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Identifying Opportunities for Sustainable Public
Procurement Briefing Series

Briefing No. 3: The guiding principles of public procurement transparency, equal treatment and proportionality



Table of Contents

Key Points	1
1. Introduction	2
2. Equal treatment	3
2.1. Treating comparable situations similarly	4
2.2. Unless objectively justified	5
3. Transparency	5
3.1. Information in the contract notice.....	5
3.2. Advertising the criteria	6
3.3. Limiting the discretion of public authorities	7
3.3.1. The <i>Medipac</i> case	8
3.3.2. The <i>Evropaiki Dynamiki</i> case.....	8
3.3.3. The <i>Concordia Bus</i> case.....	8
3.3.4. The <i>Wienstrom</i> case.....	9
4. Proportionality	10
4.1. Assessing the objective	10
4.2. Assessing the necessity.....	11
5. Conclusion	11

Key Points

The Procurement Directive is less concerned with what contracting authorities buy than how they buy it. The Court of Justice of the European Union (**CJEU**) has upheld the discretion of contracting authorities to promote horizontal policies through procurement, but insisted that this must be done in such a way to ensure that they treat economic operators equally and non-discriminatorily and act in a transparent way. These obligations kick-in once the subject matter of the contract has been decided upon.

Rule-based decision making is important to ensure the transparency of the process. Ensuring that tenderers are aware of the criteria on which they shall be judged plays a fundamental part in providing transparency and equality of opportunity.

Further, tenderers should understand the importance that the contracting authority will ascribe to each aspect in order to be able to prepare their tender. Language used in the call to tender must be precise, and importantly, must be formulated so as to 'allow reasonably well-informed tenderers of normal diligence to interpret them in the same way'. For example, using standards or classifications that are specific to the Member State may not be readily understood by organisations from elsewhere.

Where there are comparable situations, they should not be treated differently, unless there is an objective justification for doing so. In order to ensure that all tenderers are on a level playing field, the contracting authority must objectively and uniformly apply the criteria it has set out. That is not to say that a contracting authority is restricted to quantitative criteria; the CJEU has made that clear. However, it must actually intend to verify information it seeks from tenderers to determine their compliance with award criteria.

Using public procurement as a tool for advancing sustainability objectives has plainly and repeatedly been endorsed by the EU. Nonetheless, for each criteria proportionality should be considered. Is the criterion appropriate for attaining the environmental or social objective at stake? Does the criterion go beyond what is necessary to achieve these objectives? Although such issues call for complex assessments entailing political, economic, and social choices, CJEU jurisprudence has set the bar quite high - a measure must be 'manifestly inappropriate' to achieve the objective to infringe the principle of proportionality.

1. Introduction

Prior to the formation of the EU, Member State contracting authorities purchasing supplies and services for government use would have generally favoured their own national industries and suppliers. Fundamental treaty principles of the EU, however, require non-discrimination with the aim of fostering a common internal market. Treaty provisions prohibit discrimination on the basis of nationality,¹ grant freedom of establishment,² and establish the freedom to provide services.³ In order to cultivate an internal market, all public procurement policies must comply with these principles.

For these reasons, the EU enacted directives to govern public procurement. These directives were aimed primarily at ensuring that the principles of non-discrimination and transparency were upheld by contracting authorities. The most recent versions of these directives are Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts⁴ (the **Procurement Directive**) and Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport, and postal services sectors⁵ (the **Utilities Procurement Directive**). The directives focus on the process of procurement, not the subject. This means that the directives are less concerned with what contracting authorities buy than how they buy it and emphasise that:

Contracting entities shall treat economic operators equally and non-discriminarily and shall act in a transparent way.⁶

These are the overarching principles governing the public procurement procedure. The principles of equal treatment and transparency are really two facets of the principle of non-discrimination. Equal treatment requires that comparable situations are not treated differently and that different situations are not treated similarly unless such a difference or similarity in treatment can be justified objectively.⁷ A contracting authority must act fairly in the course of public procurement; all competitors must have an equal opportunity to compete for the contract. The principle of transparency requires transparent decision making in order to show that the contracting authority is following the principle of equal treatment. Although the contracting authority remains free to define the subject of the contract in any way that meets the public's needs, including through technical specifications and award criteria promoting horizontal policies,⁸ it must do so in a way to ensure transparency in awarding the contract.

