

Chapter

**REFORM OF THE EU PROCUREMENT DIRECTIVES AND WTO GPA:
FORWARD STEPS FOR SUSTAINABILITY?**

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INTRODUCTION

The potential for public procurement to contribute to environmental and social objectives¹ is broadly recognised in many jurisdictions. Public contracts can exert a strong influence on the market, due to their size and value. Moreover, governments and state enterprises are often involved in activities with a heavy environmental and social footprint – such as the operation of utilities, delivery of infrastructure and transport, and provision of housing or other essential services. The nature of procurement regulation in the EU, with its objective of creating an internal market for goods, services and works, creates particular legal challenges for the implementation of sustainable public procurement (SPP). However it also creates opportunities for the harmonisation of standards and cooperation between public authorities.

This chapter looks at some of the ways in which EU public authorities have successfully included horizontal objectives in their procurement within this legal framework, which also encompasses the EU's obligations under the WTO Government Procurement Agreement. While gathering information about the overall scope of SPP practices is difficult, several studies carried out on behalf of the European Commission have attempted to collate data on this. Following a review of the quantitative scope of SPP in EU Member States, this chapter gives a qualitative analysis of the main approaches adopted, focusing on their legality and efficacy in achieving horizontal objectives.

Three means of implementing these objectives in the context of competitive tender procedures are examined: via technical specifications, award criteria and

contract performance clauses. The proposed reforms to the procurement directives² are critiqued in terms of their impact on these approaches, and suggestions made for how the draft legislation could be improved. Potential topics to be addressed under the Work Programme on sustainable procurement established under the renegotiated WTO Agreement are also identified.

SPP IN EU MEMBER STATES

Theory and Rationale

It is useful at the outset to consider the broader policy background underlying SPP. The term ‘sustainability’ is used so frequently and for such variable purposes that its coherence may be questioned. In the field of sustainable development, it denotes the equitable use of resources between populations over time.³ This requires a balance between the economic, social and environmental aspects of development, a mandate which has been accepted by the EU as well as by all Member States and a large number of regional and local authorities.⁴

Sustainable consumption and production is an approach to sustainable development which focuses on the life-cycle impact of goods and services and aims to ensure the efficient use of resources. Applying these concepts to public procurement, one is led to think of procurement which considers and reconciles the economic, social and environmental impacts of public contracts over the whole duration of those impacts. Examples of SPP measures widely adopted by European public authorities include the promotion of equality in the labour force and fair working conditions,⁵ reduction of energy consumption and greenhouse gas (GHG) emissions, proper management of natural resources and waste, and the development of renewable energy sources.

SPP, by taking these or other considerations into account in procurement, seeks to reduce the negative impact of public contracts and leverage government spending power to promote socially and environmentally responsible practices. In the context of the EU internal market and WTO Government Procurement Agreement, social and environmental objectives must be reconciled with the principles

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of open competition, transparency and equal treatment. National and organisational procurement policies also emphasise value-for-money, and may invoke further horizontal objectives linked to economic development.

These various objectives are not mutually exclusive – open and transparent cross-border competition for public contracts has the potential to contribute to environmental and social goals while delivering value-for-money. This may occur both by stimulating firms to innovate⁶ and, in some cases, reducing the costs associated with delivery of environmentally and socially responsible goods, works and services.⁷

Nevertheless, there is on-going scepticism regarding both the legitimacy and effectiveness of using the award of public contracts to pursue horizontal objectives. In some cases, it may be perceived as a distraction from the “core” consideration of value-for-money. In others, it is seen as a fig-leaf for discriminatory practices, a way of ensuring that local or preferred suppliers can compete on grounds other than cost.

This chapter takes as its starting point that contracting authorities have a legitimate interest, and in many cases an obligation, to pursue horizontal objectives in their procurement. The legality of the various means of doing this, along with the efficacy of different approaches in practice, are the questions addressed here. Such an analysis may help to determine when it is appropriate to use public procurement to achieve social and environmental goals, either instead of or in combination with other policy measures such as taxation or regulation.

Scope of Existing Practice in Member States

A majority of the 27 EU Member States have adopted policies for green public procurement (GPP) or SPP, representing varying approaches and levels of ambition. Some include mandatory measures for the procurement of certain products or services, while others set indicative targets only. Where these policies refer to specific criteria to be applied in procurement, they are in many cases based on the common EU GPP criteria developed by the European Commission, covering 19 product and service groups.⁸ These aim to address the key environmental impacts of each product or service based on the entire life-cycle, taking into account the need to verify suppliers’ claims and ensure comparability of tenders and equal treatment.

At national level, the criteria adopted often address social considerations in addition to the environmental impacts targeted by the EU GPP criteria. Social considerations in this context include both characteristics of the final product or service, such as accessibility to all users, and supply-chain characteristics such as

exclusion of child labour or payment of a living or fair wage to those involved in the production process. Many local and regional authorities have adopted their own policies which go beyond the minimum requirements set out at national level.

Four major studies carried out since 2009 have sought to provide a quantitative and qualitative picture of GPP/SPP in the EU. The first of these, published in 2009, focused on the nature, extent and impact of GPP practice in the so-called “Green 7” Member States, showing the highest levels of GPP implementation at that time.⁹ The report compiled data drawn from Official Journal notices and responses to a questionnaire sent to a sample of contracting authorities in the seven Member States. The results indicated that on average 55% percent of procurement procedures (accounting for 45% of total contract value) included green criteria in the years 2006-2007. The impact of these criteria on life-cycle cost and CO₂ emissions was also examined – finding slightly lower costs overall for the sectors covered and significant reductions in emissions (PricewaterhouseCoopers, Significant and Ecofys, 2009).¹⁰

Unfortunately the assessment of actual rates of implementation of GPP/SPP is vitiated by a number of methodological problems, some of which apply to the analysis of EU public procurement trends more widely. The weight which can be attached to the above report’s findings is limited by the low response rate to the questionnaire issued, and the likelihood that those contracting authorities who did respond do not form a representative sample.¹¹

Analysis of contract notices and contract award notices published in the Official Journal also gives an incomplete picture of public procurement in the Member States. Most obviously, contracts advertised in the Official Journal account for only 20% of the total value of public expenditure on goods, services and works (European Commission, 2011b, p. 27) excluding most below-threshold contracts¹² and those exempted from the application of the 2004 Directives. Information about contract value and the award criteria applied is generally only available from award notices, however these are often incomplete and in many cases are not published at all.

