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Identifying Opportunities for Sustainable Public Procurement Briefing Series

Briefing No. 4:
Clarifying the Link to the Subject Matter for Sustainable Procurement Criteria

ClientEarth
Justice for the Planet
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Key Points

The Court of Justice of the European Union (CJEU) has maintained that award criteria for public procurement contracts must be ‘linked to the subject matter’ of the contract. One question arising in the context of the revision of EU legislation on public procurement is whether this ‘link’ could be broken or loosened. The pertinent question is not whether procurement criteria should or must be linked to the subject matter, but rather what is properly considered as linked to the subject matter of the contract. This briefing addresses both questions through the lens of CJEU caselaw and argues that horizontal criteria located at the intersection of functional and horizontal objectives of the contract are linked to the subject matter of the contract.

The key CJEU cases of Concordia Bus and Weinstrom indicate that the kinds of criteria rightly considered as ‘linked with the subject matter’ are broad and encompass environmental externalities of the goods or services being procured. However, a criteria rewarding renewable electricity produced by the tenderers in excess of the volume anticipated by the procurement contract did not fall within the intersection between functional and horizontal objectives for the contract at issue, and thus was found to not be ‘linked to the subject matter’.

The contracting authority is free to define the substance of the contract in any way that meets the public’s needs, including through criteria promoting horizontal policies. It is clear from caselaw that horizontal procurement objectives relating to the social pillar of sustainable development are also permissible. The reasoning applied by the Court to determine whether environmental criteria are sufficiently linked to the subject matter of the contract should be extended also to procurement criteria addressing social sustainability.

Whether a product or service has or has not been sustainably produced is one of its characteristics. Defining sustainable production, in turn, can include criteria relating to both the social and environmental impacts of the production process. Production characteristics would clearly be located at the intersection of the contract’s functional and horizontal objectives for the purpose of meeting the ‘link to the subject matter’ test.

The revision of the EU procurement legislation provides an opportunity to clarify that criteria relating to the social and environmental impacts of procured goods and services should be analyzed and applied in the same way.
1. Introduction

Public procurement is increasingly being called upon as a tool for promoting the EU’s sustainable development objectives.\(^1\) To fulfil this remit, contracting authorities must be empowered to use sustainability criteria to differentiate more sustainable products and services from those that are less sustainable.

The Court of Justice of the European Union (CJEU) has consistently held that award criteria for public procurement contracts must be linked to the subject matter of the contract. Thus, the initial step of the procurement process - how the subject matter of the contract is defined - lays the foundation for the criteria that can be included in later stages.

One question raised in the context of the pending revision of the EU framework governing public procurement is whether the revision of the Procurement Directive\(^2\) should break or loosen this link to enable contracting authorities to bring more criteria relating to sustainable development objectives into procurement policies.\(^3\) This briefing argues that loosening the link would be inconsistent with the caselaw of the CJEU. Moreover, it is not necessary to loosen this link in order to substantially achieve the aim of making public procurement more sustainable.

The revision of EU procurement legislation provides an opportunity to clarify the scope of the link to the subject matter of the contract to include environmental and social sustainability criteria, including criteria relating to the production processes of the works, supplies, or services procured. In other words, the pertinent question is not whether there should or must be a link to the subject matter, but rather what is properly considered as linked to the subject matter of the contract. This briefing addresses both questions through the lens of CJEU caselaw and argues that the reasoning applied by the Court to determine whether environmental criteria are sufficiently linked to the subject matter of the contract should be extended to procurement criteria addressing social sustainability. The revision of the EU procurement legislation provides an opportunity to clarify that criteria relating to the social and environmental impacts of procured goods and services should be analyzed and applied in the same way.

In section 2, we discuss caselaw through which the CJEU has explained its jurisprudence requiring award criteria for public contracts to be linked to the subject matter of the contract. According to this jurisprudence, horizontal criteria\(^4\) that are linked to the subject matter must be located at the intersection of functional and horizontal objectives of the contract.

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1. See section 3 in ClientEarth, Legal Briefing, Briefing No. 1: Sustainable Development as a Key Policy Objective of the European Union (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings
4. Horizontal procurement objectives can be used to promote social, environmental, and other societal objectives that are not
Although it is not strictly necessary to explicitly reference sustainability in the subject matter of the contract in order to include sustainability criteria in the tender notice, it is advisable to include sustainability in the definition of the subject matter of the contract in order to make it very clear that the contract aims to serve horizontal as well as functional objectives. This is discussed in section 3.