¹ Article 18 TFEU (ex Article 12 TEC).

² Article 49 TFEU (ex Article 43 TEC).

³ Article 56 TFEU (ex Article 49 TEC).

⁴ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L134, 30.4.2004, p.114) (as amended).

⁵ 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 (OJ L134, 30.4.2004, p.1) (as amended).

⁶ Article 2 of the Procurement Directive and Article 10 of the Utilities Procurement Directive.

⁷ See, e.g., Case C-13/63, *Italy v Commission*, [1963] ECR 165 at paragraph III, (4)(a); Case C-306/93, *SMW Winzersekt v Land Rheinland-Pfalz*, [1994] ECR I-5555 at paragraph 30.

⁸ Horizontal procurement objectives can be used to promote social, environmental, and other societal objectives that are not necessarily connected with the procured item's functional objectives. For example, a contracting authority may choose to

The transparency obligation therefore fits into contracting authorities' purchasing processes after the decision to procure any given product or service has been made, meaning the subject matter of the contract has been defined.

Public procurement criteria must also comply with the general principles of EU law, including the principle of proportionality which requires a two-step enquiry: (1) whether the measure at issue is appropriate for attaining the objective pursued and (2) whether the measure at issue goes beyond what is necessary to achieve the objective.

This briefing will first discuss equal treatment, before addressing transparency requirements in public procurement, focusing on examples where these concerns impact upon the introduction of horizontal objectives such as sustainability in procurement processes.⁹ Finally, the principle of proportionality as elucidated by the jurisprudence of the Court of Justice of the European Union (CJEU) will be examined.

2. Equal treatment

The principle of equality has an important place in EU history and much effort has been applied to dealing with discrimination.¹⁰ Primarily developed to guarantee an equal treatment between men and women on the labour market, the principle evolved to ensuring equality among the EU citizens. In the procurement context, as mentioned in the introduction, one of the main drivers of the Procurement Directive was to eliminate discrimination against bidders from other Member States. Under the Procurement Directive, the principle of equal treatment seems to be used as a 'general principle of law' to interpret and develop EU legislation and is not limited to cases of equality on grounds of nationality. For example, in the *Wienstrom* case, the Court found that a criterion should be precluded on the ground that it discriminates in favour of larger suppliers¹¹ - the criterion in question sought to award points in accordance with how much electricity the tenderer could supply in excess of the supply to be purchased under the contract. (This criterion was also found to be impermissible because it was not linked to the subject matter of the contract).¹²

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. For a discussion of the role of horizontal policies in public procurement, see ClientEarth, Legal Briefing, *Briefing No. 2: Horizontal Objectives in Public Procurement* (September 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

⁹ While this briefing series focuses mainly on Directive 2004/18/EC, many of the arguments developed will apply equally to Directive 2004/17/EC.

¹⁰ Articles 2 and 21 of the Treaty on the European Union.

¹¹ Case C-448/01, *EVN AG and Wienstrom GmbH v Austria* [2003] ECR I-4527 at paragraph 69.

¹² For further discussion on the 'link with the subject matter', see ClientEarth, Legal Briefing, *Briefing No. 4: Clarifying the Link to the Subject Matter for Sustainable Procurement Criteria*, (September 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

Under the public procurement rules, the principle of equal treatment has been defined by the CJEU in the *Fabricom* case¹³ as follows:

...the equal treatment principle requires that comparable situations are not treated differently and that different situations are not treated similarly unless such a difference or similarity in treatment can be justified objectively.¹⁴

The CJEU benefits from a wide margin of discretion to decide which situations are comparable and what objective grounds may exist to justify a different treatment.

