Briefing No. 6: Selection Criteria
# Table of Contents

**Key Points** .................................................................................................................................................. 3

1. **Introduction** ........................................................................................................................................ 4

2. **Background: selection criteria** ............................................................................................................ 5
   2.1. Selection and award: a distinction .................................................................................................. 5
   2.2. Selection criteria under the Procurement Directive ........................................................................ 6
   2.2.1. Specific Exclusion Criteria ....................................................................................................... 6
   2.2.2. Assessment of suitability .......................................................................................................... 6

3. **Existing legal uncertainties and other limitations** ...................................................................................... 7
   3.1. Interpretation of thresholds for exclusion ................................................................................... 7
   3.2. Assessment of capacity and reliability to comply with horizontal policy requirements ...................... 8
   3.2.1. Can anticipated non-compliance be taken into account? ....................................................... 9
   3.3. The role of pre-procurement consultation processes ...................................................................... 9

4. **Opportunities to implement sustainable public procurement at the selection stage** .................................. 10
   4.1. Thresholds for exclusion to be clarified ...................................................................................... 11
   4.2. Introducing a new ‘confirmation stage’ to ensure that the chosen tenderer has the capacity to deliver contract performance criteria and award criteria .................................................................... 11
   4.3. Taking into account non-compliance with conditions in previous public procurement procedures .......... 13
   4.4. Expanding the application of the assessment of the environmental management measures to be applied . 14
   4.5. Clarification that tenderers who have participated in pre-procurement tasks are eligible to take part in the main tender .................................................................................................. 14

5. **Conclusion** .......................................................................................................................................... 15
Key Points

Selection criteria relate to the contractor and aim to ensure that the tenderers put forward will be able to deliver the contract properly.

The exclusion criteria in current EU procurement legislation have the aim of preventing authorities from contracting with persons that are deemed to be untrustworthy on account of their past behaviour (corruption, money laundering etc). However, the existing thresholds set are high (conviction) or unclear (‘grave misconduct’). Nonetheless, the existing criteria serve as precedents for policy-driven exclusion criteria that do not link directly to the performance of the contract in question. There is an opportunity in the revision of the EU procurement legislation to ensure that contracting authorities feel confident to exclude a tenderer where his past conduct, either in respect of other procurement contracts or more generally, has not lived up to the high standards that a public authority should be entitled to expect. Obviously safeguards will be required to avoid subjectivity from the public authorities.

There is currently uncertainty around whether those firms involved in pre-procurement processes can go forward to take part in the procurement process. This is harmful to innovation, much needed for the development of more sustainable products and services. Equal treatment is clearly important but contracting authorities can look to overcome this by ensuring that there is minimal disparity of information relevant for preparation of the tender.

Although the selection stage includes an assessment of ‘suitability’ this does not include the tenderer’s actual ability to deliver aspects labelled as ‘specific conditions’ (also called contract performance clauses), or even some award criteria. A further assessment should be introduced to remedy this situation: it is legitimate for a contracting authority to ensure that a contract is not awarded to a contractor unable to actually deliver such requirements and promises. Further, this briefing argues that it can be relevant to take into account experience and the tenderer’s systems relating to its impact on the environment, its workforce and the wider community where this indicates less reliable compliance with the horizontal policies promoted by the procurement process in question. The most efficient stage of the process to do this may be after the offers have been scored in the award procedure, as only the top scoring offer would need to be checked to ensure that the tenderer is capable of delivering the horizontal aspects it has promised. In effect this would be a ‘confirmation’ stage.
1. Introduction

A contracting public authority not only has to set the subject-matter of the contract and decide which procedure and criteria to use for the award, it must also examine which companies ought to be invited to tender or kept within the tendering procedure. Whichever type of procurement procedure is chosen, authorities are required to think carefully about the selection criteria.

The principal objective of the selection phase is to identify those candidates who are qualified to perform the contract. At a minimum this means those who can provide the service or products satisfactorily, but it is also a valid objective to identify satisfactory contractual partners in a broader sense. It is already the case that contracting authorities can, for example, exclude those who have been convicted of corruption. This is deemed to make a company an unsuitable tenderer, although unconnected with the specific subject matter of the contract. Exclusion for ‘unsustainable’ behaviours could be a route that, with caution, might open opportunities to integrate environmental and social considerations into the procurement process.

