Identifying Opportunities for Sustainable Public Procurement Briefing Series

Briefing No.5: Technical Specifications
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Key points

The principal objective of drawing up technical specifications is to ensure that the contracting authority gets the products or services that it sets out to procure. Those tenderers who cannot meet the technical specifications will not be further considered in the process. Therefore, for horizontal criteria that the contracting authority is determined to purchase, it is logical to include these in the technical specifications. For example, a contracting authority seeking a product that has a low impact on the environment might look at the impacts that occur during the production, use, and disposal phases of the product’s life cycle and wish to make specifications relating to each of those phases.

However, there has been considerable debate about whether technical specifications have to relate to a product’s physical or functional characteristics and the Commission prefers criteria that relate to production processes to be incorporated as specific conditions in the contract (also known as contract performance clauses). This briefing argues that it is appropriate for production characteristics to be incorporated into the procurement process as technical specifications and that the revision of the EU procurement legislation should take the opportunity to clarify the law to this effect. Further, production characteristics should be defined to include social sustainability considerations as well as environmental considerations.

To promote simplified verification of compliance with technical specifications relating to sustainability considerations, the revised procurement legislation should also clarify how certification schemes and labels can be used in a manner consistent with the overarching principles of non-discrimination, equal protection, and transparency. Achieving clarity on this issue would contribute to the objective of simplifying procurement processes, to enable greater take-up of sustainable public procurement possibilities.

Also, undertaking pre-procurement consultation with potential tenderers can contribute to more sustainable procurement by educating the contracting authority about market capabilities to achieve greater sustainability. To ensure that contracting authorities aiming for more sustainable public procurement can benefit from these insights, it is important to clarify how those who participate in pre-procurement consultations can still remain eligible to participate in the tender.
1. Introduction

The principal objective of drawing up technical specifications is to ensure that the contracting authority gets the products or services that it sets out to procure. Where the contracting authority has decided to pursue horizontal objectives in its procurement policy, these requirements may be specified upfront in the technical specifications.

The consequence of including specifications relating to environmental and social considerations is that those tenders that do not comply will not be further considered and will be excluded from the tendering process. This contrasts with the results of horizontal criteria being included as award criteria or as specific conditions in the contract.

Where a contracting authority is seeking to procure a product that has a low impact on the environment, it might look at the impacts that occur during the production, use, and disposal phases of the product’s life cycle and wish to make specifications relating to each of those phases. However, there has been considerable debate about whether technical specifications have to relate to a product’s physical or functional characteristics. In particular, there has been resistance from the European Commission to accepting technical specifications that relate to production processes. This briefing explores that debate, looking at the relevant jurisprudence of the Court of Justice of the European Union (CJEU), and argues that the inclusion of production characteristics is entirely legitimate. We argue, furthermore, that technical specifications (or award criteria), rather than specific conditions, are the most appropriate place for production characteristics to be incorporated into the procurement process.

Consideration of production characteristics as technical specifications often gives rise to concerns about how contracting authorities can accurately, fairly, and transparently verify compliance with the criteria specified. While the sorts of production characteristics that contracting authorities might wish to include within technical specifications or award criteria are increasingly becoming the subject of various voluntary certification schemes, requiring a particular certification or label is prohibited by EU law. This briefing explores how relevant certification schemes and labels can be accepted as evidence of compliance with criteria relating to production characteristics in a manner consistent with the overarching principles of transparency, equal treatment, and non-discrimination.

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

2 Award criteria can consider the same sorts of things as technical specifications. It follows, therefore, that production characteristics are also appropriately considered in the context of award criteria. As discussed more fully in ClientEarth, Legal Briefing, Briefing No. 7: Award Criteria (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings, contracting authorities may, in some cases, prefer award criteria over technical specifications because award criteria can provide greater flexibility and be construed to drive innovation beyond established market standards.
Achieving clarity on this issue would contribute to the objective of simplifying procurement processes, to enable greater take-up of sustainable public procurement possibilities.

Pre-procurement consultations can also enable the development of more appropriate and ambitious sustainability criteria. Therefore, we also advocate provisions which enable the fruitful use of pre-procurement consultations, without disqualifying those who contribute to such consultations from the opportunity to bid for the resulting tender.

This briefing begins by setting out the relevant provisions of the current Procurement Directive\(^3\) and caselaw. It then identifies legal uncertainties that persist under the existing framework, as well as other challenges that limit greater use of sustainability considerations within technical specifications. Finally, it identifies opportunities presented by the forthcoming revision of the EU procurement legislation to resolve uncertainties and extend the possibilities for sustainable procurement.