Furthermore, once the contracting authority has set the criteria for the contract, the principle of equal treatment requires that all the tenders comply with them so as to ensure an objective comparison of the tenders.¹⁵

2.1. Treating comparable situations similarly

In the case *Commission v France*,¹⁶ where, in respect of a series of electrification contracts, all the calls for tender had been published at national level but only some at the EU level, the CJEU stated that equal treatment must 'apply to all the stages of the tendering procedure and not only from the time when a contractor submits a tender.'¹⁷ Furthermore, the principle protects not only the actual tenderers but also 'those who are discouraged from tendering because they have been placed at a disadvantage by the procedure followed by a contracting entity.'¹⁸

In *Fabricom*, the CJEU was asked to rule on the exclusion of a tenderer that had been instructed to carry out preparatory works relating to a public contract. The Court noted that such a tenderer is not necessarily in the same situation as regards participation in the procedure for the award of that contract as others.¹⁹ The Court considered that the tenderers must benefit from an equality of opportunity but that a rule prohibiting the participation of tenderers having carried out preparatory work goes beyond what is necessary. The implication is that such a tenderer should be given the opportunity to prove that his advantage is not capable of distorting competition.

An example: equal treatment at the selection stage

In the case of a particularly complex contract or of very specific criteria, it may appear at a relatively early stage that one tenderer will unlikely be able to offer what is requested.²⁰ The question therefore arises to whether the procurement process should allow such tenderer to

¹³ Case C-21/03 and C-34/03, *Fabricom v Belgium* [2005] ECR I-1559

¹⁴ *Ibid.*, paragraph 27.

¹⁵ Case C-87/94, *Commission v Belgium* ('Walloon Buses') [1996] ECR I-2043, paragraph 70 and also Case C-243/89 *Commission v Denmark* [1993] ECR I-3353, paragraph 37.

¹⁵ Brundtland Report 1987, p40.

¹⁶ Case C-16/98, *Commission v France* [2000] ECR I-8315.

¹⁷ *Ibid.* paragraph 107.

¹⁸ *Ibid.* paragraph 109.

¹⁹ *Fabricom* paragraph 28.

²⁰ For a discussion of the assessment of suitability of tenderers and selection criteria see ClientEarth, Legal Briefing, *Briefing No. 6: Selection Criteria* (September 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

make a final bid.

On the one hand, the principle of equal treatment as an independent objective would plead in favour of the participation of any company. Besides, there is a small chance that it produces the best offer. And, should public authorities be allowed to reject certain companies even before they have submitted an offer, the danger of abuse of discretion would be particularly high.

On the other hand, if the principle of equal treatment is merely seen as a support to other objectives, it could be argued differently. Given that the public procurement process seeks efficiency, the possibility to reject a company at an early stage if it appears that it does not have the same capacity as the others would significantly reduce the costs of continuing the negotiations and save time. The decisive criterion here would be that the company is not competing on the same basis as the others because of its insufficient capacities.

2.2. Unless objectively justified

Derogations to the principle of equal treatment have been admitted in EU law under certain conditions. First, it must be justified on grounds of public morality, order or security or pursue another objective of general interest such as safety of workers or environmental protection.²¹ It shall also fulfil the test of proportionality according to which the measure must be apt to pursue the objective at stake and not go beyond what is necessary to obtain it.²²

3. Transparency²³

3.1. Information in the contract notice

The Procurement Directive sets out step-by-step procedures related to the notice and advertisement of tenders, leaving little choice as to when, where, and how to advertise procurement events. However, fulfilling the obligation of transparency requires the use of transparent language.

