



Briefing on new EU Public Procurement Directives

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Intro

Disclaimer: this memo does not pretend to explain the Directives as a whole, just focuses on what is most directly relevant for FSC.

On the 28th of March, 2014, three Directives related to Public Procurement have been published in the EU Official Journal:

1. *on public procurement*
2. *on procurement by entities operating in the water, energy, transport and postal services*
3. *on the award of concession contracts*

The first two directives replace existing ones that were agreed in 2004, the 3rd one is new.

For the texts, in all EU languages, fact sheets, Q&A, and other explanatory documents, see the [European Commission website](#).

The directives set rules for public procurement by authorities inside the EU at all levels, for tenders above certain minimum thresholds (see Annex I). And these rules need to be taken into account when green or sustainable public procurement policies are designed and implemented.

However, a number of EU Member States use elements of these Directives for rules on smaller tenders as well. This makes the transposition process even more important (*estimations are that public procurement as a whole as a value of 17% of the combined EU Member States GDPs, and that the Directives only cover 20% of that*).

The Member States have till the **18th April 2016** to transpose them into national law and practice. This can lead to new laws or amendments to existing national legislation and implementing rules.

General purpose of these directives

The EU has had legislation to limit the freedom of public authorities in their public procurement policies since 1992. The original purpose was to oblige public authorities, for larger contracts for supplies of goods, services or works, to open up competition across national borders, to comply with the EU internal market. And it was to put an end to corruption and local favouritism, and to ensure that taxpayer's money was saved by focussing on the lowest price. All requirements in tenders had to be strictly functional and bidders should all be treated equally.

As a result, the rules set restrictions for authorities that wanted to use their purchasing power to pursue environmental and/or social objectives. This led to critique and court cases and the 2004 revision of the directives introduced the possibility to introduce, to a certain extent, environmental requirements into public tenders.

End 2011 the European Commission proposed revisions and a 3rd, parallel, Directive on concessions. It introduced a new element: besides ensuring transparency, level playing field, good use of public money, it also presented public procurement as a tool to implement the “*Europe 2020 Strategy*”. That strategy focuses on ““*smart, sustainable and inclusive growth*” and puts public procurement explicitly as a tool for public authorities to support innovation and reward environmental and social excellence.

In the final versions, the first two Directives do give concrete guidance on how this can be done, but still allow public authorities to focus on price or cost only. Interestingly however, the Directives give individual Member States the option to go one step further and *oblige* the authorities in its country to NOT only look at price or cost but at other characteristics as well, using the “**best price-quality ratio**” method.

The concessions directive is more general and liberal in its requirements. It may be relevant to wood products as the directive includes the (construction, maintenance and) exploitation of ports, rail, energy production, etc.

The new Directives explicitly allow Member States to have green/sustainable public procurement policies, for some or all public bodies, for some or all types of products, services and works, as they choose.

Opportunities/limitations/risks with the new legislation

[see in annex II the text of the relevant recitals and articles, from the three Directives, to which I refer below].

First of all, it is important to consider the three different categories of criteria/requirements:

1. **technical specifications:** these are obligatory characteristics for a product, service or public works.
2. **contract performance conditions:** comparable to technical specifications as they are “fixed objective requirements”, relating to the delivery of a works/service for a public authority, such as construction, maintenance, renovation of buildings or roads.
3. **award criteria:** these are used to choose between different bids that all comply with the technical specifications (and performance conditions where relevant). A traditional award criterion is price or cost. The results against different award criteria can be weighed against each other in the “best price-quality ratio approach”.

(The Concession’s directive uses slightly different concepts).

The new Directives:

1. Allow, for the first time, inclusion in the **technical specifications**, characteristics that refer to the “*sustainability of the production process*” (recital 74/83)¹ ... “*even where such factors do not form part of their materials substance*” (article 42/60) provided they are linked to the subject matter.
2. Allow inclusion also in **award criteria**, of reference to production processes, including social and environmental factors, even if there is no impact on the physical characteristics of product as such (see recital 97/102/64 and article 67/82). So this allows a criterion of, where applicable, sustainable managed forest (SFM) origin. However, for that the authority needs to make clear from the beginning that he will base his choice on the “**best price-quality ratio**”, not on the lowest cost/price criterion.
3. Allow inclusion in **contract performance conditions**, environmental and social references. It seems this can also relate to processes of materials used, see recital 97/102/64 and article 70/87. So it should be possible to include in such “conditions” that all wood/wood-based products used in construction, maintenance, restoration have to have SFM origin. Question remains whether in practice putting such requirements in “conditions” is more, or less, logical than placing them in “technical specifications”.
4. Allow to **require labels** as evidence of compliance with technical specifications and/or award criteria. The definition of labels includes certificates and other documents (which also includes (FSC) “claims” without labels in my view): art 2-2 and 43-61.
 - Always “equivalence” to labels should be accepted. However, the last part of article 43.1/61.1. says that once reference to a label or labels is chosen, a bidder who does not have such a label should demonstrate that it had “*no possibility of obtaining the specific label or an equivalent label within the relevant time limits for reasons that are not attributable to that economic operator*” and then ofcourse also prove that his bid complies with the same requirements.
 - Not all types of label are acceptable. Article 43.1.e/61.1.e is meant to prevent greenwashing by using self-declaration/own-validated labels from companies. It says that for labels to be relevant, “*the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence*”. This clause is meant to prevent reference to “Type II” ecolabels, invented and managed by companies themselves. FSC, which has a balanced multi-stakeholder decisionmaking