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2. Background: technical specifications

In this section, we summarise and analyse how technical specifications are presented and understood in the context of the Procurement Directive, including the reasoning of the CJEU in considering key issues relevant to enabling more sustainable procurement through technical specifications. We first compare technical specifications to award criteria and specific conditions in the contract, and the different implications of considering the same kinds of concerns under each category. Next, we expound further on some of the important features and functions of technical specifications prior to considering more closely the treatment of production characteristics as technical specifications. Finally, we consider the potential and implications of employing pre-procurement consultations to help contracting authorities develop and refine appropriate technical specifications.

2.1. Technical specifications, award criteria and specific conditions: the differences

When defining what they want to result from a contract, in most cases contracting authorities will wish to impose requirements that a contractor is not otherwise obliged by law to meet. This is usually the case where a contracting authority wishes to incorporate horizontal policy objectives. To achieve this, a contracting authority has a choice of approaches: technical specifications, award criteria or specific conditions in the contract.

**Technical specifications** are used to define the subject matter of the contract more specifically. Ability to meet the technical specifications is a prerequisite for being considered a candidate for the contract. Technical specifications can be defined in relation to technical standards or performance/functional requirements.

**Award criteria** enable the contracting authority to compare the relative advantages of different combinations of criteria. The criteria are weighted and each tender is scored on the basis of its satisfaction of each criterion. Ability to meet all the award criteria is not a prerequisite for being considered a candidate for the contract. Further, a contracting authority may set up the criteria so that it can award extra points to those candidates that go beyond minimum requirements to achieve additional advantages.

**Specific conditions** (also called contract performance clauses) may be included in the contract to specify how the contract is to be performed. Under current EU legislation, there is no expectation that ability to comply with such clauses will be assessed before the tender is awarded, therefore ability to comply cannot form the basis of advance exclusion.⁴

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⁴ See further discussion of this point in sections 3.2 and 4.2 in ClientEarth, Legal Briefing, *Briefing No. 6: Selection Criteria* (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings
It is often the case that technical specifications and award criteria can address the same type of issue. For example, contracting authorities wishing to value the percentage of paper from recycled fibres could either specify in the technical specifications that they require paper with a certain percentage of recycled fibres or make the percentage of recycled fibres an award criterion.

As set out in the box above, there are differences between the opportunities presented by inclusion of horizontal criteria in each of technical specifications, award criteria and specific conditions. Given that a bid cannot proceed to the award stage if it does not satisfy all of the technical specifications, using technical specifications is the way to include sustainability considerations that the contracting authority is unwilling to make a purchase without. Where sustainability criteria are included as technical specifications, the bidder should be required to demonstrate prior to the contract being awarded that it is in fact able to provide goods or services compliant with the criteria specified.  

However, on some occasions it may be better to use award criteria than technical specifications - some of the practical advantages of including horizontal objectives as award criteria as opposed to technical specifications are discussed in Briefing No. 7: Award Criteria.

2.2. Technical specifications under the Procurement Directive

‘Technical specification’ is defined in the Procurement Directive. Slightly different definitions apply depending on whether the contract is a public works contract or a public supply or service contract, but basically the technical specifications define the required characteristics of the product or service. Examples of characteristics given in the Procurement Directive include levels of environmental performance, performance, design for disabled access, use of the product, safety, dimensions, packaging, and production processes and methods.

Specifications may be drawn up in terms of the performance or function of the product or service. This approach, as opposed to giving exact technical characteristics, provides more opportunity for innovative responses, including in relation to achieving horizontal objectives such as greater sustainability. Innovation can often result in a more sustainable procurement.

When deciding upon technical specifications, contracting authorities must ensure that they comply with the over-arching principles of equal treatment, non-discrimination, transparency and proportionality. Moreover, technical specifications must be precise - for example, it would not be enough to require ‘low environmental impact’ without defining what that means.

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5 See further discussion in section 4.2 in ClientEarth, Legal Briefing, Briefing No. 6: Selection Criteria (October 2011).
6 ClientEarth, Legal Briefing, Briefing No. 7: Award Criteria (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings
7 See Annex VI, paragraph 1 of the Procurement Directive.
8 For further discussion on these principles see ClientEarth, Legal Briefing, Briefing No. 3: The Guiding Principles of Public Procurement - Transparency, Equal Treatment and Proportionality (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings
The Procurement Directive sets out rules on how technical specifications shall be formulated, with contracting authorities able to either reference particular standards, describe the performance or functional requirements, or combine the two approaches for different characteristics.\(^9\)

It is explicit that technical specifications shall afford equal access for tenderers and must not create unjustified obstacles to the opening up of public procurement to competition.\(^10\) References (for example, to specific makes or processes or trademarks) with the effect of favouring or eliminating certain undertakings or certain products are not allowed, unless justified by the subject-matter of the contract and where a sufficiently precise and intelligible description of the subject-matter of the contract is not possible.\(^11\)

Where performance or functional requirements are used, the contracting authority may indicate standards that will be presumed to conform to such requirements, but it must also accept tenders that show to the contracting authority’s satisfaction that the technical specifications are satisfied in an equivalent manner.\(^12\) Essentially, the tenderer must prove to the satisfaction of the contracting authority that the work, product or service is in compliance with the requirements of the authority.