2. The ‘link to the subject matter’ rule: a strict rule with a liberal application

The CJEU has clarified that horizontal criteria for public contracts must be ‘linked to the subject matter of the contract’ in two key cases: Concordia Bus\(^5\) and Wienstrom\(^6\). While setting out a strict rule, the application of the rule in these cases indicates that the kinds of criteria rightly considered as ‘linked with the subject matter’ are broad and encompass horizontal concerns such as environmental externalities of the goods or services being procured. This includes, for example, impacts resulting from the production as well as the use of the product or service procured.

The Court’s application of its ‘link to the subject matter’ rule in Concordia Bus and Wienstrom illustrates that, while the link to the subject matter can clearly include criteria relating to horizontal as well as functional objectives,\(^7\) technical specifications and award criteria must relate directly to the goods or services being procured, and not to bidder’s activities more generally.\(^8\) Accordingly, horizontal criteria that are linked to the subject matter of the contract might be understood as being located at the intersection between the functional and horizontal objectives of the contract.

Concordia Bus and Wienstrom both involved environmental criteria. However, the reasoning of Concordia Bus and Wienstrom, indicating the sorts of environmental criteria that can be considered linked to the subject matter of the contract, should be extended to comparable criteria relating to the social sustainability of procured goods and services.

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\(^5\) Case No. C-513/99, Concordia Bus Finland v Helsingin Kaupunki, [2002] All ER (EC) 87. (Concordia Bus)

\(^6\) Case No. C-448/01, EVN AG and Wienstrom GmbH v Austria, [2003] ECR I-4527. (Wienstrom)

\(^7\) For a more detailed discussion of horizontal and functional objectives, see section 2 of ClientEarth, Legal Briefing, Briefing No. 2: Horizontal Objectives in Public Procurement (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

\(^8\) There is some scope for selection criteria to consider the bidder’s activities beyond fulfilment of the specific contract at issue, however; these possibilities are taken up in ClientEarth, Legal Briefing, Briefing No. 6: Selection Criteria (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings
2.1. The Concordia Bus case

Citing the ‘integration principle’, the CJEU in the Concordia Bus case plainly affirmed that contracting authorities can use horizontal criteria relating to the preservation of the environment when assessing the economically most advantageous tender for a public contract.\(^9\) The Court went on to state: ‘However, that does not mean that any criterion of that nature [i.e., addressing horizontal objectives] may be taken into consideration by the contracting authority.’\(^10\) The Court explained that, although the contracting authority has discretion to choose the criteria on which it proposes to base the award of the contract, this choice is nevertheless constrained to criteria which are linked to the subject matter of the contract. This is because a tender necessarily relates to the subject matter of the contract and, the Court reasoned, it follows that the award criteria which may be applied must themselves also be linked to the subject matter of the contract.\(^11\)

Applying this rule to the facts at issue in the Concordia Bus case, the Court held that ‘criteria relating to the level of nitrogen oxide emissions and the noise level of the buses ... must be regarded as linked to the subject matter of a contract for the provision of urban bus transport services.’\(^12\)

2.2. The Wienstrom case

The CJEU subsequently applied the ‘link to the subject matter’ rule set out in Concordia Bus in the Wienstrom case.

At issue in Wienstrom was an award criterion consisting of the allocation of points for the amount of electricity from renewable energy sources that the tenderers will be able to supply to a non-defined group of consumers, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the invitation to tender.\(^13\) The Court broke down the question of whether such a criterion was lawful into two parts.

First, the Court applied its reasoning in Concordia Bus and held that ‘where a contracting authority decides to award a contract to the tenderer who submits the most economically advantageous tender[,] it may take into consideration ecological criteria.’\(^15\) More specifically, the Court held that, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, a criterion requiring that the electricity supplied be produced from renewable energy sources is permissible, provided that it complied with the other conditions set out in Concordia Bus, including the provision that the criterion be ‘linked to the subject matter of the contract’.\(^16\)