The same methodological difficulties are present in two later studies examining, respectively, GPP/SPP implementation in nine member states plus Norway (Evans, Ewing, Nuttall, & Mouat, 2010), and the strategic use of public procurement to achieve horizontal objectives (Essig, Frijdal, Kahlenborn & Moser, 2011). The latter, published in June 2011, draws upon analysis of national policies as well as a survey of some 2300 contracting authorities across the EU-27 and EEA Member States. The results from this survey indicate that 64% of the respondent contracting authorities included environmental requirements in their

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tenders “regularly, sometimes or as much as possible”, while 49% included social requirements with this frequency (Essig et al., 2011, p. 64-65, 74-75). A further monitoring report published in 2012 found that 55% of the last contracts signed by a sample of 856 public authorities across 26 Member States included at least one ‘green’ criterion (Centre for European Policy Studies & College of Europe [CEPS/CoE], 2012, p. 39-40).¹³

The most common means of implementing environmental objectives into regulated procurement procedures appears to be via technical specifications (Essig et al., 2011, p. 8; CEPS/CoE, 2012, p. 46). In the case of social considerations, the position is somewhat different, with contract performance conditions being the most common locus of implementation (Essig et al., 2011, p. 12). One likely reason for this is the legal uncertainty surrounding the inclusion of social considerations in the competitive stages of procurement, discussed below.

The difficulty of gathering information from contracting authorities directly regarding their procurement practices, and the incomplete picture given by notices published in the Official Journal, makes an authoritative analysis of the overall extent of GPP/SPP implementation in the EU challenging. In addition to the lack of readily-available and representative data, the question of causality in procurement outcomes can be complex. Drawing a direct line between criteria which address a particular horizontal objective and broader environmental and social outcomes is seldom possible.¹⁴

Nevertheless, widespread incorporation of both environmental and social considerations in regulated procurement procedures can be discerned from the above reports. The impact of GPP/SPP measures on levels of competition, costs and achievement of the intended environmental or social objectives remain areas for further study. In the absence of such data, it is possible to examine outcomes at the individual contract level, drawing upon the documented experiences of public authorities. Case studies or collections of best practice relating to SPP are one way of collating such information.

A number of voluntary networks¹⁵ have arisen across the EU, supporting the efforts of public authorities to implement GPP/SPP and the exchange of good practice. The European Commission has provided support to public authorities to develop their capacity in this area, particularly in the newer accession states and those with lower levels of GPP implementation.¹⁶ Since 2010 a Helpdesk has been available to disseminate information about GPP and respond to enquiries. A collection of some fifty examples of contracts incorporating environmental criteria awarded in accordance with the Directives has been developed, covering twenty Member States and fifteen product/service groups. News on policy developments,

training opportunities and reports from procurement officers are circulated by means of a monthly electronic newsletter. A comprehensive website is maintained with guidance and links to background information and resources.¹⁷

All of these actions may be taken to demonstrate a willingness at various levels of government to expend time and effort on SPP. Despite this, serious barriers exist to the broader adoption of such measures and the deepening of their ambition with regard to environmental and social outcomes. Cost is often cited as a factor, however as noted above there is little solid evidence to link SPP measures to cost impacts in either direction. While at individual contract level, market research can readily be done, an overall perception of higher costs may impede firm policy support. With public sector retrenchments in spending following the financial crisis of 2008, this perception carries even greater weight. This is one reason for the development of life-cycle costing (LCC) as a strategy within SPP.

By calculating the total lifetime cost associated with the purchase, use and disposal of a supply service or work, LCC takes into account considerations such as energy and water consumption. This typically favours the purchase of more sustainable alternatives, a tendency which is magnified when environmental or social externalities are assigned a monetary value and included in LCC calculations. LCC can help “translate” such costs and benefits into figures which are more readily included in procurement decisions. It can offer an objective and transparent means of weighing such considerations, especially where the costing methodology is fully disclosed in advance to tenderers. However in some cases the complexity of LCC calculations will deter contracting authorities and, potentially, tenderers. The role of LCC in SPP is discussed further in a later section of this chapter.

LEGAL CHARACTERISATION OF SPP MEASURES

Arrowsmith proposed a taxonomy for the analysis of horizontal policies in public procurement, facilitating analysis of the various means by which public authorities pursue SPP as well as other policies such as support to SMEs (Arrowsmith, 2009; Arrowsmith 2010). The taxonomy distinguishes between policies which are limited to securing compliance with legal obligations and those which go beyond compliance, and policies applied only to the contract being awarded and those which go beyond it. She identifies nine discrete mechanisms for implementing horizontal policies in procurement processes: the decision to purchase (or not); the decision on what to purchase; packaging and timing of orders; set-asides; exclusion of firms from tendering; preferences in inviting firms

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to tender; measures for improving access to contracts; award criteria and contract conditions.

While all of these mechanisms can be and are used by contracting authorities under the EU procurement rules, those of greatest interest for this chapter are those which have attracted the greatest scrutiny for their compliance with the procurement directives and Treaty. These are (i) the decision on what to purchase as implemented in technical specifications, (ii) the use of award criteria to identify environmentally or socially preferred tenders, and (iii) the proper role of contract performance clauses. The distinction between policies which are applied only to the contract being awarded and those which go beyond it is of central importance in the EU context, encapsulated in the “link to the subject matter of the contract” test discussed below.

Both the 2004 Directives and the proposed reforms take account of the EU’s obligations as a party to the WTO plurilateral Agreement on Government Procurement (GPA). By applying the Directives to economic operators of third countries that are signatory to the GPA, EU contracting authorities fulfil their obligations under the GPA. For this reason any reform to the Directives must not interfere with the requirements of the GPA, which include the general principles of non-discrimination and transparency as well as more specific rules regarding technical specifications, selection of tenderers and evaluation of tenders.

The recent renegotiation of the GPA includes the possibility to address environmental considerations via technical specifications and award criteria. Article X (6) of the new text specifically authorises technical specifications which “promote the conservation of natural resources or protect the environment” while the indicative list of evaluation criteria in Article X (9) now includes environmental characteristics. The possibility of addressing social characteristics by these means is not mentioned, but this does not mean it is prohibited, provided it is done in accordance with the other provisions. In general, the requirements under the GPA may be considered less onerous than the EU procurement rules, which, it is argued below, have extended beyond purely procedural aspects to regulate the substance of procurement.