It is up to the contracting authority to decide, from a technical perspective, what constitutes equivalence.

When dealing with environmental characteristics in terms of performance or functional requirements, the Procurement Directive allows for reference to specifications defined by eco-labels that comply with certain rules.\(^13\) However, as with other specifications, the contracting authority must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.\(^14\) The contracting authority will have to check, on a case by case basis, whether the submitted proof can be considered ‘appropriate’. More generally, EU law does not allow contracting authorities to require specific certification or labelling schemes. However, as explained in section 4.3 below, such schemes can be used as non-exclusive evidence of compliance with sustainability criteria elaborated in technical specifications, provided that measures are undertaken to ensure compliance with the principles of transparency, non-discrimination, and equal treatment.

### 2.2.1. Description, not prescription

While laying down minimum requirements may be appropriate where these are essential, the Procurement Directive allows contracting authorities to define technical specifications in terms of the performance of the product or service or the function the final product is required to fulfil. It is

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\(^9\) Article 23(3) of the Procurement Directive.

\(^10\) Article 23(2) of the Procurement Directive. The CJEU’s application of the principles of equal treatment and non-discrimination is discussed in ClientEarth, Legal Briefing, *Briefing No. 3: The Guiding Principles of Public Procurement - Transparency, Equal Treatment and Proportionality* (October 2011).

\(^11\) Article 23(8) of the Procurement Directive.

\(^12\) See also discussion of Nord Pas de Calais and Dundalk Pipes cases at section 3.1 in ClientEarth, Legal Briefing, *Briefing No. 3: The Guiding Principles of Public Procurement - Transparency, Equal Treatment and Proportionality* (October 2011) accessible at [www.clientearth.org/sustainable-public-procurement-briefings](http://www.clientearth.org/sustainable-public-procurement-briefings)

\(^13\) Article 23(6) of the Procurement Directive.

\(^14\) Article 23(6), second paragraph of the Procurement Directive.
explicitly mentioned that this may include environmental characteristics.\textsuperscript{15} This approach, as opposed to giving exact technical characteristics, allows greater flexibility in how potential suppliers can respond, providing an opportunity for innovative responses. Innovation can often result in a more sustainable product.

Furthermore, tenderers are likely to have better knowledge of the market and the solutions potentially available. Using a descriptive rather than prescriptive approach gives tenderers the freedom to use the most cost-effective methods.\textsuperscript{16}

\subsection*{2.2.2. Variant bids}

Variant bids are another way for contracting authorities to allow for flexibility and encourage sustainable innovation.\textsuperscript{17} Variants are useful where a contracting authority is interested in comparing the value of bids with and without sustainable components. The contracting authority establishes a minimum set of technical specifications for what it wishes to purchase and then invites tenderers to also submit a sustainable variant. The contracting authority must also specify the additional technical specifications that the variant bids must meet.

The variant and standard bids still need to be weighed against the award criteria that the contracting authority has set out - the same criteria apply to both types of bid. Where the cost of the variant bid is higher than that which the standard bid has set out, contracting authorities can ascertain whether sustainability gains from the variant bids outweigh the extra cost.

\subsection*{2.3. Production characteristics as technical specifications}

Whether a product or service is produced through a sustainable production process is essential to any comprehensive assessment of whether or not a product or service contributes to or hinders sustainable development objectives. In this section, we explain how the CJEU has analyzed the consideration of production characteristics in public procurement.

\subsubsection*{2.3.1. Key caselaw: Wienstrom\textsuperscript{18}}

In 2002 the CJEU held in \textit{Concordia Bus}\textsuperscript{19} that award criteria encompassing environmental externalities (in that case, the pollution effects of the procured bus services) should be considered as linked to the subject matter even though they did not relate directly to the functional objectives of the service being procured.\textsuperscript{20} Some have sought to distinguish technical specifications related to the