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\(^{9}\) For a discussion of the ‘integration principle’, see section 2.2.2 in ClientEarth, Legal Briefing, Briefing No. 1: Sustainable Development as a Key Policy Objective of the European Union (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings
\(^{10}\) Concordia Bus at paragraph 57.
\(^{11}\) Ibid. at paragraph 58.
\(^{12}\) Ibid. at paragraph 59.
\(^{13}\) Ibid. at paragraph 65.
\(^{14}\) Wienstrom at paragraphs 26, 60.
\(^{15}\) Ibid. at paragraph 33.
\(^{16}\) Ibid. at paragraphs 34, 72.
Second, the Court held that an award criterion that relates solely to the amount of electricity produced from renewable energy sources in excess of the expected annual consumption, as laid down in the invitation to tender, cannot be regarded as linked to the subject matter of the contract and was therefore impermissible. 17

2.3. Locating the link with the subject matter at the intersection of horizontal and functional procurement objectives

Horizontal criteria that satisfy the ‘linked with the subject matter’ rule set out in Concordia Bus and Wienstrom can be understood as located at the intersection of horizontal and functional procurement objectives. The relationship between functional and horizontal procurement objectives is discussed in detail in Briefing No. 2: Horizontal Objectives in Public Procurement 18 and is briefly summarised here.

Any purchase made by a contracting authority will obviously have a functional objective. For example, a transportation authority might procure the construction of roads, bridges, and bus services in order to perform the governmental function of facilitating public transport.

Public procurement can also be used to promote social, environmental, and other societal objectives that are not necessarily connected with the procured items’ functional objectives. For example, a contracting authority may choose to honour human rights obligations through a policy prohibiting the purchase of supplies produced using child labour, to advance social cohesion by requiring public works contractors to employ ethnic minorities or long-term unemployed persons in the contracted work, or to pursue environmental objectives by requiring publicly-procured paper to have a minimum recycled-fibre content. These sorts of procurement policy objectives are referred as ‘horizontal objectives’. 19

One commentator illustrates the relationship between functional and horizontal procurement policies by considering the specific functions of public authorities as organised into vertical ‘silos’, with societal objectives envisaged as involving cross-cutting ‘horizontal’ policies that, while not necessarily arising from the particular function of a specific public authority, might nevertheless be advanced through the way in which it conducts its functions. 20

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17 Ibid. at paragraphs 68.
18 ClientEarth, Legal Briefing, Briefing No. 2: Horizontal Objectives in Public Procurement (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings
20 Ibid. at p.13.
The nitrogen oxide emissions and the noise level of the bus services at issue in Concordia clearly fall within the intersection of the relevant functional and horizontal objectives, as the emissions would flow directly from the utilization of the bus services procured. So, too, the environmental impacts of the production of electricity procured by public authorities would fall within this intersection. The criterion at issue in Wienstrom, however, related not to electricity procured by the contracting authority but rather to electricity produced by the tenderers in excess of the volume anticipated by the procurement contract, to be consumed by an undefined group of consumers. While such a criterion would be relevant to the horizontal objective of promoting renewable energy generally, it would not fall within the intersection between functional and horizontal objectives for the contract at issue, and thus failed to comply with the ‘link to the subject matter’ rule.

2.4. Transferring the reasoning of Concordia Bus and Wienstrom to criteria relating to social sustainability

The revision of the Procurement Directive provides an opportunity to clarify that the reasoning of Concordia Bus and Wienstrom, indicating the sorts of environmental criteria that can be considered linked to the subject matter of the contract, should also be extended to comparable criteria relating to the social sustainability of procured goods and services.

In the Beentjes case, the CJEU clarified that horizontal procurement objectives relating to the social pillar of sustainable development are also permissible. Specifically, the Court held in Beentjes that a

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contract performance condition relating to the employment of long-term unemployed persons is compatible with the contracting authority’s discretion to define the terms of its contract, provided that it has no direct or indirect discriminatory effect on tenderers from other Member States and that the condition is mentioned in the contract notice.22

The reasoning of the Court in Concordia Bus and Wienstrom, which involved award criteria, leaves open the possibility that criteria addressing the social impacts of a public contract should be analysed in the same manner as the environmental impacts at issue in Concordia Bus and Wienstrom.