The revised GPA text also includes a commitment to establish a Work Programme to “promote the use of sustainable procurement practices, consistent with the Agreement.” (WTO Committee on Government Procurement, 2012, Annex 7). It is suggested that the lacunae arising from the EU experience described above – notably the ability to effectively monitor SPP outcomes and development of robust LCC techniques – should form part of this Work Programme, in addition to specific considerations arising under Article X.

SPP under EU Law

The EU's competence to regulate public procurement arises from the Treaty provisions governing the establishment and functioning of the internal market.¹⁸ As with other areas of EU competence, a purposive interpretation of the relevant provisions has extended the scope of regulation beyond measures strictly needed to ensure the free movement of goods, services, people and capital. Arrowsmith and Kunzlik identify three means by which the EU public procurement regime has sought to develop the internal market: (i) prohibiting discrimination (ii) ensuring transparency and (iii) removing disproportionate restrictions on access to the market – including in some cases non-discriminatory restrictions (Arrowsmith & Kunzlik, 2009, p. 32-35).

This broad approach has led, for example, to the extension of advertising requirements beyond contracts covered by the Directives, in order to give effect to the Treaty principle of non-discrimination and its concomitant requirement of transparency.¹⁹ In counterbalance to these developments stands the subsidiarity principle,²⁰ which the European Court of Justice (ECJ) has interpreted in its public procurement jurisprudence as mandating a relatively wide field of discretion for contracting authorities in making decisions as to what to purchase (Treumer, 2006).²¹

The ECJ upheld the ability of contracting authorities to include social and environmental considerations in procurement procedures in the *Beentjes*,²² *Nord Pas de Calais*,²³ *Concordia*²⁴ and *EVN Wienstrom*²⁵ cases. The 2004 Directives adopted some of this jurisprudence in provisions on contract performance clauses²⁶ and award criteria,²⁷ while also creating specific provisions for the exclusion of economic operators in cases of professional misconduct or non-payment of taxes or social security contributions²⁸ and the reservation of contracts for sheltered workshops.²⁹

A number of recent EU legislative measures create specific obligations for contracting authorities regarding the “what” of procurement. Under this heading we find the Energy Star Regulation, requiring central government authorities to purchase only office IT equipment meeting certain minimum energy-efficiency levels;³⁰ the Clean Vehicles Directive, requiring contracting authorities and entities to take fuel consumption and greenhouse gas emissions into account when purchasing road transport vehicles;³¹ and the Energy Performance of Buildings Directive, under which all new buildings owned and occupied by public authorities from 31st December 2018 must be “nearly zero-energy” as defined nationally according to a common framework methodology.³² Other EU environmental

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legislation, for example on energy services³³ and energy labelling,³⁴ sets out indicative targets for public procurement without however creating substantive and mandatory obligations for contracting authorities in the sense of the above three instruments.

The 2004 Directives are also not strictly limited to procedural requirements. The provisions on technical specifications state that “Technical specifications shall afford equal access for tenderers and not have the *effect* of creating unjustified obstacles to the opening up of competition.”³⁵ The prohibition on technical specifications with a discriminatory effect goes back to the first procurement directive,³⁶ and can be seen in the context of the case law on quantitative restrictions and measures having equivalent effect.³⁷ A requirement which regulates the effect of technical specifications necessarily impacts on their substance, because procedural compliance may be insufficient to demonstrate that the obligation has been met.

Technical Specifications

As seen above, under the EU legal framework contracting authorities are generally free to define the “what” of their purchases – with important exceptions where legislation mandates certain minimum standards or where the specification of requirements would have a discriminatory effect. Thus for example if a city wishes to specify the purchase of recycled paper or a building which is accessible to all users, this can clearly be done.³⁸ However the scope for technical specifications to address production processes and methods (PPM) has been cast into some confusion. This is a question of key importance for SPP; for many goods, services and works, the bulk of environmental and social impacts will be incurred during the production process, and cannot be adequately addressed by specifying requirements for the end product.

Position under 2004 Directives

Technical specifications are defined in the annexes to the 2004 Directives, using slightly different formulations for works contracts and supply or service contracts:

‘Technical specification’ in the case of public works contracts, means the totality of technical prescriptions...defining the characteristics required of a material, product or supply, which permits [it] to be described in a manner such that it fulfils the use for which it is intended by the contracting authority. These characteristics shall include levels of environmental performance...production processes and methods.

[...]

‘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 a service, such as quality levels, environmental performance levels...production processes and methods...³⁹

These definitions are quoted because of the insight they provide into the scope of PPM requirements which may be included in technical specifications. In its guidance documents on the inclusion of environmental considerations in public procurement (European Commission, 2001; European Commission, 2004), the Commission has sought to limit this scope, notably by introducing the “Invisibility Fallacy” which has been thoroughly critiqued elsewhere (Kunzlik, 2009). In brief, this was an attempt to curtail PPM requirements which may be specified by introducing an additional requirement that these be reflected in the characteristics of the end product, even if the effect is not visible.

While it is clear from the above-quoted sections that technical specifications must define the characteristics of the goods, services or works in question, it is also clear that production processes and methods may themselves *be* the characteristics which are defined. If an additional requirement of reflection of PPM characteristics in the end product were to be implied, a specification for electricity from renewable sources would clearly fail to meet this test, as the end product is indistinguishable from any other electricity.

The scope under the existing legal framework for PPM requirements to lead to specifications which are discriminatory or restrictive of trade should not be exaggerated – although a risk does exist. The general requirement that technical specifications afford equal access for tenderers and not have the effect of creating unjustified obstacles to competition applies, as does the principle of proportionality. The scope of these obligations, as interpreted in recent case law,⁴⁰ may include taking positive steps to place tenderers in a position of equality, as well as avoiding discriminatory specifications. A PPM requirement which is overly restrictive or clearly goes beyond what is needed to achieve the contracting authority’s objectives would be unlikely to survive challenge on these grounds.

Proposed Reforms

The Commission’s proposed new directives contain an explicit acknowledgement that technical specifications may relate to production processes and methods. Located in the main text of the directives (Article 40 in COM 896/Article 54 in COM 895), this applies to supply, service and works contracts, and makes it clear that such specifications may relate to any stage of

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the life-cycle. There is no reference to the concept that the characteristics of the end product must be altered by the PPM.