\begin{flushleft}
\textsuperscript{15} Article 23(3)(b) of the Procurement Directive.
\textsuperscript{16} Arrowsmith, ‘A taxonomy of horizontal policies in public procurement’, p.133 in Sue Arrowsmith and Peter Kunzlik, eds., \textit{Social and Environmental Policies in EC Procurement Law: New Directives and New Directions} (Cambridge: Cambridge University Press, 2009). For a brief discussion of how pre-procurement processes can be employed by contracting authorities to gather inputs to inform how they should best formulate technical specifications relating to sustainability objectives, see section 2.4 of this briefing.
\textsuperscript{17} Article 24 of the Procurement Directive.
\textsuperscript{18} Case No. C-448/01, EVN AG and Wienstrom GmbH v Austria, [2003] ECR I-4527. (‘Wienstrom’)
\textsuperscript{19} Case No. C-513/99, Concordia Bus Finland v Helsingin Kaupunki, [2002] All ER (EC) 87. (‘Concordia Bus’)
\textsuperscript{20} For a discussion of the scope and meaning of the ‘link to the subject matter’ requirement for procurement criteria, including the application of this rule to criteria relating to sustainability considerations and other horizontal objectives, see ClientEarth, Legal Briefing, Briefing No. 4: Clarifying the Link to the Subject Matter for Sustainable Procurement Criteria, (October 2011)
\end{flushleft}
consumption phase of a product’s life-cycle (such as in the Concordia Bus case) from those technical specifications that relate to the production phase and which do not so obviously result in different physical composition or performance of the end product. However, as discussed below, the CJEU rejected this argument in the Wienstrom case.

When considering the environmental and social impact of a product, the production phase is just as important as the consumption phase. How a product is made, as well as what it is made of, can comprise a significant part of its environmental and social impact. Environmental criteria can concern aspects of the production process, such as emissions to air and water during the production process, which do not necessarily impact on the physical characteristics or functional performance of the end product. Equally, the employment conditions of those making the product do not necessarily impact on the physical characteristics or function of the end product but are important when considering the sustainability of a product.

The appropriateness of incorporating production characteristics as award criteria was squarely addressed in the Wienstrom case. Although Wienstrom involved award criteria, the Court’s reasoning applies equally to technical specifications.

In Wienstrom, the Court held that award criteria assigning value to the environmental performance of procured goods or services at the production stage are sufficiently related to the subject matter of the contract to be used as award criteria. Specifically, the Court held that EU public procurement law does not preclude a contracting authority from applying, in the context of a contract for the supply of electricity, an award criterion with a weighting of 45% in favour of electricity produced from renewable energy sources.

Notably, the award criteria at issue in Wienstrom had to do with the sustainable production of the supplies procured. Moreover, the production characteristic endorsed as an award criteria in Wienstrom was irrelevant to the procured supplies’ physical or functional characteristics - electricity produced from fossil fuels has the same physical and functional characteristics as electricity produced from renewable sources, but the environmental impact of the respective production processes is, obviously, quite different. Wienstrom plainly confirms that award criteria (and, by extension, technical specifications) can be used to compare the relative advantages of different production processes on the basis their environmental impacts. The Court noted that the promotion of electricity produced from renewable energy sources is a high Community priority and emphasised the irrelevance of the fact that the criterion at issue did not serve to achieve the
functional objective pursued by the procurement. Thus, Wienstrom plainly refutes any distinction between production processes and methods that affect the functional characteristics of the procured product and those that do not, for the purposes of award criteria (or, by extension, technical specifications).

2.3.2. Contracting authorities’ discretion to adopt horizontal procurement policies relating to the impacts of production choices

Enabling Member States to pursue horizontal policies advancing sustainable development objectives is an aim of EU procurement law. Many of the factors contributing to the sustainability of a product or service can only be evaluated at the production stage and will not be captured by technical specifications limited to the physical characteristics or functional performance of the product or service. Restricting technical specifications to production processes impacting upon physical or functional characteristics is an unnecessary infringement on the contracting authority’s discretion to define what it wishes to procure.

Wienstrom involved award criteria pertaining to the environmental impacts of the procurement’s production processes. It did not squarely address whether or not the social impacts of the production processes of procured goods or services could likewise be included in award criteria or technical specifications. As noted above, however, the Court in Wienstrom emphasised that promotion of electricity produced from renewable energy sources is a high Community priority. As discussed in Briefing No. 1: Sustainable Development as a Key Policy Objective of the European Union, the EU has consistently and increasingly called upon public procurement policies to achieve sustainable development objectives, including social sustainability. While it does not address the question of criteria pertaining to social sustainability considerations directly, the Court’s reasoning in Wienstrom leaves open the possibility that criteria addressing the social impacts of a public contract would be analyzed in the same manner as the environmental impacts at issue in Wienstrom.

2.4. Pre-procurement processes

It is acknowledged by the European Commission that pre-procurement processes can motivate greater innovation. In the field of sustainability, innovation is to be strongly encouraged.
It can be envisaged in particular that engaging with those in the sector through consultation could allow the contracting authority to better understand the scope for incorporating sustainability criteria in technical specifications. For example, engaging with the market before defining the technical specifications can help with the assessment of potential environmental impacts that the specifications need to address. The consultation should flush out which solutions are already on the market and also flag future developments that may be nearly ‘market-ready’.  