Public authorities may legitimately wish to ensure that the candidates they select have endorsed certain horizontal policies in their general professional behaviour. For example, a contracting authority might not want to enter into contractual relations with a firm that is performing badly in terms of energy efficiency or has a particularly bad record with regards to employment of job seekers or people with disabilities. There is no doubt that in certain sectors exclusion from eligibility for public contracts is a potentially powerful tool to further encourage compliance with law or to encourage even higher standards. The effect is to hold back those who have not taken their obligations seriously, including environmental and social obligations, and support those who have.

However, additional criteria to ensure such high standards involve a heightened level of discretion available to the contracting authority. As with all other stages of the procurement procedure, the selection of tenderers must be governed by the principles of transparency, equal treatment and proportionality. So long as these principles are strictly complied with, we argue that there is scope to integrate horizontal policies into the selection criteria.

The assessment of tenderers is also particularly important because the choice of the right contracting partner is essential to ensuring a good performance of the contract. Once the contract has been signed the tenderer has started work, it may be extremely difficult and costly for the contracting authorities to modify or terminate the contract where the chosen candidate is not

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1 The concept of the link with the subject matter of a contract is further discussed 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
2 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 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 (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings
performing to the required standards in this respect. Therefore, where the contract is to include conditions relating to horizontal policy objectives, it should be possible for the contracting authority to assess that the tenderer will be able to comply with those requirements before finalising the award. In order to reduce the administrative burden, this check could be performed after the offers have been rated against the award criteria; this would mean that only the top-rated tender needs to be assessed.

This briefing focuses on the current system established by 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 (the Procurement Directive) and the case-law of the Court of Justice of the European Union (CJEU) and identifies how social and environmental requirements can be taken into account and where further opportunities lie.

2. Background: selection criteria

2.1. Selection and award: a distinction

The determination of the winning bidder of a procurement procedure is carried out in two stages. During the selection stage, the contracting authorities assess the ability of economic operators to satisfy the requirements of the contract. Then, in the award stage, they examine the offers in order to choose the best one, i.e. the best price or the most economically advantageous tender. The current rules and caselaw emphasise the need to operate a strict distinction between the selection criteria and the award criteria.

The distinction between the selection and award criteria is particularly relevant with regard to the respective aim of each stage. Selection criteria relate to the contractor and include aspects such as economic and financial standing as well as professional and technical knowledge. They aim at ensuring that the tenderers are reliable and responsible and that they have sufficient experience with the type of contract to be able to deliver it properly. On the other hand, award criteria relate to the offer based on the lowest price or the most economically advantageous tender. So for example, caselaw shows that criteria such as tenderers’ experience, manpower and equipment or their ability to perform the contract by the anticipated deadline are considered as selection criteria and not award criteria.

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3 This is further discussed in ClientEarth, Legal Briefing, Briefing No. 8: Specific Conditions (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings
6 Lianakis, paragraph 32.
2.2. Selection criteria under the Procurement Directive

As for all procurement criteria and conditions, selection criteria must comply with the overarching principles of transparency, equal treatment, non-discrimination, and proportionality. In particular, the Court has emphasised that criteria and conditions which govern each contract must be given sufficient publicity so that contractors may become aware of the existence:

in order to fulfil its role of enabling contractors in the Community to determine whether a contract is of interest to them it must contain at least some mention of the specific conditions which a contractor must meet in order to be considered suitable to tender for the contract in question.

2.2.1. Specific exclusion criteria

The Procurement Directive sets out a list of grounds for exclusion. The CJEU has found this list to be exhaustive, subject to one case-law exception.

Article 45(1) of the Procurement Directive sets mandatory grounds for exclusion: participation in a criminal organisation, corruption, fraud and money laundering requires exclusion of the guilty firms.

Contrary to the grounds contained in Article 45(1), the grounds of exclusion set out in Article 45(2) are optional. Economic operators may be excluded from a public contract on grounds of solvency, grave professional misconduct, and failure to fulfil social security or tax obligations. Exclusion may also result from misrepresentation or failure to supply information on the foregoing grounds. It could be said that the existing exclusion criteria have the shared aim of preventing contracting authorities from contracting with persons that are deemed to be untrustworthy on account of their past behaviour.