The existing provisions on accessibility for users with disabilities are strengthened to require that technical specifications take this into account where the subject of the procurement is intended for use by people, except in duly justified cases. The provisions on references to labels in technical specifications make clear that these may relate to social characteristics as well as environmental ones. The new labelling provisions nevertheless fail to resolve the uncertainty regarding the use of environmental or social labels as part of technical specifications.

Article 41.1 of the proposed Public Sector Directive states that where contracting authorities include environmental or social characteristics in a functional specification “they may require that these works, services or supplies bear a specific label...” provided certain conditions are met. However the next paragraph effectively removes the ability to insist on a particular label by requiring that all equivalent labels be accepted, as well as a manufacturer’s dossier or other appropriate means of proof.

An unwary public authority may take this provision at face value – that a specific label can be required. While the caveat to accept equivalent labels is fair and would be required under the GPA, the additional requirement to accept a manufacturer’s own dossier completely removes the ability of the contracting authority to insist upon third-party certification regarding the environmental or social characteristics of the product they are buying. Not only does it lack any progression from the current position, it confuses the matter with seemingly contradictory wording.

Award Criteria

Award criteria can be seen as central to SPP in that they encourage competition in respect of the specific environmental, economic or social factors targeted. Uniquely in the procurement process, they allow for advantages and disadvantages under different headings to be weighed against each other to determine the optimal outcome – a process which is fundamental to identifying sustainable solutions. They are also highly visible as a means of communicating a contracting authority’s objectives to the market. The most economically advantageous tender award criterion (MEAT), as developed in case law, offers significant potential to pursue horizontal objectives, including by allowing the assessment of cost on a whole life-cycle basis instead of on price alone.

However two major areas of uncertainty surround the use of award criteria to pursue horizontal objectives in the EU context: the requirement of a link to the subject matter of the contract and the question of whether award criteria must confer an advantage on the contracting authority itself.

Link to the Subject Matter

The requirement for contract award criteria to be linked to the subject matter of the contract was first enunciated in the *Concordia* case. It is worthwhile reviewing the specific reasoning of the ECJ, in order to understand the proper scope of this requirement. The Court in *Concordia* had to consider the compliance with the Treaty and old Services Directive⁴¹ of award criteria applied by the City of Helsinki in a tender for the provision of bus services. Helsinki awarded marks, inter alia, based upon the nitrogen dioxide and noise emissions of vehicles tendered, with lower-emission vehicles receiving higher marks. The ECJ rejected the argument of the European Commission that, where contracts are awarded on the basis of MEAT, all the award criteria must be purely economic in nature. The Court articulated a new requirement in the following terms:

While Article 36(1)(a) of Directive 92/50 leaves it to the contracting authority to choose the criteria on which it proposes to base the award of the contract, that choice may, however, relate only to criteria aimed at identifying the economically most advantageous tender. Since a tender necessarily relates to the subject-matter of the contract, it follows that the award criteria which may be applied in accordance with that provision must themselves also be linked to the subject-matter of the contract.⁴²

This test, along with the further requirements of compliance with the Treaty principles, non-conferral of an unrestricted freedom of choice upon the contracting authority and prior disclosure of award criteria, was subsequently written in to the 2004 Directives.⁴³ The extent to which it restricts the acceptable scope of award criteria remains unclear – especially given the freedom of contracting authorities to define the subject matter of their contracts.

The only instance in which the ECJ has found that an award criterion was not linked to the subject-matter of the contract is *EVN Wienstrom*, and this concerned a criterion based upon tenderers' ability to supply electricity from renewable sources in excess of the amount required by the contracting authority. This indicates that award criteria based on the overall practices of a tenderer, as opposed to their proposal for the specific contract, are unlikely to stand.

The Commission appears to view the subject-matter link as placing limits on the scope not only of award criteria of other aspects of the procurement process.

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Section 4 of the *Green Paper on the Modernisation of EU Procurement Policy* (European Commission, 2011a), which focuses on the strategic use of public procurement to achieve horizontal policy objectives, includes the following passage:

..In the current EU public procurement legal framework the link with the subject-matter of the contract is a fundamental condition that has to be taken into account when introducing into the public procurement process any considerations that relate to other policies. This is true throughout the successive stages of the procurement process and for different aspects (technical specifications, selection criteria, award criteria). In the case of contract execution clauses, what is required is that there should be a link with the performance of the tasks necessary for the production/provision of the goods/services being tendered (European Commission, 2011a, p.39).

The subsequent questions relate to the possibility of “softening or even dropping the condition that requirements imposed by the contracting authority must be linked to the subject matter of the contract” (European Commission, 2011a, p. 40-41) and ask respondents to consider the effect of such changes in terms of restricting competition and potentially limiting SME access to contracts.

The *Green Paper* thus suggests that a general duty exists at all stages of the procurement process for contracting authorities to consider whether their requirements are linked to the subject-matter of the contract. The source of such a general obligation is not clear, nor does it seem logical to suggest that in the case of technical specifications, for example, such a test could be meaningfully applied. Technical specifications, as outlined above, describe the characteristics of the supplies, services or works required by a contracting authority. Given that such requirements form the subject matter of the contract, to which tenderers will respond, it is redundant to ask if they are linked to this subject-matter.

In a recent case concerning the procurement of fair trade and organic products,⁴⁴ the ECJ has confirmed that award criteria may concern aspects of the production process which do not materially alter the final product. The case concerned a contract for the supply of coffee machines and ingredients to a Dutch authority, in which references were made to certain environmental and social labels. While finding against the specific form of these references, the Court stated that “there is no requirement that an award criterion relates to an intrinsic characteristic of a product, that is to say something which forms part of the material substance thereof.”⁴⁵ This means that in the Court’s view an award

criterion may relate to fair trade production, provided all the relevant requirements are met.

In contrast, a new restriction on social award criteria is set out in the recitals to the proposed directives:

In order to better integrate social considerations in public procurement, procurers may also be allowed to include, in the award criterion of the most economically advantageous tender, characteristics related to the working conditions of the persons directly participating in the process of production or provision in question.

Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities (European Commission, 2011c, Recital 41).

This appears to be yet another errant manifestation of the link to the subject matter test, in this case one which draws an arbitrary distinction between supply-chain characteristics concerning health or social integration and those which might relate, for example, to working hours or rates of pay. The European Parliament and Council, in considering the proposals, will need to weigh this approach against that taken by the ECJ.