The Commission has also developed an approach called ‘pre-commercial procurement’. This is a procurement of research and development services in respect of a specific problem or need that a contracting authority has. It allows contracting authorities to invite several companies to come up with solutions where there is currently no solution to the needs of the contracting authorities. However, any follow-up procurement of commercial volumes of the resulting product usually requires a new tendering process under the EU procurement legislation.


3. Existing legal uncertainties and other limitations

In this section, we discuss four areas in which existing legal uncertainties are inhibiting the potential for technical specifications to be used for more sustainable procurement. In addition to concerns relating to the topics of production characteristics and pre-procurement consultation already introduced above, these include concerns about the use of certification schemes and labels to verify compliance with sustainability criteria.

3.1. Differing views on the scope of production characteristics that can be incorporated into technical specifications

Despite the explicit inclusion of ‘production processes and methods’ in the definition of ‘technical specification’ in Annex VI of the Procurement Directive, the European Commission’s starting position has been that contracting authorities may not include in technical specifications any requirements which relate to externalities arising from ‘production processes and methods’. Rather, according to the Commission, only criteria relating to a physical or functional characteristic of the end-product are allowable.

Post-Wienstrom, the Commission slightly amended its position: ‘you can only include those requirements which are related to the manufacturing of the product and contribute to its characteristics, without necessarily being visible’. In respect of ‘green’ electricity, the Commission has asserted that the ‘nature and value’ of electricity is affected by the manner in which it is generated. Nevertheless, the Commission has sought to narrowly restrict the use of technical specifications or award criteria relating to production characteristics, demonstrating reluctance to extend the Court’s reasoning in Wienstrom beyond the example of green electricity. This approach remains flawed: if ‘cleaner production’ of electricity affects its nature and value, why is it not acceptable to also allow criteria relating to the production characteristics of other products which result in ‘cleaner production’? The same argument can be made when looking beyond environmental impacts of production to wider sustainability impacts.

If the concern is that, where the functional characteristics are not affected, a criterion related to a production process is not sufficiently linked to the subject matter, then the CJEU decision in

33 Ibid.; European Commission, Interpretive Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM(2001) 566 (final) at section 1.4.1.
34 European Commission, Buying Green!: A Handbook on Environmental Public Procurement (2004), section 3.4.2.
36 See Buying Green!, supra note 34, section 3.4.2; Kunzlik in Arrowsmith et al (eds.). p.395.
38 As set out in ClientEarth, Legal Briefing, Briefing No. 4: Clarifying the Link to the Subject Matter for Sustainable Procurement Criteria, (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings, a criterion is linked to the subject matter if it is located at the intersection of functional and horizontal objectives.
Wienstrom refutes this argument in respect of award criteria.\(^{39}\) The same analysis should follow in respect of technical specifications.

In contrast to the Commission’s restrictive interpretation of production characteristics as technical specifications, the Standing Forestry Committee (SFC)\(^{40}\) through its adoption of a report prepared by its Ad Hoc Working Group (AHWG) on Public Procurement of Wood and Wood-Based Products, endorsed a different view:

‘[S]ustainable produced timber’ can qualify as subject matter and [...] criteria of all three pillars of sustainable production, including criteria regarding use and tenure rights of the forest, are appropriate in the technical specification and/or the award stage of wood and wood products. Such criteria are widely accepted as indissolubly part of the sustainability concept of forest management, the production process of wood.\(^{41}\)

The AHWG also stressed that the EU urged the use of public procurement to promote sustainable development, that it has repeatedly endorsed an understanding of sustainable development comprised of the integration of economic, environmental, and social concerns, and that this integration was particularly pertinent to the widely-accepted understanding of ‘sustainable forest management’.\(^{42}\)

Notably, the AHWG on Public Procurement of Wood and Wood-Based Products was comprised of Member State officials responsible for the development of national procurement policies pertaining to wood and wood-based products and/or sustainable procurement policies more generally, along with officials from relevant Directorates General of the European Commission.\(^{43}\)

While the AHWG report pertained specifically to timber procurement policies, its positions and recommendations rested upon an analysis of the Procurement Directive and relevant caselaw. While indicating its consensus opinion that technical specifications and award criteria related to the production process of wood are permissible under the current Procurement Directive,\(^{44}\) the AHWG failed to concur regarding the precise scope of sustainability criteria that could be incorporated into technical specifications and award criteria.\(^{45}\) Accordingly, the AHWG expressly called for further

\(^{39}\) For a fuller discussion of this point, see Briefing No. 4: Clarifying the Link to the Subject Matter for Sustainable Procurement Criteria accessible at www.clientearth.org/sustainable-public-procurement-briefings

\(^{40}\) 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


\(^{42}\) AHWG Report at p19, 25-26, 44.