Article 23(3) of the Procurement Directive requires that performance and/or functional requirements must be 'sufficiently precise as to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract.' In evaluating the clarity of procurement criteria in response to allegations of vagueness, the CJEU explained that award criteria must be formulated so as to allow 'reasonably well-informed and normally diligent tenderers to interpret them in the same way.'²⁴

²¹ See, e.g. Case C-120/78, *Rewe-Zentral AG ('Cassis de Dijon')* [1979] ECR 649 and Case 302/86, *Commission v Denmark ('Danish bottles')* [1988] ECR 4607.

²² Case C-277/02, *EU Wood Trading* [2004] ECR I-11957.

²³ A fuller discussion of transparency requirements can be found in ClientEarth, *Legal Analysis: Transparency Requirements for Public Procurement in the European Union* (November 2010).

²⁴ Case C-19/00 *SIAC Construction v County Council of Mayo* [2001] ECR I-7725, paragraph 42.

An example: referring to standards

Several CJEU decisions provide guidance in applying the concept of transparency in the context of reference to particular standards in contract notices. This may be particularly relevant to procurement processes seeking to incorporate sustainability criteria. By specifying a certain standard, such as a specific source or particular process or specific production, in effect products that do not conform are eliminated and competition is thereby limited. Care must be taken that this does not result in discrimination and transparency is a safeguard against this.

The Procurement Directive provides that on an exceptional basis certain standards may be stipulated in the contract notice, but that in such cases tenderers should be entitled to proffer tenders with equivalent standards.²⁵ This is to ensure that tenderers remain on an equal footing.

In order that a tenderer might offer equivalence, the transparency obligation requires that the standards must be readily comprehensible. Caselaw states that contracting authorities must communicate in such a way that no potential tenderer would be disadvantaged.²⁶ Specifically, in the *Nord Pas de Calais* case, classifications readily understood by French professional organisations were found to render more information available to French candidates, making such classifications 'specific and abstruse' rather than transparent.²⁷

3.2. Advertising the criteria

Transparency also requires the selection and award processes are based on known criteria.²⁸ This means that the criteria for assessing the suitability of tenderers and for assessing the tenders in order to award a contract must form part of the minimum information contained in the letter of invitation or contract notice. It also means that, where the award will be made to the most economically advantageous tender, all criteria the contracting authority is intending to apply must be stipulated, where possible, in descending order of importance.

The jurisprudence of the CJEU outlines that, for non-discrimination and transparency to be respected, tenderers must be aware of all the factors taken into account by the contracting authority in its selection process.²⁹ This does not mean, however, that every detail or nuance regarding how the tenders will be evaluated must be communicated at the time the tender is noticed. The CJEU addressed this issue in the *ATI EAC* case.³⁰ There, an award criterion that had been notified to

²⁵ Procurement Directive, Article 23(8).

²⁶ This point was first emphasised in the *Dundalk Pipes* case where an Irish standard required by the technical specifications was found to favour Irish products and thus was discriminatory as it formed the basis for rejecting a Spanish bid. See *C-45/87, Dundalk Pipes*, [1988] ECR 4929.I-7445.

²⁷ Case C-225/98, *Nord Pas de Calais*, [2000] ECR I-7445, paragraph 81.

²⁸ For discussion of these phases of the procurement process, see respectively ClientEarth, Legal Briefing, *Briefing No. 6: Selection Criteria* (September 2011) and ClientEarth, Legal Briefing, *Briefing No. 7: Award Criteria* (September 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

²⁹ See Case C-479/99 *Universale-Bau and others v. EBS* [2002] ECR I-11617 (and cases cited therein).