Conferral of an Advantage

The ECJ affirmed in *Concordia* that when awarding contracts on the basis of MEAT, contracting authorities may take into account and reward in the procurement process factors which are not purely economic in nature.⁴⁶ The inclusion of non-economic factors in the assessment of tenders can be seen as an inherent aspect of a contracting authority's discretion to determine optimal procurement outcomes within certain defined procedural rules. However the ECJ in *Concordia* did not address directly the question of whether an award criterion must confer some advantage (economic or otherwise) on the contracting authority itself, or whether they may aim to confer advantages on the broader public or some other group.

The judgment does refer to the role of emission limits in reducing the financial burden to the City of Helsinki of health care,⁴⁷ but the existence of such a benefit to the contracting authority itself was not included amongst the general requirements for award criteria formulated in the case. The link to the subject-matter requirement could however be construed as meaning that award criteria must confer a benefit on the contracting authority itself. If such a benefit is

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required, the further question arises of whether it must be conferred upon the contracting authority acting in its capacity as purchaser/consumer, or whether it could benefit the authority in its general public interest capacity, for example.

All public procurement involves some element of public benefit and detriment, even when a purely transactional view is taken. Once the possibility of a qualitative assessment based on the particular needs and priorities of the contracting authority has been acknowledged, the grounds for restricting this to an assessment of factors which confer a direct benefit upon the contracting authority itself, as opposed to a broader interest group or society as a whole, are tenuous. In the first place, it would require courts in their adjudication of challenges to award criteria to determine what is and isn't of benefit to public authorities exercising their procurement function.

While this seems problematic, it might be argued that a model for such a test can be found in the ECJ's jurisprudence on public procurement as state aid (Priess & von Merveldt, 2009). In a line of cases beginning with *BAI v Commission*,⁴⁸ the ECJ has developed a test for determining when procurement decisions confer an economic advantage on private undertakings in violation of Article 107 (1) TFEU.⁴⁹ This draws upon the concept of a "normal commercial transaction" and requires the Court to determine whether the public authority has acted in the same manner as a private undertaking would in the circumstances of the transaction.

In the *P&O* case,⁵⁰ the Court of First Instance held that a decisive factor in determining whether the state had acted according to commercial principles was whether a procurement decision "reflected actual needs felt by the authorities."⁵¹ Were such a test to be extended to the review of procurement decisions generally, it might allow the Court to distinguish between horizontal policies which confer a direct benefit upon the public authority and are therefore legitimately included in the decision, and those which do not. However as pointed out by Priess and von Merveldt the use of a private company as a hypothetical counterpart to determine whether procurement decisions have been made according to commercial principles does not rule out the inclusion of environmental or social factors in those decisions (Priess & von Merveldt, 2009, p. 258-263). Companies increasingly have regard to a range of objectives such as corporate social responsibility and environmental performance goals, which may be written directly into the bottom line.

Life-cycle costing is an example of an approach to sustainable procurement which has been taken up in both the private and public sectors. The inclusion of environmental externalities in the calculation of LCC for the purpose of procurement has been specifically endorsed in the Clean Vehicles Directive –

which provides a common methodology and prices for costing greenhouse gas emissions. These costs are not incurred directly by the contracting authority itself, unlike the costs assigned to energy consumption. This approach has the particular advantage of allowing the quantitative assessment and comparison of environmental costs in a way which is transparent and can be adjusted to the contracting authority's level of environmental ambition.⁵²

The proposed new directives contain an explicit recognition that LCC, including external environmental costs, may be an award criterion and introduce rules regarding the calculation of LCC (Article 67/Article 77). Contracting authorities are to specify the methodology they will apply in the tender documents, however they must allow operators to apply their own, different methodology, provided the operator establishes its equivalence. Three conditions are set out for LCC methodologies, which must be met whether it is specified by the contracting authority or proposed by the tenderer. The methodology must be (i) drawn up on the basis of scientific information or other objectively verifiably criteria; (ii) established for repeated or continuous application and (iii) accessible to all interested parties.

The second condition appears to foreclose the possibility of applying a bespoke methodology suitable for one particular contract – which is possible under the 2004 Directives provided this is done in compliance with the Treaty principles and the specific requirements for award criteria. Without the ability to insist on a particular methodology, it is likely that many authorities will choose not to apply LCC, as this may undermine the comparability of tenders and introduce further uncertainties into what is already often a complicated (if, ultimately, cost-saving) process. Removing the requirement that LCC methodologies be established for repeated or continuous application, and making the acceptance of alternative methodologies presented by suppliers discretionary would improve the usability of the new provisions.

Article 67.3 provides that where a common methodology is developed at EU level for LCC in specific sectors, this methodology shall be applied by contracting authorities. While this provision may assist in preventing fragmentation and offer greater legal certainty to contracting authorities to carry out LCC in those sectors, its success depends very much on the quality and comprehensiveness of the methodologies developed at EU level. The list at present consists only of the Clean Vehicles Directive, and it may be some time before such measures are adopted in other sectors.

Contract Performance Clauses

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Commission guidance on social considerations in procurement has suggested that the correct locus for implementation of these is in contract performance clauses (European Commission, 2010, p. 43-44). Contract performance clauses are largely unregulated by the 2004 Directives, although ECJ case law in this area has established that these are not completely outside the procurement rules. In particular, the Court has enforced requirements to make contract clauses known to bidders and prevent material amendments to contracts after their award. The 2004 Directives explicitly mention the possibility of including social and environmental considerations in the conditions for performance of a contract.⁵³

Contract conditions can play a vital role in underlining environmental or social commitments made by tenderers and providing for appropriate remedies in case of breach. They may also be used to incentivise operators to deliver higher levels of performance, for example by linking progressive improvements to bonus payments. However contract performance clauses are likely to be more effective, and also more transparent, where they relate to matters which have already been examined as part of the competitive tender process. As was made clear by the Court in *Nord Pas de Calais*, contract performance clauses in themselves cannot be the basis for rejection of a tender.⁵⁴ Case law also indicates that changes to contract performance clauses during the lifetime of a contract may lead to the requirement for a new tender procedure.⁵⁵

A large degree of foresight is thus required to develop contract clauses which are appropriate to achieve specific social or environmental objectives – without being either over or under-ambitious. Because contract conditions do not form part of the assessment of tenders (other than by a simple declaration of acceptance), tenderers may not in fact take adequate account of these requirements in their tendered price and delivery terms. The delivery of the contract can be compromised if the cost of compliance outweighs the margin of profit achieved by the successful tenderer.