¹ The first, black, reference relates to Directive nr. 1, red to Directive nr. 2. Where applicable there is green for reference to the 3rd, (concessions) directive).



structure, is not affected by this limitation (forest certification schemes are usually referred to as “Type I like”).

- It is possible to see a contradiction in Article 43/61 about what to do with labels that require more than the EU Directives allow or the public authority wants to include. Article 43.2/61.2 seems to forbid reference to such labels, while a sub-para under Article 43.1.e/61.1.e provides a practical procedure on how to find a way out without losing the right to refer to a label. This could become relevant e.g. if a public authority wants to focus only on the environmental dimension of production and not the social one. However, as regards FSC (and PEFC) labels, there is already a mature practice of requiring evidence of **sustainable** forest management, recognising that here the environmental and social dimension cannot be easily separated. And this approach is followed also by the European Commission itself, in its guidance for Green Public Procurement and its criteria for European Ecolabels. Also: recital 93/98 mentions “sustainable timber” as an accepted qualification, and one of the Fact Sheets² the Commission published confirms this.
- 5. Give the opportunity to public authorities that want to set the bar high as regards the specific elements of sustainable forest management and/or the ways compliance is being guaranteed, to follow the approach presented in Article 43.1.e/61.1.e where it says that the procurer can list the specific environmental requirements. For example the [FSC Principles and Criteria](#) can be used as basic for that.
- 6. Do NOT allow to select on basis of “**general corporate policy**”. (recital 97/102/64). For example, an authority cannot select on the basis of companies being an FSC certificate holder, but only on the basis of whether the specific products that are part of the bid are certified.
- 7. Do refer to **Life Cycle Costing** (LCC) as a restricted version of life cycle assessment, which could go against reference to SFM, because biodiversity or social impacts are not easily quantified in monetary terms. However, LCC is only obligatory to use when an authority has chosen for the “lowest cost” approach (which he has to announce in the tender already). If he chooses for the best price-quality ratio approach this LCC cannot dominate the procurement (art. 67/82).

² See the Environmental Factsheet under “Factsheets on the review of Public Procurement” on http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en



ANNEX I:

Financial thresholds for the three Directives [*below these amounts the EU rules are not obligatory*]³

Directive on Public Procurement:

- (a) EUR 5.225.000 for public works contracts;
- (b) EUR 135.000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; where public supply contracts are awarded by contracting authorities operating in the field of defence, that threshold shall apply only to contracts concerning products covered by Annex III;
- (c) EUR 209.000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities; that threshold shall also apply to public supply contracts awarded by central government authorities that operate in the field of defence, where those contracts involve products not covered by Annex III;
- (d) EUR 750.000 for public service contracts for social and other specific services listed in Annex XIV.

Directive on Public Procurement for Public Services:

- (a) EUR 418.000 for supply and service contracts as well as for design contests;
- (b) EUR 5.225 000 for works contracts;
- (c) EUR 1.000.000 for service contracts for social and other specific services listed in Annex XVII.

Directive on Concessions

Equal to or greater than EUR 5.225.000.

³ The below figures include the increases determined in the European Commission Delegated Regulations 2015/2170, 2015/2171 and 2015/2172

ANNEX II: FSC relevant quotes EU DIRECTIVES ON PUBLIC PROCUREMENT 2014

The numbers in black relate to Directive 2014/24 on public procurement (nr. 1)

The numbers in red relate to Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors (nr. 2)

The numbers in green relate to Directive 2014/23 on the award of concession contracts (recitals only – this Directive does not deal with labelling and is not that specific about environmental and social labelling (nr. 3)

Yellow in the text is my emphasis

Recitals

(41/**56/59**) Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life, the **preservation of plant life or other environmental measures**, in particular with a view to sustainable development, provided that those measures are in conformity with the TFEU.