³⁰ Case C-331/04 *ATI EAC Srl e Viaggi di Maio Snc and Others v ACTV Venezia SpA and Others* [2005] ECR I-10109.

potential tenderers was to be addressed under five subheadings. The weighting of the criterion itself was notified to potential tenderers, but the subheading weightings were not. The CJEU indicated

[EU] law does not preclude a jury from attaching specific weight to the subheadings of an award criterion which are defined in advance, by dividing among those headings the points awarded for that criterion by the contracting authority when the contract documents or the contract notice were prepared, provided that the decision:

- does not alter the criteria for the award of the contract set out in the contract documents or the contract notice;
- does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation;
- was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.³¹

The Court found it significant that, although the weighting of the subheadings in the *ATI EAC* case were not notified prior to the tenders being submitted, the subheadings were weighted prior to the tender envelopes being opened and the commencement of the evaluation process.³²

In contrast, in the *Lianakis* case,³³ the CJEU held that assigning relative weights to criteria during the evaluation that were not notified to prospective tenderers violated the principle of transparency. The Court distinguished the *ATI EAC* case on the grounds that, unlike in the *ATI EAC* case, the weighting of the criteria and subheadings in the *Lianakis* case were not assigned until after the envelopes had been opened. It could therefore be reasonably inferred that discrimination influenced the weightings.

Thus, CJEU jurisprudence suggests that all known criteria weightings and subweightings should be notified to potential tenderers and only elaborated upon during the evaluation process in a manner that does not materially change the advice and information given to the potential tenderers on how the selection is to be made. Such requirements allow operators to be aware of the existence and scope of the award criteria, and thereby to have equality of opportunity in preparing their tenders. It also provides a transparent process.

3.3. Limiting the discretion of public authorities

Transparency requires rule-based decision-making in awarding tenders - the idea is that the impartiality of the contracting authorities' decision can be reviewed.³⁴ Rule-based decision-making is

³¹ *Ibid.* at paragraph 32.

³² *Ibid.* at paragraph 9.

³³ Case C-532/06 *Lianakis and others v Municipality of Alexandroupolis* [2008] ECR I-251.

³⁴ Case C-324/98, *Teleaustria Verlogs v Telekom Austria* [2000] ECR I-10745 at paragraph 62; *Universale-Bau* at paragraph 92.

designed to limit discretion and concealed discrimination. Several CJEU cases outline the contours of this requirement.

3.3.1. The *Medipac* case

In *Medipac-Kazantzidis AE v Venizelio-Pananio*,³⁵ the question arose as to whether a Greek contracting authority which had sought tenders for medical devices which met EC standards could reject tenders which, although they met those standards, were deemed less safe than other devices. The Court held that the principle of equal treatment and the obligation of transparency required that, where the tender had stipulated a particular standard and a product met that standard, the contracting authority is precluded from rejecting that tender on the basis of a higher standard.³⁶ This, the Court stated, was to avoid arbitrariness. Thus, a strong rule-based approach to the selection decision-making procedure was endorsed.

3.3.2. The *Evropaiki Dynamiki* case

The primary focus of rule-based decision making is to clearly identify award criteria and then objectively and consistently apply them. This can be achieved with both quantitative and qualitative criteria, although the latter are more difficult to apply objectively and uniformly because qualitative criteria can be subject to allegations of vagueness. For example, in *Evropaiki Dynamiki—Proigmena Systimata Tilepikinonion Pliroforikis AE v European Commission*, a disappointed tenderer complained that award criteria were vague, requiring the contracting authority to engage in a subjective analysis of bids.³⁷

The Court stated that, where best-value-for-money procedures were applied, the award criteria must be justified by reference to the subject of the contract and weightings must be communicated to tenderers.

However, importantly for those contracting authorities seeking to incorporate sustainability criteria into their procurement processes, the Court also confirmed that this does not mean the contracting authority must adopt criteria which are ‘quantitative or related solely to prices.’ Instead, it observed that ‘even where criteria which are not expressed in quantitative terms are included in tender specifications, they may be applied objectively and uniformly in order to compare the tenders and are clearly relevant for identifying the most advantageous tender.’³⁸

3.3.3. The *Concordia Bus* case³⁹

In *Concordia Bus*, the Court considered environmental criteria relating to noise and pollutant emissions in the procurement of municipal bus services. That case confirmed that transparency requirements are equally applicable to procurement criteria intended to achieve environmental objectives.⁴⁰

³⁵ Case C-6/05 *Medipac-Kazantzidis AE v Venizeleio-Pananeio (PE SY KRITIS)*, [2007] ECR I-04557.