On a practical level, contracting authorities lose the opportunity to verify whether economic operators have the technical and professional capacity to deliver these requirements as part of the procurement process. Additional costs may be incurred in monitoring compliance with these provisions throughout the lifetime of the contract. Hiding social or environmental requirements in contract conditions can also limit the opportunity for market-led innovation to improve performance, as tenderers will not be rewarded in the competition for innovative approaches.

For all of these reasons, the suggestion that contract performance clauses are the most appropriate stage for inclusion of social or environmental considerations

is problematic. The rationale for endorsing this approach appears to be driven by concerns about the potentially trade-restrictive nature of (in particular) social criteria applied during the tender process. Significant complexity already exists in this area due to the operation of legislation on the protection of employees in transfers of undertakings⁵⁶ and the effect of the ECJ's ruling in the *Rüffert* case on the enforcement of collective agreements in public contracts. Nevertheless, using contract performance clauses as a type of back door means of pursuing social or environmental objectives only adds to this complexity, while detracting from the transparency and effectiveness of these measures by removing them from the realm of competition.

REFORM OF THE EU PROCUREMENT DIRECTIVES

Summary of Relevant Provisions

In December 2011, the European Commission published its proposals for legislation replacing the 2004 Directives, along with a new directive on concessions. The following provisions of the proposed Public Sector Directive are of relevance to SPP:

- Increased scope for contracts to be reserved for enterprises employing disabled or disadvantaged workers (Article 17);
- Explicit recognition that technical specifications may include reference to the production process or any other stage of the life-cycle for all types of contract, and stronger requirements on accessibility (Article 40);
- Possibility to refer to specific environmental or social labels in technical specifications (Article 41);
- Ability to invoke non-compliance with EU or international social and environmental law as grounds for refusal to award a contract to a tenderer (Article 54.2);
- Ability to exclude a candidate from a competition on the basis of violations of EU or international environmental or social obligations (Article 55.3(a));
- Explicit recognition that life-cycle costing (LCC), including external environmental costs, may be an award criterion and introduction of rules regarding the calculation of LCC (Article 67);
- Recognition (as in the current Directive) that contract conditions may include social and environmental requirements (Article 70).

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Identical provisions exist in the proposed Directive for entities operating in the water, energy, transport and postal services sectors.

Several of these provisions have already been discussed above. Unfortunately, the drafting of Articles 41 and 67 in the proposal means that instead of facilitating the use of eco-labels and life-cycle costing by contracting authorities, they may make it more difficult and subject to legal challenge. The creeping extension of the link to the subject-matter requirement is also likely to cast further shadows on the use of technical specifications and award criteria to address sustainability considerations along the supply-chain. As discussed above, the attempt in recital 41 to limit the scope of social award criteria runs counter to recent jurisprudence from the ECJ.

The ability to exclude a candidate or refuse to award a contract based on violations of EU or international environmental or social law is valuable, however it does not extend to violations of national laws in these areas. It is also accompanied by a new “self-cleaning” provision (Article 55.4) which, in seeking to make the use of mandatory and discretionary exclusions from tender competitions fairer, will also make them more complex. The requirement to reject tenders which are abnormally low due to violations of EU or international labour, social, and environmental legislation is also accompanied by a complex process which leaves ample room for challenges.⁵⁷

The proposed directives also include the apparent widening of the ability to select tenderers based on the environmental management measures they will be able to apply, and to request third-party evidence of this (e.g. EMAS or ISO 14001). Under the 2004 Directives, this is possible only for service and works contracts, whereas the combined effect of Article 61.2 and Annex XIV Part II (f) extends this to all forms of contract. This is not highlighted in the introduction or recitals, but could be a useful development for the application of environmental management systems to supply contracts.

Assessment of Reforms from an SPP Perspective

Overall, while some of the proposed revisions will assist contracting authorities in implementing SPP, others may actually impede this. With the exception of the reporting requirement for national oversight bodies, the absence of any mandatory provisions on SPP is notable, but perhaps not surprising. The Commission stated in its introduction to the proposal that “many stakeholders, especially businesses, showed a general reluctance to the idea of using public procurement in support of other policy objectives.” (European Commission, 2011c, p.5). It is regrettable that

the views of public authorities and others – including businesses – committed to sustainability in public contracts were not put forward more effectively.

The proposed reforms offer little to support the practical application of SPP or resolve the areas of legal uncertainty identified above. Further work on the wording of the provisions on labels and life-cycle costing could enhance their usability, without creating unjustified barriers to competition. Clear, easy to use provisions in these areas would open up new ways for businesses to compete while allowing contracting authorities to meet their environmental and social obligations. Removing the current flexibility which contracting authorities have to determine award criteria, including life-cycle costing schemes, is likely to be a step backwards. It is extremely difficult to define one-size-fits-all methodologies for life-cycle costing, and efforts towards harmonisation should not be at the expense of those authorities who are already applying successful LCC approaches for specific contracts.

CONCLUSION

GPP and SPP are being implemented by contracting authorities across the EU, however deep areas of legal uncertainty exist, which have in some cases been exacerbated by the Commission's standpoint on environmental and social considerations in procurement. The scope for technical specifications to address production processes and methods has been cast into doubt. There has been a creeping extension of the link to the subject matter of the contract requirement, in itself vague, from award criteria to other areas of procurement. The role of contract performance clauses in securing environmental or social objectives in procurement has been exaggerated, partly in order to compensate for the uncertainty created in these other two areas. At the same time, the flexibility for contracting authorities to set, verify and where necessary amend contract clauses has been limited.

Public procurement should be distinguished from regulation in terms of its legitimate scope and suitability to pursue horizontal objectives. It is only one of the tools available to achieve these goals, and subject to many other demands such as value-for-money and transparency. However its importance and influence to achieve sustainability goals cannot be ignored. Public contracts can, and already do, play a key role in influencing environmental and social practices in areas where other forms of regulation may not be effective or efficient. The appropriate role for the procurement directives in facilitating or mandating SPP depends not only on the competence of the EU to act, but also on the effectiveness of the measures proposed.

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Measures to address environmental and social considerations in procurement should be driven by an assessment of their efficacy and legal legitimacy – while maintaining sufficient scope for public authorities to develop divergent approaches. The risk of market fragmentation in this context can in part be addressed through voluntary initiatives aimed at exchanging best practice and developing common criteria and approaches. However mandatory measures such as those set out in the Energy Star Regulation, Clean Vehicles Directive and Energy Performance of Buildings Directive also have a role to play in ensuring cohesive progress towards higher standards.

