be integrated and comprehensive.

...

5(a) National forest policies should recognize and duly support the identity, culture and the rights of indigenous people, their communities and other communities and forest dwellers. Appropriate 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 organization, as well as adequate levels of livelihood and well-being, through, inter alia, those land tenure arrangements which serve as incentives for the sustainable management of forests.

¹¹ *Ibid.* at paragraph 13(c).

¹² Food & Agricultural Organization, *State of the World's Forests 2007* (FAO, 2007) at 3.

¹³ *Ibid.*

¹⁴ Regulation (EC) No 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.

¹⁵ Belgian Federal Public Service of P70, *Circular letter P&O/DO/2*; Danish Ministry of the Environment, *Draft Criteria for Legal and Sustainable Timber and Assessment of Certification Schemes* (April 2007); Dutch Ministry of Housing, Spatial Planning, and the Environment, *Dutch Timber Procurement Policy: Framework for Evaluating Evidence of Compliance with Timber Procurement Requirements* (February 2010); Central Point of Expertise on Timber (CPET), *UK Government Timber Procurement Policy: Definition of Legal and Sustainable for timber procurement (fourth edition)*, April 2010; CPET, *Executive Summary of UK Government Timber Procurement Advice Note* (April 2010); see also CPET, *Common Framework, Comparison of timber procurement policy criteria for forest standards, certification, accreditation, chain of custody and labeling, Denmark, the Netherlands, United Kingdom, and Belgium* (June 2008) and sources cited therein.

¹⁶ Adapted from Duncan Brack, *Social Issues in Timber Procurement Policies* (Chatham House, London, 2009).

¹⁷ See *infra* note 23 and accompanying text.

¹⁸ Council of the European Union, 10255/1/05 (REV 1) *Presidency Conclusions 16-17 June 2005* (Brussels, 15 July 2005 (19.07)).

¹⁹ European Commission, *Green v. Sustainable Procurement*, found at

http://ec.europa.eu/environment/gpp/green_vs_sustainable.htm (accessed 26 May 2010).

²⁰ For a general discussion of horizontal procurement policies under EU procurement law, see Sue Arrowsmith and Peter Kunzlik, “Public procurement and horizontal policies in EC law: general principles,” in Sue Arrowsmith and Peter Kunzlik, eds.,

Social and Environmental Policies in EC Procurement Law :New Directives and New Directions (Cambridge: Cambridge University Press, 2009).

²¹ *Ibid.* at 13.

²² European Commission, *Buying Green!: A Handbook on Environmental Public Procurement* (Luxembourg: Official Publications of the European Communities, 2004) at section 3.3.3 (citing <http://www.energystar.gov>).

²³ Directive 2004/18/EC, Recital 5 (emphasis added).

²⁴ Directive 2004/18/EC, Recital 6.

²⁵ *See, supra*, note 1.

²⁶ Directive 2004/18/EC, Preamble

²⁷ Directive 2004/18/EC, Article 23 and Annex VI.

²⁸ Directive 2004/18/EC, Articles 44 – 52.

²⁹ Directive 2004/18/EC, Article 53.

³⁰ *Ibid.*

³¹ Directive 2004/18/EC, Article 26.

³² *Concordia Bus* at paragraph 6 (quoting Article 34 of Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport, and telecommunications sectors (OJ 1993 L 199 at 84)).

³³ *Ibid.* at paragraph 44.

³⁴ *Ibid.* at paragraph 45 (citing *Beentjes, C-324/93 R v. Secretary of State for the Home Department, ex parte Evans Medical and MacFarlan Smith* [1995] ECR I-563 167, 190).

³⁵ *Ibid.* at paragraph 52.

³⁶ *Ibid.* at paragraph 64.

³⁷ *Ibid.* at paragraph 66.

³⁸ *Ibid.* at paragraph 64.

³⁹ *Ibid.* at paragraph 65.

⁴⁰ Directive 2004/18/EC, Recital (1).

⁴¹ Directive 2004/18/EC, Article 53 (emphasis added).

⁴² Directive 2004/18/EC, Annex VI (emphasis added).

⁴³ *See* Directive 2004/18/EC, Article 23(6).

⁴⁴ *EVN-Wienstrom* at paragraph 30-34.

⁴⁵ *Ibid.* at paragraphs 40-43.

⁴⁶ *Ibid.* at paragraphs 30-43.

⁴⁷ *Ibid.* at paragraphs 32-33 (citing *Concordia Bus*) and paragraphs 66-72 (holding that, although a criterion relating to electricity *in excess* of that required by the contract is not sufficiently related to the subject matter of the contract, “the Community legislation on public procurement does not preclude a contract authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, an award criterion with a weighting of 45% which requires that the electricity supplied be produced from renewable resources”).

⁴⁸ *Ibid.* at paragraph 39.

⁴⁹ *Ibid.* at paragraph 36. *See also* *ibid.* at paragraph 37 (noting further that “[i]t must be recalled that according to settled case-law it is open to the contracting authority when choosing the most economically advantageous tender to choose the criteria on which is proposed to base the award of contract, provided that the purpose of those criteria is to identify the most economically advantageous tender and that they do not confer on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer” and citing Case 31/87 *Gebroeders Beentjes BV v. Netherlands* [1988] ECR 4635, paragraphs 19 and 26; Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraphs 36-37; and *Concordia Bus*, paragraphs 59 and 61).

⁵⁰ Directive 2004/18/EC, Article 26.

⁵¹ Case 31/87 *Gebroeders Beentjes BV v. Netherlands* [1988] ECR 4635.

⁵² European Commission, Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, COM (2001) 274 final.

⁵³ European Commission, Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM (2001) 566 final.

⁵⁴ *See supra*, note 52, at section 3.3.

⁵⁵ *See* section III.B.2, *supra* notes 33-40.

⁵⁶ *See supra*, note 53, at section 1.4.1.

⁵⁷ *See* section III.B.2, *supra* notes 33-40.

⁵⁸ *Buying Green!*, *supra* note 22, at paragraph 3.4.5.

⁵⁹ *Ibid.*

⁶⁰ *See, e.g., ibid.*, at paragraph 3.4.2.