\(^{43}\) See Terms of Reference of the SFC AHWG on public procurement of wood and wood-based products annexed as Annex B to the AHWG Report. The AHWG also included non-voting industry and NGO representatives.

\(^{44}\) AHWG Report at p4, 19, 29-30 (citing ClientEarth, 2010: Legal Analysis: The place of ‘Social Criteria’ in Public Procurement for Legal and Sustainable Timber).

\(^{45}\) AHWG Report at p.13, 32.
clarity ‘in order to rightly determine what could and could not be included in the technical specifications, selection and award criteria and contract execution clauses’. The forthcoming revision of EU legislation on public procurement provides an opportunity to do this, as discussed in section 4 below.

3.2. Limiting production characteristics pertaining to social considerations to specific conditions in the contract

As noted above, technical specifications are used to define the subject matter of the contract more specifically. Therefore, where a public authority has determined that it wants to procure not just a ‘widget’ but a ‘sustainable widget’, it is appropriate to include criteria that distinguish a sustainable product or service from a non-sustainable product or service as part of the technical specifications. Many of the factors contributing to the sustainability or non-sustainability of a product or service can only be evaluated at the production stage and cannot be captured by technical specifications limited to the functional performance of the product or service. It follows that production characteristics relevant to determining sustainability of a product or service can be incorporated into technical specifications or award criteria.

The Commission’s current practice, however, is to relegate concerns relating to production processes to specific conditions in the contract, particularly in the case of production characteristics relating to social sustainability, such as the labour conditions of the workforce producing the goods or services procured. But this does not always fulfil the contracting authority’s horizontal objectives.

As set out in section 2.1 above, there are differences between the opportunities presented by inclusion of horizontal criteria in technical specifications and specific conditions. Given that a bid cannot proceed to the award stage if it does not satisfy all of the technical specifications, using technical specifications is the best way to include sustainability considerations that the contracting authority is unwilling to make a purchase without. Where a contracting authority sees procuring a horizontal objective that falls into the ‘production characteristic’ category as a pre-requisite, then, it should include it as a technical specification.

In contrast to technical specifications which require up-front assessment of compliance with the criteria specified, specific conditions are a less reliable mechanism for ensuring that the conditions specified are in fact complied with. As elaborated in Briefing No. 8: Specific Conditions, once a contract has been awarded, contracting authorities often lack resources to verify and enforce compliance by the successful tenderer. And in the case of non-compliance, public authorities would have few and generally unsatisfactory measures against the defaulting operator. Cancelling a contract and setting up a new tender would be a very lengthy and costly procedure.

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46 AHWG report at p.16. See also ibid at p.45 (calling on the European Commission to provide a further analysis of the possible legal framework on how to incorporate the principles of sustainable development into clear public procurement policies).


48 ClientEarth, Legal Briefing, Briefing No. 8: Specific Conditions (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings
Moreover, it is more logical and appropriate to consider the sustainability of the production of the procured goods or services as a characteristic of the product or service, rather than an element of the performance of the procurement contract. It is highly questionable whether environmental or social considerations related to the supply chain of the procured goods or services can be linked to the performance of a contract between the contracting authority and the product or service provider. In the case of supply contracts, the goods at issue are generally not made-to-order (as is implied by the inclusion of production characteristics in specific conditions in the contract). Rather, the procured products will likely be supplied from warehoused stocks or otherwise obtained through established supply chains. Accordingly, where sustainability criteria are included as technical specifications, the bidder should be require to demonstrate, prior to the contract being awarded, that it is in fact able to provide goods compliant with the criteria specified. Likewise, in the case of service contracts, recognizing concerns such as the labour conditions or fair remuneration of the workers employed to deliver the contract as technical specifications rather than specific conditions means that the bidder will need to demonstrate that it has in place the appropriate employment conditions to be able to satisfy the criteria specified, rather than merely that it will do so in the course of delivering the contract, if awarded.

Furthermore, the Commission’s reticence towards allowing production characteristics as technical specifications is inconsistent with the CJEU’s reasoning in Wienstrom. As explained in section 2.3.1 above, Wienstrom clarifies that pursuing horizontal objectives through award criteria or technical specifications – including criteria relating to externalities of the production process – is permissible.