(74/**83**) The **technical specifications** drawn up by public purchasers need to allow public procurement to be open to competition **as well as to achieve objectives of sustainability**. To that end, it should be possible to submit tenders that reflect the diversity of technical solutions, standards and technical specifications in the marketplace, including those drawn up on the basis of performance criteria linked to the life cycle and **the sustainability of the production process** of the works, supplies and services. [...]

(90/**95**) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the **most economically advantageous tender**. It should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the **best price-quality ratio, which should always include a price or cost element**. It should equally be clarified that such assessment of the most economically advantageous tender could also be carried out on the basis of either price or cost effectiveness only. It is furthermore appropriate to recall that contracting authorities are free to set adequate quality standards by using technical specifications or contract performance conditions.

In order to encourage a greater quality orientation of public procurement, Member States should be permitted to prohibit or restrict use of price only or cost only to assess the most economically advantageous tender where they deem this appropriate. [...]

(91/**96**) Article 11 TFEU requires that environmental protection requirements be integrated into the definition and implementation of the Union policies and activities, in particular with a

view to promoting sustainable development. This Directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.

(93/98) Where national provisions determine the remuneration of certain services or set out fixed prices for certain supplies, it should be clarified that **it remains possible to assess value for money on the basis of other factors than solely the price or remuneration**. Depending on the service or product concerned, such factors could, for instance, include conditions of delivery and payment, aspects of after-sale service (e.g. the extent of advisory and replacement services) or environmental or social aspects (e.g. **whether books were stamped on recycled paper or paper from sustainable timber**, the cost imputed to environmental externalities or whether the social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract has been furthered). Given the numerous possibilities of evaluating value for money on the basis of substantive criteria, recourse to drawing of lots as the sole means of awarding the contract should be avoided.

(97/102) Furthermore, with a view to the better integration of social and environmental considerations in the procurement procedures/, contracting authorities should be allowed to use award criteria or contract performance conditions relating to the works, supplies or services to be provided under the public contract in any respect and **at any stage of their life cycles from extraction of raw materials for the product to the stage of disposal of the product, including factors involved in the specific process of production, provision or trading and its conditions of those works, supplies or services or a specific process during a later stage of their life cycle, even where such factors do not form part of their material substance**. Criteria and conditions referring to such a production or provision process are for example that the manufacturing of the purchased goods did not involve toxic chemicals, or that the purchased services are provided using energy-efficient machines. In accordance with the case-law of the Court of Justice of the European Union, this includes also award criteria or contract performance conditions relating to the supply or utilisation of fair trade products in the course of the performance of the contract to be awarded. Criteria and conditions relating to trading and its conditions can for instance refer to the fact that the product concerned is of fair trade origin, including the requirement to pay a minimum price and price premium to producers. Contract performance conditions pertaining to environmental considerations might include, for example, the delivery, package and disposal of products, and in respect of works and services contracts, waste minimisation or resource efficiency.

[until here, recital 64 of the Concessions directive has similar wording]

However, the condition of a link with the subject-matter of the contract **excludes** criteria and conditions relating to **general corporate policy**, which cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services. Contracting authorities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place.

[this limitation does not exist in the Concessions directive!]

(98/103) It is essential that award criteria or contract performance conditions concerning social aspects of the production process relate to the works, supplies or services to be provided under the contract.[...]

(99/104/66) Measures aiming at the **protection of health of the staff involved in the production process**, the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract or training in the skills needed for the contract in question can also be the subject of award criteria or contract performance conditions provided that they relate to the works, supplies or services to be provided under the contract. For instance, such criteria or conditions may refer, amongst other things, to the employment of long-term job-seekers, the implementation of training measures for the unemployed or young persons in the course of the performance of the contract to be awarded. In technical specifications contracting authorities can provide such social requirements which directly characterise the product or service in question, such as accessibility for persons with disabilities or design for all users.

[recital 66 of the Concessions directive has similar wordings, but related to “the performance of the concession”. So that cannot relate back to production processes of materials used for that performance, and is therefore not relevant for FSC, unless the concession is about exploitation of a state/publicly owned forest].

Articles

Article 2 Definitions

(2.1.23/2.1.19) “label” means any document, **certificate** or attestation confirming that the works, products, services, processes or procedures in question meet certain requirements;

(2.1.24/2.1.20) “label requirements” means the requirements to be met by the works, products, services, processes or procedures in order to obtain the label concerned.

Article 42/60 Technical specifications

42.1/60.1 The technical specifications as defined in point 1 of Annex VII shall be set out in the procurement documents. The technical specifications lay down the characteristics required of a works, service or supply.