As an economic operator may also be required to prove its enrolment on a professional or trade register, or membership of a particular organisation in their country of origin that entitles them to be able to perform the service in question, and failure to produce proof would in effect also exclude them from the tender.

2.2.2. Assessment of suitability

The Procurement Directive provides the opportunity for the suitability of the economic operators that have not been excluded to be checked by contracting authorities in accordance with the criteria

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7 For a discussion of how the CJEU has applied these principles in the context of public procurement, 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](http://www.clientearth.org/sustainable-public-procurement-briefings)

8 See [Beentjes](http://www.clientearth.org/sustainable-public-procurement-briefings), at paragraph 34. The Court in [Beentjes](http://www.clientearth.org/sustainable-public-procurement-briefings) made an exception to such a rule for criteria which are ‘inseparable from the very notion of suitability’, giving as an example, specific experience relating to the work to be carried out (one of the selection criteria in the case).

9 With the exception of grave professional misconduct, a contracting authority must, under Article 45(3), accept a judicial record or equivalent or certificate issued by the competent authority in the Member State concerned as proof that none of the grounds in 45(1) and 45(2) applies.

10 Article 45(2) of the Procurement Directive.

of economic and financial standing, of professional and technical knowledge or ability. Both financial and technical ability criteria relate only to the tenderer’s capacity to perform the contract at stake.

The provisions in the Directive set out the references or evidence which may be furnished in order to establish a contractor’s knowledge or ability to perform that contract. In effect, a tenderer who fails to produce such evidence or who does not meet the level of technical ability required will not participate in the award stage of the contract.

Further, Article 44(2) establishes that the extent of the information and the minimum levels of ability required by a contracting authority for a specific contract must be related and proportionate to the subject-matter of the contract. The question of what is properly considered as linked to the subject matter is discussed in detail in Briefing No. 4: Clarifying the Link to the Subject Matter for Sustainable Procurement Criteria. In that briefing it is argued that horizontal objectives, not just functional objectives, can be linked to the subject matter of a contract. Horizontal criteria that satisfy the ‘linked with the subject matter’ rule can be understood as located at the intersection of horizontal and functional procurement objectives. The test for proportionality is that the measure is appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it.

3. Existing legal uncertainties and other limitations

3.1. Interpretation of thresholds for exclusion

Article 45(2)(c) of the Procurement Directive allows exclusion of economic operators if they have been convicted by judgment of any offence concerning their professional conduct. Professional conduct should be considered to include behaviour which impacts on the environment and on society and it is clear from several of the recitals that the legislator anticipated this.

However, the existence of a court conviction is a high threshold to reach. It is not necessarily the case that those who have broken the law will have a judicial record; given the cost and time as well as the uncertainty of obtaining a favourable judgment, it is often the exception that cases are actually brought to court.

The alternative ground for exclusion is that the economic operator is guilty of ‘grave professional misconduct’. Although the term ‘grave’ is not defined by the legislation nor by the CJEU, it is clear that the threshold for exclusion on that basis will necessitate particularly poor conduct, but does it have to be a contravention of the law?

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12 Articles 46 to 50 of the Procurement Directive.
13 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
14 For a discussion of proportionality, please see section 4 of 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
15 See for example Recitals 34 and 43 of the Procurement Directive.
Two practical questions arise: firstly, the level of misconduct sufficient to exclude a tenderer and secondly, if there is no judgment, the type of evidence that would be required to convince the contracting authority that the tenderer should be excluded.

Taking as an example a company that has repeated administrative fines for breaches of health and safety or environmental laws, the contracting authority would be entitled to infer a serious disregard for social and environmental policies and might wish to exclude the tenderer on that basis. Would this, however, meet the test of grave professional misconduct? What about conduct that is not in itself a breach of regulatory requirements?

3.2. Assessment of capacity and reliability to comply with horizontal policy requirements

What can currently be assessed at the selection stage?

**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. Therefore ability to meet the award criteria cannot be assessed at the selection stage.