### 3.3. Verification challenges

Consideration of production characteristics as technical specifications often gives rise to concerns about how contracting authorities can accurately, fairly, transparently, and efficiently verify compliance with the criteria specified. Some production characteristics that contracting authorities might wish to include as technical specifications or award criteria are covered by various voluntary certification schemes. But EU law prohibits contracting authorities from requiring any particular certifications or labels. However, relevant certification schemes and labels can be accepted as evidence of compliance with criteria relating to production characteristics. This is different from requiring a particular certification or label which infringes the requirement for transparency and equal treatment. Rather, a two-step process is required. First, the sustainability criteria are set out. In a separate process, the criteria for various certification schemes and labels are assessed against the sustainability criteria specified in its procurement policy in order to determine whether the certification schemes examined meet the terms of its procurement policy. But it is not sufficient to simply identify whether the criteria required for the certification scheme and the criteria required by the public procurement policy

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49 For further discussion of how this requirement might be implemented, see the proposed “confirmation stage” discussed in section 4.1 of ClientEarth, Legal Briefing, Briefing No. 8: Specific Conditions (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

50 Unless justified by the subject matter of the contract – see Article 23(8) of the Procurement Directive.
match up on paper; it is also necessary to assess whether the certification scheme is, in practice, likely to produce credible evidence of compliance with the criteria.

This does not mean, however, that a contracting authority must engage in both steps on the occasion of every procurement contract. Rather, standard criteria for repeat procurements of frequently purchased goods or categories of goods can be established, and a contracting authority can work in conjunction with other contracting authorities, or the process can be done at Member State level or even EU level, in order to share the costs of developing the criteria and assessing certification schemes and avoid duplication of effort.

The process through which contracting authorities determine whether a certification scheme corresponds with its procurement criteria must comply with the principles of transparency, non-discrimination, equal treatment, and proportionality, in the same manner that tendering processes must comply with these principles. Having decided on its criteria and completed its assessment of schemes and labels that comply with those criteria, then, alongside the criteria in the contract notice, a contracting authority can indicate which schemes or labels have been determined to comply. In contrast with requiring a specific label, this approach does comply with transparency and equal treatment requirements.

This kind of two-step process has been modelled in the area of sustainable timber procurement by both the UK and the Netherlands. While the initial development and implementation of such systems require commitment and resources, once sustainable procurement policies have been adopted and certification schemes assessed, the verification process for subsequent procurements are greatly simplified, enabling greater take-up of sustainable public procurement.

3.4. The role of pre-procurement consultation processes

There is current uncertainty around whether those firms involved in pre-procurement processes can go forward to take part in the procurement and this may be discouraging contracting authorities and economic operators from utilising the potential of pre-procurement processes to the full. Ultimately, this is negative for sustainable public procurement.

The uncertainty stems from the finding in the Fabricom v Belgium case that tenderers who have carried out preparatory works may have additional information and therefore an advantage over others when preparing their offers which would infringe the principle of equal treatment.

In Fabricom, an undertaking had been forbidden to take part in a procurement procedure by a Belgian rule according to which a bidder who had carried out certain preparatory works for a contract is prohibited from participating in a procedure for the award of that contract. The Court found that the rule prohibiting participation was disproportionate and therefore contrary to EU law.

52 Case C-21/03 and C-34/03, Fabricom v Belgium [2005] ECR I-1559.
The rationale for this decision was that the economic operator excluded from the procedure was not granted any possibility to demonstrate that there was no problem of equality in the particular case. The Court also positively commented on a process whereby an assessment is made, in each specific case, of whether the fact of carrying out certain preparatory works has conferred on the contractor a competitive advantage over other tenderers.

In the revision of the Procurement Directive it may be useful to include a specific reference to the treatment of tenderers who have participated in the preparatory tasks.
4. Opportunities to implement sustainable public procurement through technical specifications

The revision of EU procurement legislation provides an opportunity to set out clearly that:

- Production characteristics have equal status with performance/functional characteristics, and are appropriately considered within technical specifications or award criteria.
- Production characteristics are defined to include both environmental and social impacts of production choices.
- Labels and certification can be used as credible evidence of compliance with sustainability criteria.
- Pre-procurement consultation can be usefully employed to help contracting authorities assess how they should formulate technical specifications relating to sustainability objectives, provided that measures are undertaken to ensure respect for the principles of transparency, non-discrimination, and equal treatment.

4.1. Clarifying that technical specifications can include production characteristics

Various stakeholders - including contracting authorities, Member States and members of the European Parliament as well as NGOs - have called for greater clarity on how production characteristics can be incorporated into technical specifications and award criteria. The forthcoming revision of EU procurement legislation should clarify that whether or not a product or service has been sustainably produced is a characteristic of the product or service that can be specified as technical specifications. This follows from the fact that whether a product or service has or has not been sustainably produced is one of its characteristics and contributes to any assessment of whether it contributes to or hinders sustainable development objectives. It is also consistent with the jurisprudence of the CJEU, in particular the Wienstrom case.

4.2. Applying the Court’s jurisprudence on production characteristics to social sustainability considerations

Just as the environmental externalities of the production process should not be disregarded, what a product is made of, and how it is made, can comprise a significant part of its social impact. Accordingly, defining sustainable production can include criteria relating to both the social and environmental impacts of the production process.