³⁶ *Ibid.* at paragraphs 50-55.

³⁷ Case T-59/05 *Evropaiki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis AE v Commission* [2008] ECR II-00157, at paragraphs 58-59. (The appeal of this case to the CJEU was dismissed - Case C-476/08).

³⁸ *Ibid.* at paragraphs 47-48, 58-59.

³⁹ Case No. C-513/99, *Concordia Bus Finland v Helsingin Kaupunki*, [2002] ECR I-7213.

⁴⁰ *Ibid.* at paragraph 60-64.

3.3.4. The *Wienstrom* case⁴¹

In *Wienstrom*, the Court again reviewed the degree of clarity and substance required in award criteria. The Court grappled with several questions relevant to the transparency of the criteria in question.

The Court clarified EU law governing the concrete application of a criterion favouring tenderers who could provide electricity produced from renewable sources in excess of the amount to be purchased through the tender.

However, no time period for this supply was specified in the contract notice. In respect of this failure, the Court cited its decision in *SIAC Construction*⁴² that award criteria must be formulated to allow 'all reasonably well-informed tenderers of normal diligence to interpret them in the same way.'⁴³ The Court noted that lack of clarity regarding the period of time could infringe equal treatment and transparency as it meant that tenders were not comparable and might leave certain tenderers at a disadvantage if the scope of the criterion was not clear.⁴⁴ Such factual analysis, however, was left for the national court to determine.⁴⁵

The Court was also asked to assess the fact that the criterion was not accompanied by requirements which permitted the accuracy of the information to be tested and which may not necessarily serve the stated objective. In assessing how the absence of requirements enabling the accuracy of the information contained in the tenders to be effectively verified bore on the legality of the criterion, the Court reiterated that transparency requires tenderers to be in a position of equality when formulating their tenders and when the contracting authorities assess those tenders.⁴⁶ It further found that the impartiality of the procurement procedures must be capable of review.⁴⁷ In turn, the objective and transparent evaluation of the tenders depends on whether the contracting authority, relying on the information and proof provided by the tenderers, is able to verify effectively whether the tenders submitted meet the award criteria. Accordingly, the Court held that, where an award criterion is to be evaluated on the basis of information provided by tenderers, but that information is neither intended to be nor capable of being verified, the principles of equal treatment and transparency are infringed.⁴⁸ This, of course, is an important limit on the types of criteria that contracting authorities can use when seeking to incorporate horizontal procurement criteria in their procurement processes.

⁴¹ Case C-448/01, *EVN AG and Wienstrom GmbH v Austria* [2003] ECR I-4527.

⁴² Case C-19/00 *SIAC Construction v County Council of Mayo* [2001] ECR I-7725 ('*SIAC Construction*').

⁴³ *Wienstrom* at paragraph 57 (citing *SIAC Construction* at paragraph 41).

⁴⁴ *Ibid.* at paragraph 58.

⁴⁵ *Ibid.* at paragraphs 58 and 59.

⁴⁶ *Ibid.* at 47-49 (citing *Universale-Bau* at paragraph 91 and *SIAC Construction* at paragraphs 34, 44).

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* at paragraph 50-52.