**Specific conditions** (also called *contract performance clauses*) are included in the contract to specify how the contract is to be performed. They must be publicised in the contract notice. Although where a tenderer does not accept a requirement expressed as a special condition, that tenderer must be excluded as its offer will not comply with one of the contracting authority’s fundamental requirements, it is not considered possible to take into account the tenderer’s technical ability to comply with such a special condition and exclude the tenderer on that basis.

In the *Beentjes* case the CJEU noted that it was clear from the provisions of the relevant procurement directive at the time that ‘the authorities awarding contracts can check the suitability of the contractors only on the basis of criteria relating to their economic and financial standing and their technical knowledge and ability’. The Court noted that the condition that a tenderer should be in a position to employ long-term unemployed persons (which was to be a condition of the contract) had no relation to checking the contractor’s suitability on the basis of their economic and financial standing and their technical knowledge and ability. Subsequently, in *Commission v. Italy* and later *La Cascina*, the Court followed the reasoning that only the

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16 Beentjes (cited above).
17 Ibid. paragraph 28.
Identifying Opportunities for Sustainable Public Procurement.
Briefing No.6: Selection Criteria
ClientEarth
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As highlighted in the above analysis, there is currently no scope for contracting authorities to assess at the selection stage a tenderer’s ability in relation to award criteria and specific conditions as the results of such assessment cannot be taken into account. Therefore if we want clarity that contracting authorities can assess the suitability of a contractor to deliver the sustainability requirements of the contract, the revised procurement legislation needs to specifically include provisions to this effect.

3.2.1. Can anticipated non-compliance be taken into account?

As the selection stage aims to ensure that the tenderer will be able to carry out the contract, on a common sense basis, the anticipation of non-compliance with a specific condition would seem a legitimate reason for excluding firms. To what extent may anticipated non-compliance with horizontal requirements be considered?

It is noted that exclusion for unsuitability precludes any chance to demonstrate actual compliance; therefore clearly the reasons for any such decision would need to be objective. However, when assessing the technical ability of tenderers in the selection stage under the current procurement legislation, the contracting authority is also making decisions on the basis of anticipated compliance with the technical specifications.

As things stand, firms that have not properly executed a previous contract can nevertheless submit a bid again in other public procurement procedures. This is undesirable in general as the faith of the parties in each other has been damaged. More importantly, in the present context, the threat of exclusion from future contracts would heighten the incentive to comply with conditions relating to horizontal policy objectives in the present contract.

3.3. The role of pre-procurement consultation processes

It is acknowledged 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 could allow the contracting authority to better understand the scope for incorporating sustainability criteria in the selection process and award criteria.
However, 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 case\(^{21}\) and in particular the question of how to ensure equality of opportunity and equal treatment when those who have participated in the preparatory tasks will more than likely have more background information than those who have not, thereby putting them at an advantage when preparing their offer. 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 national provision, based on the principle of equal treatment, responded to the risk of distorting competition between competitors.

In that case the CJEU acknowledged the advantage of those tenderers with additional information from carrying out preparatory works and reiterated that all tenderers must have equality of opportunity when formulating their tenders. The Court stated, ‘it cannot be maintained that the principle of equal treatment requires that that [a person who has carried out certain preparatory work] be treated in the same way as any other tenderer.’\(^{22}\) This could arguably justify exclusion on the basis of equal treatment. Nevertheless, the Court found that the rule prohibiting participation was disproportionate and therefore contrary to EU law. 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.

In the revision of the EU procurement legislation 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 at the selection stage

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

- Assessment of a tenderer’s capacity to perform the contract in accordance with specific conditions (and award criteria satisfied by a particular offer) may be taken into account before the contract is awarded.
- Non-compliance issues in relation to previous contracts (relating to horizontal objectives or otherwise) can be taken into account at the selection stage (or confirmation stage) and contracting authorities can exclude tenderers on this basis.

\(^{21}\) Case C-21/03 and C-34/03, Fabricom v Belgium [2005] ECR I-1559 (Fabricom).
\(^{22}\) Fabricom, paragraph 31.
• ‘Grave professional misconduct’ does not necessarily have to be evidenced by a proven breach of environmental or health and safety laws and that it may include a disregard for sustainable development.

• 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. Firms involved in pre-procurement procedures can take part in related procurement processes provided that the contracting authority ensures that there is not disparity of information between tenderers.