What a product is made of, and how it is made, can influence a significant part of its environmental and social impact. Whether a product or service has or has not been sustainably produced is therefore one of its characteristics. Defining sustainable production, in turn, can include criteria relating to both the social and environmental impacts of the production process.23 As elaborated further in Briefing No. 5: Technical specifications,24 the revision of the Procurement Directive provides an opportunity to clearly define the production characteristics of goods or services procured to include both environmental and social impacts of production choices, and to allow criteria aimed at assessing the relative sustainability of various production choices as technical specifications and award criteria. Such production characteristics can include things that are not apparent in the physical characteristics or functional qualities of the resulting product or service, such as emissions into the environment resulting from the production process or the social and economic conditions of the labourers engaged in the production process. The important point to emphasise here is that such production characteristics would clearly be located at the intersection of the contract’s functional and horizontal objectives for the purpose of meeting the ‘link to the subject matter’ test.

This reasoning finds support in a report recently endorsed by the Standing Forestry Committee (SFC).25 The SFC endorsed a report issued by its Ad Hoc Working Group on the Sustainable Procurement of Wood and Wood Products (AHWG) which stated:

The Working Group is of the opinion that ‘sustainably produced timber’ can qualify as subject matter and that criteria of all three pillars of sustainable production, including criteria regarding use and tenure rights of the forest, are appropriate in the technical specifications and/or the award stage of wood and wood products. Such

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22 Beentjes at paragraph 37.
23 For further discussion of the social, environmental, and economic pillars of sustainable development as it is understood in the European Union, see ClientEarth, Legal Briefing, Briefing No. 1: Sustainable Development as a Key Policy Objective of the European Union (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings
24 ClientEarth, Legal Briefing, Briefing No. 5: Technical specifications (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings
25 The Standing Forestry Committee represents the forestry administrations of the EU Member States and has a three-fold role: (1) it acts as an advisory and management Committee for specific forestry measures; (2) it is an ad-hoc consultation forum that provides expertise in connection with the development of forest-related measures in the framework of various Community policies, such as those on rural development and the environment; and (3) it provides a venue for exchange of information among Member States, and between Member States and the Commission. See http://ec.europa.eu/agriculture/fore/sfc_en.htm
criteria are widely accepted as indissolubly part of the sustainability concept of forest management, the production process of wood.26

In respect of wood, the AHWG noted that defining a sustainable production process necessarily entails consideration of whether or not the wood is harvested from a sustainably managed forest and, therefore, that sustainable procurement policies will need to define comprehensive criteria for the sustainable management of forests.27 Sustainable forest management is a particularly complex topic, necessarily involving consideration of all three pillars of sustainability and no one pillar in isolation. Again, the SFC-endorsed report spells this out:

the principle of sustainable development requires an understanding of the ‘sustainable production’ of wood to include both social and environmental policy components. The social component of sustainable development comprises a wide and diverse range of issues, affecting people and their communities and cultures in many different ways. It overlaps with economic development and with cultural and political issues, such as rights, including participation in decision-making.28

Wood is a specific example, but it is often true to say that the assessment of the sustainability of a product or service to be procured must be based on both social and environmental aspects of its production. Therefore, social impacts of procured goods and services - including production characteristics - should be regarded as linked to the subject matter in the same fashion as the Court found environmental externalities of the use and production of procured goods and services at issue in Concordia Bus and Wienstrom to be linked to the subject matter.

3. The subject matter of the contract frames the scope and content of the procurement criteria

What is to be purchased? This is a very important stage in the procurement process, as it sets out the scope of the content of the procurement contract, the details of which are elaborated through procurement criteria in the remaining stages. For example, if a contracting authority seeks to procure legal and sustainable timber rather than merely timber, this will have important implications for the content of the technical specifications and award criteria.

While it is nowhere stated that it is necessary to explicitly reference sustainability in the subject matter of the contract in order to include sustainability criteria, it is advisable to include sustainability in the definition of the subject matter of the contract in order to make it very clear that the contract aims to serve horizontal as well as functional objectives.

27 Ibid. p.30.
28 Ibid.
3.1. Discretion to define the subject matter of its contract rests with the contracting authority

Member States have broad discretion to define their horizontal procurement policies. The contracting authority is free to define the substance of the contract in any way that meets the public’s needs, including through criteria promoting horizontal policies. Procurement criteria promoting horizontal objectives should be considered permissible unless there are special reasons to curtail them. In EU law, such special reasons are found in the tendency for governments to favour national industry for reasons that are directly contrary to the single market. Beyond this, however, any restraints need to be carefully considered.