Social aspects of production processes should also be eligible for use as technical specifications where they are linked to the subject matter.\(^{53}\) Production characteristics can include things that are

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\(^{53}\) For a discussion of the ‘link to the subject matter’ requirement, see ClientEarth, Legal Briefing, Briefing No. 4: Clarifying the Link to the Subject Matter for Sustainable Procurement Criteria, (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings
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 same reasoning that led the CJEU in Wienstrom to rule that emissions into the air during the production process for electricity can be considered as award criteria - even though they do not impact on the physical characteristics or functional performance of the end product - should be applied to consideration of the social or economic conditions of labourers engaged in the production process. In both examples, the production characteristics should be eligible as technical specifications regardless of whether they are apparent in the procured goods’ or services’ physical characteristics or whether they affect the performance of the end product.

The revised EU legislation should clearly define ‘production characteristics’ to include both environmental and social sustainability considerations. While the CJEU in Wienstrom made it clear that production characteristics pertaining to environmental externalities could be the subject of technical specifications and award criteria, it left open the question of whether the social sustainability of production processes could be likewise considered. The forthcoming revision process provides the opportunity to clarify the further implications of Wienstrom and extend its reasoning to the social impacts of the production processes of procured products and services.

4.3. Use of labels and certification as evidence of compliance with sustainability criteria

Public authorities should be able to note, in the technical specifications, the types of evidence that can be provided to demonstrate compliance with the sustainability criteria specified. In the case of the procurement of goods, this could include reference to relevant, transparent and robust certification schemes with reliable verification systems where the contracting authority has, through a separate and transparent process, assessed the schemes against the sustainability criteria specified and determined that they meet the terms of its procurement criteria and, furthermore, that the schemes are likely to produce credible evidence of compliance with the comporting criteria.

The revision of EU procurement legislation should simplify and encourage greater take-up of sustainable public procurement by clarifying that, following a transparent assessment of a certification scheme or label against the criteria specified, a certificate or label that is judged to be both consistent with the criteria and sufficiently robust can be accepted as evidence of compliance with criteria relating to production characteristics.

4.4. Clarification that tenderers who have participated in pre-procurement tasks are eligible to take part in the main tender

In Evropaiki Dynamiki v Commission 54, the General Court considered a case where the applicant alleged that the omission by the contracting authority of some technical information benefitted

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54 Evropaiki Dynamiki - Proigmena Systimion Tipeikoinion Pliroforikis kai Tilematikis AE v European Commission, case T-50/05, 19 March 2010, ECR 2008 II-00157. (‘Evropaiki Dynamiki v Commission’)
tenderers which were previous or current contractors for the contracting authority. In that case, the successful tenderer was already the contractor (under a separate contract) developing an IT system which the applicant alleged gave access to information that the applicant did not have, thereby causing a disparity in their respective abilities to submit precise and competitive tenders.\footnote{Ibid, paragraphs 44 and 64.}
The Court dealt with the question of the circumstances in which an award decision must be annulled\footnote{Z.Petersen, Principle of equal treatment in IT procurement: Evropaiki Dynamiki v Commission (T-50/05), in Public Procurement Law Review, 2011.} i.e. it sought to set out the steps to determine whether the principle of equal treatment had been infringed.

The Court’s conclusion was that annulment should only occur where any disparity of information relevant for preparation of the tender had adversely affected the outcome of the procedure.\footnote{Evropaiki Dynamiki v Commission, paragraph 62.} It was also emphasised that the disparity must result from a procedural defect by the contracting authority.

This judgment paves the way for specific rules to be included in the revised EU procurement legislation in relation to the participation of firms who have already been involved in pre-procurement processes or are existing or previous contractors on related contracts.

5. Conclusion

The revision of the EU procurement legislation 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. The recognition that production characteristics, including social aspects of production, can be required as technical specifications is clearly a crucial step in facilitating sustainable procurement policies. The environmental and social impacts of the production phase of a product’s life-cycle are hugely significant and contracting authorities should be able to set relevant requirements in respect of production characteristics.

In addition, the forthcoming revision of EU legislation on public procurement provides an opportunity to clarify the circumstances under which those who participated in pre-procurement consultations with the contracting authority can nevertheless remain eligible for the tender as well as how certification schemes and labelling can be lawfully and usefully employed to verify compliance with sustainability criteria.

This briefing is the fifth in a series of ClientEarth briefings entitled Identifying Opportunities for Sustainable Public Procurement and has focussed on the technical specification element of the procurement process. The four introductory briefings in this series discuss cross-cutting issues. In the remaining briefings, we point to how the EU procurement legislation 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 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:**


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.