4.1. Thresholds for exclusion to be clarified

Greater clarity around the type and level of misconduct for which it is appropriate to exclude a tenderer at the selection stage and the type of evidence that would be required to justify such exclusion would be welcome in the revised EU procurement legislation.

The aim is for contracting authorities to feel confident to exclude a tenderer from the award of a contract if they are aware of misconduct that has not been recognised by a judgment where the area of misconduct makes that tenderer an unsuitable candidate for the tender in light of the contracting authority’s horizontal objectives. It may be possible for contracting authorities to draw on the work of other regulatory bodies if they wish.

4.2. Introducing a new ‘confirmation stage’ to ensure that the chosen tenderer has the capacity to deliver contract performance criteria and award criteria

Although it is argued in Briefing No. 5: Technical specifications that the suggestion by the Commission that production characteristics can only be specific conditions (and therefore only incorporated into the procurement process as contract performance clauses) is unfounded, some contracting authorities might still choose to use specific conditions instead of technical specifications or award criteria to incorporate certain horizontal procurement objectives.

In order to give contracting authorities more confidence that requirements included as contract performance clauses will be fulfilled and that aspects promised in order to meet award criteria will be delivered, they should be entitled to verify whether economic operators have the technical and professional capacity to deliver these requirements before the contract has been awarded. This check should reduce the likelihood of non-compliance after a contract has been awarded and significantly increase the chance that the contracting authority will get the horizontal objectives that it contracts for.

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23 ClientEarth, Legal Briefing, Briefing No. 5: Technical specifications (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings
To limit the administrative burden on the contracting authority, this ‘capacity-check’ should take place in respect of only the highest point-scoring tenderer in the award stage. Of course, if that tenderer fails the check, then the next highest point-scoring tenderer will be checked and if the check is satisfactory, the contract will be awarded to this tenderer instead. Therefore, this check needs to take place after the award stage but before the contract is finally awarded. A new stage in the procedure is therefore necessary: the ‘confirmation stage’. In essence just like the selection stage, this stage will operate to exclude tenderers.

Further by sending the message that contracting authorities are taking contract performance clauses seriously upfront, it is less likely that the contract performance clauses will be ignored and could even encourage businesses thinking of tendering for public contracts to introduce systems relating to achieving relevant horizontal objectives in advance of bidding for contracts in order to be certain of passing the confirmation stage.

As part of the confirmation stage contracting authorities could take into account:

- previous non-compliances in public contracts by the tenderer (see section 4.3 below); and
- the tenderers’ general approach and behaviour and its impact on the environment, its workforce and the wider community, particularly the systems that it has in place to be able to deliver the horizontal objectives concerned.

Admittedly, information gathered from past performance and existing firm-wide systems will only be indicative as to future compliance with the specific contract. However, taking the example of supply chain sustainability due diligence, if a firm had such a due diligence policy, this would arguably give greater comfort that the appropriate systems are in place to ensure that the sustainability criteria that the local authority is concerned about in the specific contract would be met by the tenderer and its suppliers. Another example would be a contracting authority who wished to reward tenderers who sourced the timber for a product they wished to procure from sustainably managed forests. Tenderers who showed that they would source sustainable timber specifically for that contract would have less experience of this aspect than those who as a policy always buy from such sources. Consequently, tenderers in the former category might be considered to be less reliably able to fulfil that requirement.

Under the present EU public procurement legislation, selecting a tenderer on the basis of its firm-wide systems in favour of the promotion of environmental and social considerations is particularly difficult as a tenderer’s general policies have not been deemed to be linked to the subject matter of the procurement contract. However, identification of such systems are valuable for assessing the reliability of delivery of horizontal objectives that the contracting authority has set out to procure, therefore this would need to be made explicit in the new legislation.