3.2. Defining the subject matter of the contract to include horizontal sustainable development objectives

A contracting authority aiming to procure more sustainable goods and services should specify sustainability concerns in the subject matter of the contract, because this sets the stage for sustainability criteria to follow. Contracting authorities should be able to describe the subject matter that they seek to purchase as, for example, ‘tables made from sustainable wood’ or ‘a school building built in accordance with a high standard of labour conditions’ or ‘coffee meeting the Fair Trade criteria’. The details of what comprises ‘sustainable wood’ or ‘a high standard of labour conditions’ or ‘meeting Fair Trade criteria’ should then be specified by the technical specifications.

A contracting authority could also define the subject matter as calling for the ‘most sustainable’ product or service, in line with the award criteria outlined in the tender offer. Award criteria specifying the indicators of sustainability that will be considered can then be developed and weighted along with criteria relating to the functional objectives of the product or service being procured, with the contract awarded to the tender obtaining the highest overall score.

It should be noted that EU competency to regulate public procurement under the Procurement Directive extends only to regulating how to buy, not what to buy. Contracting authorities can value sustainability as a horizontal procurement objective and the EU should provide an enabling framework for sustainable public procurement. It is for the contracting authority to define what it wants to purchase, and to elaborate the corresponding criteria. The role of the EU legal framework is not to limit this discretion by circumscribing possibilities for more sustainable public procurement. Rather, the role of the EU legal framework is to ensure that the procurement criteria used are applied in a manner compliant with the principles of transparency, non-discrimination, equal

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29 For elaboration on this point, see section 3 of ClientEarth, Legal Briefing, Briefing No. 2: Horizontal Objectives in Public Procurement (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings
30 As noted in section 3.7 in ClientEarth, Legal Briefing, Briefing No. 1: Sustainable Development as a Key Policy Objective of the European Union (October 2011) (accessible at www.clientearth.org/sustainable-public-procurement-briefings), the EU has formally recognised the fair trade criteria as defined by the Fair Trade movement.
31 See also ClientEarth, Legal Briefing, Briefing No. 5: Technical specifications (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings.
32 See also ClientEarth, Legal Briefing, Briefing No. 7: Award Criteria (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings.
33 For further discussion see section 3 in ClientEarth, Legal Briefing, Briefing No. 2: Horizontal Objectives in Public Procurement (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings
protection, and proportionality.\textsuperscript{34} Clarifying the horizontal procurement objectives of the contract in the subject matter of the contract enhances the transparency of the procurement’s horizontal objectives and related criteria.

4. Conclusion

Confusion around the ‘link to the subject matter’ requirement seems to have been one of the key obstacles to the take-up of sustainable public procurement, particularly in respect of social sustainability criteria. A good understanding of the possibilities and limits this concept imposes is crucial to drawing up appropriate technical specifications and award criteria.

The revision of the Procurement Directive should be seeking to put in place an enabling framework so that those contracting authorities who wish to can confidently proceed with their sustainable procurement policies. Clarification that criteria relating to the social and environmental impacts of the production of procured goods and services should be analyzed as production characteristics and can legitimately be taken into account as technical specifications and award criteria would provide much needed legal certainty.\textsuperscript{35}

This briefing is the fourth in a series of ClientEarth briefings entitled \textit{Identifying Opportunities for Sustainable Public Procurement} and has focussed on the definition of the subject matter. The four introductory briefings in this series discuss cross-cutting issues. In the remaining briefings, we 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. All briefings are accessible at \url{www.clientearth.org/sustainable-public-procurement-briefings}

\textsuperscript{34} For further discussion of these issues see ClientEarth, Legal Briefing, \textit{Briefing No. 3: The Guiding Principles of Public Procurement - Transparency, Equal Treatment and Proportionality} (October 2011) accessible at \url{www.clientearth.org/sustainable-public-procurement-briefings}

\textsuperscript{35} The legitimacy of including criteria relating to the social and environmental impacts of the production of procured good and services is discussed in detail in ClientEarth, Legal Briefing, \textit{Briefing No. 5: Technical specifications} (October 2011) accessible at \url{www.clientearth.org/sustainable-public-procurement-briefings}
ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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

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Identifying Opportunities for Sustainable Public Procurement Briefing Series

The European Commission is expected to propose a revision of public procurement legislation\(^1\) 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).

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