4. Proportionality

Member State public procurement policies must comply with the principle of proportionality. The CJEU has consistently defined the principle of proportionality as ‘one of the general principles of [EU] law’ which ‘requires that measures implemented through [EU] provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it.’⁴⁹ As it is a general principle of EU law, Member States are bound by the principle of proportionality in the same way as the EU itself when implementing directives.⁵⁰ Moreover, Recital 2 of the Procurement Directive specifically calls for the award of contracts in the Member States to comply with the principle of proportionality.⁵¹

The CJEU has clarified that the principle of proportionality does not call for a balancing test between two competing interests. Rather, determination of whether the principle of proportionality has been complied with in a given instance requires a two-step enquiry: (1) whether the measure at issue is appropriate for attaining the objective pursued and (2) whether the measure at issue goes beyond what is necessary to achieve the objective. CJEU jurisprudence indicates that a policymaker should be allowed broad discretion to determine appropriate measures where the objectives pursued ‘entail [...] political, economic, and social choices’ calling upon the policymaker to undertake ‘complex assessments.’⁵² The legality of a measure adopted in such a sphere ‘can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.’⁵³

The introduction of sustainable considerations in public procurement is motivated by broader policy objectives of environmental protection and improvement of social cohesion. Thus, to determine whether a sustainable procurement criterion infringes the principle of proportionality, it must first be determined (1) whether the criterion is appropriate for attaining the environmental or social objective at stake and (2) whether the criterion goes beyond what is necessary to achieve these objectives. These issues call for complex assessments entailing political, economic, and social choices. Thus, policymakers charged with the duty of ascertaining these questions should be allowed broad discretion to determine appropriate criteria for the procurement of sustainable products and services. CJEU jurisprudence makes clear that the Court will not engage in second-guessing the complex assessments involved in such judgments, but will instead defer to competent authorities’ exercise of discretion except where the measure in question is manifestly inappropriate.

4.1. Assessing the objective

The CJEU has reasoned, in the context of assessing whether a measure alleged to violate proportionality is appropriate for the objective pursued, that where the measure in question

⁴⁹ Case No. C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR (‘*British American Tobacco*’) at paragraph 122; see also cases cited therein.

⁵⁰ See, e.g., *Karlsson C-292/97* [2000] ECR I-2737 at paragraph 37.

⁵¹ Procurement Directive, Recital 2.

⁵² *British American Tobacco* at paragraph 123 and cases cited therein

⁵³ *Ibid.*

constitutes a 'recognised means' of pursuing the identified objective, the first part of the proportionality test will be satisfied.⁵⁴ It would be hard to argue that using public procurement as a tool for advancing sustainable development goals is 'manifestly inappropriate'. Indeed, using public procurement as a tool for advancing sustainability objectives has plainly and repeatedly been endorsed by the EU.⁵⁵

4.2. Assessing the necessity

Once it has been established that the measure in question is appropriate for attaining the objective pursued, the second part of the proportionality enquiry requires the party challenging the measure at issue to show that alternative measures would be sufficient to fully attain the objective.⁵⁶ This is consistent with the Court's reluctance to second-guess competent authorities' policy judgments calling for complex assessments entailing political, economic, and social choices.⁵⁷ Moreover, even where it can be shown that the measure in question is not a perfect or complete solution to the problem posed, this will be insufficient to prove an allegation that the proportionality principle has been infringed. Rather, so long as the measure in question is 'likely to make an effective contribution' to the objective pursued, the competent authority opting for such a measure will not have overstepped its bounds of discretion.⁵⁸

5. Conclusion

The analysis of the CJEU cases on the transparency of procurement criteria indicates the need for rule-based procedures to limit discretion, ensure the objective and uniform application of the criteria, and enable the selection process to be reviewed for impartiality. Publicising the relative weightings assigned to the criteria promoting horizontal policies as well as the procedures and indicators used to assess compliance with each criterion, and publishing the reasoning underlying decisions, would ensure a transparent, rule-based decision-making process that limits discretion and ensures equal treatment and non-discrimination.