Changes to the WTO Government Procurement Agreement which facilitate SPP are to be welcomed. The experience of the EU in defining the scope of technical specifications and award criteria which take into account life-cycle impacts may be useful in interpreting the new provisions, as many of the same considerations are at play. It is to be hoped that the legal shadows which continue to afflict the legitimate efforts of European public authorities to implement SPP will not extend to interpretation of this agreement, and can be resolved in the final text of the revised EU procurement directives.

NOTES

1. Hereafter referred to as “horizontal objectives.” This term is chosen over “secondary objectives” as it includes social or environmental considerations which may be essential to the award of the contract, for example compliance with legal obligations to pay minimum wages or apply environmental regulations.
2. *Directive 2004/17/EC on the co-ordination of procurement procedures of entities operating in the water, energy, transport and postal services sectors* OJ L 134, 30.4.2004, pp. 1–113 and *Directive 2004/18/EC on the co-ordination of procedures for the award of public supply contracts, public service contracts and public works contracts* OJ L 134, 30.4.2004, pp. 114–240 (“the 2004 Directives.”) The Commission’s proposals for the replacement of the 2004 Directives are set out in COM (2011) 895 final *Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors* and COM (2011) 896 final *Proposal for a Directive of the European Parliament and of the Council on public procurement*.
3. The World Commission on Environment and Development (1987), offered the following definition: “Sustainable development is development which meets

the needs of the present without compromising the ability of future generations to meet their own needs.”

4. Article 11 of the Treaty states that: “Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.” The European Council adopted a renewed sustainable development strategy in 2006, and the most recent commitments can be found in COM (2009) 400 *Mainstreaming sustainable development into EU policies*, which specifically mentions the role of green public procurement. In addition to their commitments through the EU, all 27 Member States have adopted sustainable development strategies. A large number of local and regional authorities across Europe have also adopted their own strategies, in many cases linked to the UN sustainable development initiative, Agenda 21.
5. For a comprehensive discussion of these practices both within the EU and internationally see McCrudden (2007).
6. An extensive literature is developing on the use of public procurement to stimulate innovation, and many of the cases cited involve social or eco-innovation. See, *inter alia*: Wilkinson et al. (2005); Aho et al. (2006); Organisation for Economic Cooperation and Development (2011).
7. The impact of GPP/SPP on costs has not been systematically studied in the EU, however some evidence does exist to link it to reduced prices for environmentally or socially responsible goods and services. A 2009 report found an average 1% reduction in costs associated with the introduction of GPP criteria across ten product groups in seven Member States. See Pricewater-houseCoopers, Significant and Ecofys, (2009), p. 5-7.
8. The criteria, along with technical background reports and an explanation of the process for their development, can be accessed on the EU GPP website <http://ec.europa.eu/environment/gpp>.
9. The “Green 7” countries were Sweden, Finland, Denmark, the Netherlands, United Kingdom, Germany and Austria.
10. The average reduction in CO₂ emissions across the ten product groups studied was 25%; the average cost reduction 1%. A wide variation applied between the ten product and service groups studied.
11. An element of ‘self-selection’, in which contracting authorities who are actively aware of and implementing GPP/SPP are more likely to respond to such questionnaires, is a problem facing this type of research. In the absence of more fulsome information regarding environmental and social aspects of

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contracts being included in notices which are published in the Official Journal, there are no obvious methods for comparing the results of such direct research to a 'control group' of public authorities not actively responding to questionnaires.

12. While there is no obligation to publish notices in the case of contracts which fall below the respective thresholds for supplies/services and works, this appears to be done frequently. The *Evaluation Report* indicates that in 2006-2010 approximately 18% of notices published in the Official Journal fell below the €125,000 central government threshold for supplies and services, and 30% of notices published by sub-central authorities fell below the €193,000 threshold. Even more notable is the frequency with which notices for below-threshold works contracts are published: this accounted for 70% of the total number of works notices in the period analysed. Potential explanations for this include the difficulty of accurately predicting the value of contracts, uncertainty about when notices must be published, desire to attract EU-wide competition even for lower value contracts, and specific national or institutional rules requiring publication.
13. The finding relates to reports from 856 public authorities in relation to 1783 individual contracts covering ten product and service groups. For the purpose of the study a "green" contract was defined as containing at least one of the core EU GPP criteria for that product group. Only 26% of the last contracts signed met the tougher measure of containing all core EU GPP criteria.
14. In certain cases, it may be observed that suppliers respond to environmental or social criteria included in a tender by changing their practices or obtaining third-party certification in order to compete in subsequent tenders. See, for example, the contract awarded by the City of Reykjavik for cleaning services: http://ec.europa.eu/environment/gpp/pdf/news_alert/Issue12_Case_Study29_Reykjavik_Cleaning.pdf [retrieved 5 June 2012]

However it is still difficult to isolate GPP as a causal factor in such changes.

15. These include, for example, the Procura+ campaign (www.procuraplus.org), Compraverde (www.forumcompraverde.it), Kompass Nachhaltige Öffentliche Beschaffung (<http://oeffentlichebeschaffung.kompass-nachhaltigkeit.de>), Ach-ats Responsables (www.achatsresponsables.com) and the Sustainable Procurement Centre of Excellence (<http://spce.procureweb.ac.uk>). [All Retrieved on June 5, 2012].

16. In 2009/2010 a specific programme of capacity building for GPP was funded by the European Commission and carried out in 20 Member States (see <http://gpp.itcilo.org>, (Retrieved on June 5, 2012).
17. All resources are available at <http://ec.europa.eu/environment/gpp>. [Retrieved on June 5, 2012].
18. Specifically articles 53, 62 and 114 of the Treaty on the Functioning of the European Union (TFEU).
19. See Case C/324-98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG* [2000] ECR I-10745. The extension of certain Treaty-derived rules to contracts not covered by the Directives was consolidated by the European Commission in its 2006 interpretative communication *on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02)*. This communication was challenged unsuccessfully by Germany (supported by six other Member States) in Case T-258/06 *Germany v Commission*.
20. Article 5 (3) TEU provides: “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”
21. The author points out that the ECJ has adopted a wider interpretation of the discretion of contracting authorities than the Commission, notably in the *Concordia, EVN Wienstrom* and *Fabricom* cases (Joined Cases C-21/03 and 34/03, *Fabricom SA v Belgian State*, [2005] ECR I-01559. The extent to which discretion in the choice of award criteria vests in contracting authorities, as opposed to Member States, was considered in Case C-247/02 *Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici* [2004] ECR I-09215 – with the ECJ again finding in favour of the discretion of contracting authorities. A countervailing trend to limit this discretion might be seen in Case C-6/05 *Medipac-Kazantzidis AE* [2007] ECR I-04557 and Case C-489/06 *Commission v Greece* [2009] ECR I-01797, however these cases concerned a specific area of harmonised EU legislation (standardised medical devices bearing the CE marking).
22. Case 31/87 *Gebroeders Beentjes BV v State of the Netherlands* [1988] ECR I-04635 (“Beentjes”).