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24 For an in-depth discussion of the ‘link with the subject matter’ please 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
Nonetheless, care must be taken when assessing anticipated non-compliance and the contracting authority must be careful to demonstrate that it is not abusing the discretion that is conferred on it. For transparency reasons, the contracting authority would need to publish details of the type of evidence to be assessed in the confirmation process. Contracting authorities will also need to consider proportionality when devising their criteria to assess ability to perform the horizontal policy aspects of the tender - however, as discussed above, Member States are allowed considerable discretion and caselaw suggests that provided a measure is not ‘manifestly inappropriate’ it should not be disproportionate.25

4.3. Taking into account non-compliance with conditions in previous public procurement procedures

There are precedents for policy-driven exclusion criteria that do not link directly to the performance of the contract in question. The existing mandatory and optional exclusion provisions in the Procurement Directive, such as the exclusion for a conviction for corruption, are examples of exclusion criteria that apply to all of a contractor’s business, rather than just his ability to perform the contract in question.

Advocate General Gullman, in the case Commission v Spain, stated that the objective of ensuring the adequate performance of contracts should be recognised.26 In his opinion, he explains that deliberate omission to perform awarded contracts in the past could justify the exclusion of an economic operator. However, AG Gullman considered that the Spanish law in the case at stake was discriminatory and therefore contrary to EU law. The CJEU followed the conclusion of the AG without discussing nevertheless the legitimacy of taking account of past misbehaviours.

The revision of the EU public procurement legislation is an opportunity to clarify that contracting authorities may take past performance into account (whether or not the subject matter of the contract is in the same field). However, a number of safeguards will be required to avoid subjectivity from the public authorities. Assessment of the past performance of a tenderer should be fair and objective and subject to a transparent system, including known criteria and verifiable evidence, as well as judicial protection. It will not be sufficient to rely on tenderers to produce completion certificates to show that there have been no previous problems, unless accompanied by a declaration that the completion certificates represent all the projects undertaken by that tenderer.

The question of proportionality might also need to be given careful consideration in the application of such exclusions - however, contracting authorities should be reassured that CJEU caselaw indicates that policy makers should be allowed broad discretion to determine appropriate measures and that the legality is only in question if the measure is ‘manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue’.27

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26 Opinion of AG Gullman on case C-71/92, Commission v Spain, paragraph 95.

27 R v Secretary of State for Health ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd, C-
4.4. Expanding the application of the assessment of the environmental management measures to be applied

In accordance with the Procurement Directive, contracting authorities may require economic operators to prove their ability to perform the contract in question by indicating environmental management measures they will apply.\(^{28}\) However, this aspect is only relevant in the case of public works and services contracts and in ‘appropriate cases’.

The revision of the EU procurement legislation is an opportunity to expand this criterion to all types of contracts and in all cases. This should ensure that public authorities are always contracting with economic operators who endorse environmental protection considerations.

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

In the *Evropaiki Dynamiki* case,\(^{29}\) the General Court considered a case with a factual situation analogous to that in *Fabricom*; the applicant alleged that the omission by the contracting authority of some technical information benefited 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.\(^{30}\)

The Court dealt with the question of the circumstances in which an award decision must be annulled\(^{31}\) 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.\(^{32}\) 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.

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491/01 [2002], paragraph 123 and cases cited therein. See also 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

\(^{28}\) Article 48(2)(f) of the Procurement Directive.


\(^{30}\) Ibid, paragraphs 44 and 64.


\(^{32}\) *Evropaiki Dynamiki v Commission*, paragraph 62.
5. Conclusion

Contracting authorities should be allowed to require exemplary behaviour from the economic operators that they entrust to carry out public contracts and thereby to encourage wider acceptance and practice of the highest possible standards or to penalise previous breaches.

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. Clarification that contracting authorities can be bold in applying exclusion criteria against those who do not take their environmental and social obligations seriously would be welcomed. Where the tenderer's success at the award stage is based on his promises to satisfy award criteria, the contracting authority should be able to assess whether satisfaction of the award criteria is guaranteed. If the contract performance includes delivery of horizontal policy objectives, it should follow that the ability to deliver this aspect of the contract can be legitimately assessed. The assessment of tenderers' technical ability to perform contracts including delivery of horizontal policy objectives should also cover the systems a firm has in place where this can indicate the level of reliability that there will be compliance with those objectives.

This briefing is the sixth in a series of ClientEarth briefings entitled *Identifying Opportunities for Sustainable Public Procurement* and has focussed on the selection stage of the procurement process. The four introductory briefings in this series discuss cross-cutting ideas. 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](http://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 legislation by early 2012. 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.

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.