In applying the two-part proportionality enquiry to sustainable procurement criteria, courts are unlikely to find that a criterion violates the principle of proportionality unless the criterion is manifestly inappropriate and unlikely to make an effective contribution to the environmental or social objective at stake. Moreover, generally speaking, given the complexity of ascertaining certain

⁵⁴ cf *British American Tobacco* at paragraph 131 (deeming that measures removing national barriers against requiring cigarette packets to contain health warnings are appropriate measures for attaining a high level of health protection where such warnings constitute a recognised means of encouraging consumers to reduce their consumption of tobaccos products known to endanger health).

⁵⁵ See section 3 of ClientEarth, Legal Briefing, *Briefing No. 1: Sustainable Development as a Key Policy Objective of the European Union* (September 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

⁵⁶ See, e.g., *British American Tobacco* at paragraph 130 (noting that Applicants had failed to establish that alternative measures would, in the circumstances, be enough to attain the objectives pursued by the contested provision).

⁵⁷ *Ibid.* at paragraph 123 and cases cited therein.

⁵⁸ *Ibid.* at paragraph 129.

criteria that entail political, economic, and social choices, courts will grant broad discretion to policymakers charged with this duty.

This briefing is the third in a series of ClientEarth briefings entitled *Identifying Opportunities for Sustainable Public Procurement*. In the remaining briefings to this series, we will point to how the Procurement Directive could be clarified and revised to enable contracting authorities to bring horizontal criteria into each stage of the procurement process while keeping in mind the overarching principles discussed in this briefing. All briefings are accessible at www.clientearth.org/sustainable-public-procurement-briefings

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Identifying Opportunities for Sustainable Public Procurement Briefing Series

The European Commission is expected to propose a revision of public procurement legislation¹ by early 2012.² A primary objective of this revision is to allow procurers to make better use of public procurement in support of common societal goals, including protection of the environment, better resource and energy efficiency, combating climate change, promoting innovation and social inclusion, and ensuring the best conditions for the provision of high quality public services.

ClientEarth's briefing series, *Identifying Opportunities for Sustainable Public Procurement* aims to consolidate, clarify, and expand opportunities to use public procurement to contribute to sustainable development objectives. Where appropriate the current legal situation is analysed, focussing on the Procurement Directive.³

The briefings can be found at:

www.clientearth.org/sustainable-public-procurement-briefings

This briefing series seeks to foster the development of new EU procurement legislation that fulfils the following aims:

- *Provide an enabling framework for sustainable public procurement.* To this end, the legal framework should not be limited to the tools, products, and data sets that exist presently. Rather, it should anticipate and provide an enabling framework for the next generation of sustainable public procurement tools and practices to evolve.
- *Ensure legal certainty* as to how sustainability criteria can be brought into each stage of the procurement process.
- *Strive for greater flexibility and simplification* of procurement processes, to enable greater take-up of sustainable public procurement possibilities.
- *Ensure compliance with the principles of transparency, non-discrimination, equal treatment, and proportionality.* While public procurement is increasingly utilized to serve horizontal objectives including sustainable development, the initial aim of the EU procurement legislation—to ensure a transparent and non-discriminatory single market for procurement within the European Union—must also continue to be secured.

The series is comprised of four introductory briefings discussing (1) the sustainable development objectives of the European Union, (2) the concept of horizontal procurement objectives and the scope of the EU's authority to regulate the procurement activities of Member States, (3) how the principles of transparency, equal treatment and proportionality are understood in the context of procurement, and (4) understanding how sustainability criteria are 'linked to the subject matter' of contracts for sustainable goods and services. These are followed by four briefings discussing opportunities for incorporating sustainability objectives into each stage of the procurement process: (5) technical specifications, (6) selection criteria, (7) award criteria and (8) specific conditions (also known as contract performance conditions).

¹ 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 (OJ L134, 30.4.2004, p.1) (as amended) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L134, 30.4.2004, p.114) (as amended).

² *The Green Paper on the modernisation of EU public procurement policy*. 27 January 2011, COM(2011) 15 final, p.3.

³ Many of the arguments developed in the briefings will apply equally to Directive 2004/17/EC.