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23. Case C-225/98 *Commission v France* [2000] ECR I-07445 (“*Nord Pas de Calais*”).
24. Case C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [2002] ECR I-07213 (“*Concordia*”).
25. Case C-448/01 *EVN AG and Wienstrom GmbH v Republic of Austria* [2003] ECR I-14527 (“*EVN Wienstrom*”).
26. Art. 26 of Directive 2004/18/EC recognises that contracting authorities may set conditions for the performance of a contract concerned with social and environmental considerations, provided these are compatible with Community law and indicated in the contract notice or specifications.
27. Art. 53 of Directive 2004/18/EC includes environmental characteristics in the non-exhaustive list of criteria upon which the award of contracts may be based when the award criterion of most economically advantageous tender is used. The recitals to the Directive also cite the requirements for award criteria enunciated by the Court in *Concordia*.
28. Art. 45.2 (c), (d), (e) and (f) of Directive 2004/18/EC
29. Art. 19 of Directive 2004/18/EC
30. *Regulation (EC) No. 106/2008 on a Community energy-efficiency labelling programme for office equipment (recast version)* OJ L 39, 13.2.2008, pp. 1–7
31. *Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles* OJ L 120, 15.5.2009, pp. 5–12. Under the Directive contracting authorities must include energy/fuel consumption and environmental performance in their technical specifications and/or award criteria when awarding contracts for road transport vehicles. Where these impacts are monetised for inclusion in the purchasing decision, specific values are set out for the costing of different types of emission.
32. *Directive 2010/31/EU on the energy performance of buildings* OJ L 153, 18.6.2010, pp. 13–35.
33. *Directive 2006/32/EC on energy end-use efficiency and energy services* OJ L 114, 27.4.2006, pp. 64–85.
34. *Directive 2010/30/EU on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products* OJ L 153, 18.6.2010, pp. 1–12.

35. Article 23 (2) of Directive 2004/18/EC and Article 34 (2) of Directive 2004/17/EC, emphasis added.
36. Council Directive 71/305/EEC *concerning the co-ordination of procedures for the award of public works contracts* OJ L 185, 16. 8. 1971, p. 5.
37. For a good overview and analysis of this case law, see de Burca G. and Craig, P. (2007) *EU Law: Text, Cases and Materials* (4th edition, p. 666-696), Oxford: Oxford University Press.
38. The latter example is in fact explicitly endorsed in the 2004 Directives which provide that “Whenever possible...technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users.” (Art. 23(1), Directive 2004/18/EC; Art. 34 (1), Directive 2004/17/EC)
39. Annex VI, 1 (a) and (b) of Directive 2004/18/EC; Annex XXI of Directive 2004/17/EC contains identical definitions, save the reference to ‘public’ contracts.
40. See Case T-345/03 *Evropaïki Dynamiki v Commission* [2008] ECR II-00341, in which the Court annulled the award of a contract by the European Commission, finding that the failure to make information about its requirements for an IT system available to all tenderers which would neutralise the advantage of the incumbent service provider violated the principle of equal treatment.
41. Council Directive 92/50/EEC of 18 June 1992 *relating to the coordination of procedures for the award of public service contracts* OJ L 209, 24.7.1992, p. 1-24
42. *Concordia*, above note 24, para. 59. Advocate General Mischo’s opinion took the view that such a link was not required, based upon the approach taken in the *Beentjes* and *Nord Pas de Calais* cases. (Case C-513/99, Advocate General’s Opinion, para. 110-112)
43. Directive 2004/18/EC First recital and Article 53 (1) a; Directive 2004/17/EC First recital and Article 55 (1) a
44. Case C-368/10 *European Commission v Kingdom of the Netherlands*, judgment of 10 May 2012, not yet reported.
45. *Ibid.*, para 91.
46. *Concordia*, above note 24, para 55.
47. *Ibid.*, para. 46.

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48. Case T-14/96 *BAI v. Commission* [1999] ECR II-00139.
49. Formerly Article 87(1) TEC.
50. Joined Cases T-116/01 and T-118/01 *P&O European Ferries (Vizcaya) SA and Diputación Foral de Vizcaya v Commission* [2003] ECR II-02957.
51. *Ibid*, para. 116.
52. Although specific values for the costing of emissions are set, higher values can be set up to two times those specified (Article 6.1 of Directive 2009/33/EC). Contracting authorities are also free to determine the overall weight which these factors have in their award criteria weighting.
53. Directive 2004/18/EC, Article 26; Directive 2004/17/EC, Article 38.
54. *Commission of the European Communities v France (C-225/98)* [2000] ECR I-07445, para 53.
55. See in particular See Case C-496/99 P *Commission v CAS Succhi di Frutta* [2004] ECR I-03801 paras. 115-121; Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-04401, and Case C-91/08 *Wall AG v Stadt Frankfurt am Main*. Where changes to a contract after award constitute material amendments which would have allowed for the admission of tenderers other than those originally admitted or the acceptance of an offer other than that originally accepted, a new contract award procedure may be required. It is proposed to codify these developments in the new procurement directives (Article 72 of COM (2011) 896 final and Article 82 of COM (2011) 895 final.)
56. Council Directive 2001/23/EC of 12 March 2001 *on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses* OJ L 82, 22.3.2001, pp. 16–20.
57. The reference value for calculation of an abnormally tender is set at more than 50% lower than the average price or cost and more than 20% lower than the second-lowest tender, where at least five tenders have been received (Article 69.1). It is perhaps unfortunate that this includes **all** tenders, and not only those which are valid and responsive to the specification set out, as this may result in a skewed reference value for the determination of abnormally low tenders.

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