These characteristics may also refer to the **specific process or method of production** or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle **even where such factors do not form part of their material substance provided that they are linked to the subject-matter** of the contract and proportionate to its value and its objectives.



[...]

42.2/60.2 Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

42.3/60.3 Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:

- (a) in terms of performance or functional requirements, including **environmental characteristics**, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;
- (b) by reference to technical specifications and, in order of preference, to national standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or – when any of those do not exist – national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words 'or equivalent';
- (c) in terms of performance or functional requirements as referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements;
- (d) by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics.

42.4/60.4 Unless justified by the subjectmatter of the contract, technical specifications shall not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph 3 is not possible. Such reference shall be accompanied by the words "or equivalent".

42.5/60.5 Where a contracting authority uses the option of referring to the technical specifications referred to in point (b) of paragraph 3, it shall not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to

which it has referred, once the tenderer proves in its tender by any appropriate means, including the means of proof referred to in Article 44(-62), that the solutions proposed satisfy in an **equivalent manner** the requirements defined by the technical specifications.[.....]

Article 36 Technical and functional requirements

36.1. Technical and functional requirements shall define the characteristics required of the works or services that are the subject-matter of the concession. They shall be set out in the concession documents.

Those characteristics may also refer to the specific process of production or provision of the requested works or services provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives. The characteristics may for instance include quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, terminology, symbols, testing and test methods, marking and labelling, or user instructions.

Article 43/61 Labels

43.1/61.1 Where contracting authorities intend to purchase works, supplies or services with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, services or supplies correspond to the required characteristics, provided that all of the following conditions are fulfilled:

- (a) the label requirements **only** concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;
- (b) the label requirements are based on objectively verifiable and non-discriminatory criteria;
- (c) the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate
- (d) the labels are accessible to all interested parties;
- (e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.



Where contracting authorities do not require the works, supplies or services to meet all of the label requirements, they shall indicate which label requirements are referred to.

Contracting authorities requiring a specific label shall accept all labels that confirm that the works, supplies or services meet equivalent label requirements.

Where an economic operator had demonstrably no possibility of obtaining the specific label indicated by the contracting authority or an equivalent label within the relevant time limits for reasons that are not attributable to that economic operator, the contracting authority shall accept other appropriate means of proof, which may include a technical dossier from the manufacturer, provided that the economic operator concerned proves that the works, supplies or services to be provided by it fulfil the requirements of the specific label or the specific requirements indicated by the contracting authority.

43.2/61.2 Where a label fulfils the conditions provided in points (b), (c), (d) and (e) of paragraph 1 but also sets out requirements not linked to the subject-matter of the contract, contracting authorities shall not require the label as such but may define the technical specification by reference to those of the detailed specifications of that label, or, where necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.”

Article 67/82 Contract Award Criteria

67.1/82.1 Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall base the award of public contracts on the most economically advantageous tender.

67.2/82.2 The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost effectiveness approach, such as life-cycle costing in accordance with Article 68/83, and may include the best price-quality ratio, which shall be assessed on the basis of criteria including qualitative, environmental and/or social aspects linked to the subject-matter of the public contract in question. Such criteria may comprise, for instance:

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics, trading and its conditions,

[(b-c).....]

The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.



Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts.

67.3/82.3 Award criteria shall be considered to be **linked to the subject-matter** of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:

(a) **the specific process of production**, provision or trading of those works, supplies or services, or

(b) a specific process for another stage of their life cycle, even where such factors do not form part of their material substance.

67.4/82.4 Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. In case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers.

67.5/82.5 The contracting authority shall specify, in the procurement documents, the **relative weighting** which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.

Those weightings may be expressed by providing for a range with an appropriate maximum spread.

Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

Article 41 Award criteria

[.....]

41.2 The award criteria shall be linked to the subject-matter of the concession, and shall not confer an unrestricted freedom of choice on the contracting authority or the contracting entity. They may include, inter alia, environmental, social or innovation-related criteria.

[...]

Article 68/83 Life-cycle costing



68.1/**83.1** Life-cycle costing shall to the extent relevant cover parts or all of the following costs over the life cycle of a product, service or works:

- (a) costs, borne by the contracting authority or other users, such as:
 - (i) costs relating to acquisition,
 - (ii) costs of use, such as consumption of energy and other resources,
 - (iii) maintenance costs,
 - (iv) end of life costs, such as collection and recycling costs.
- (b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

68.2/**83.2** Where contracting authorities assess the costs using a life- cycle costing approach, they shall indicate in the procurement documents the data to be provided by the tenderers and the method which the contracting authority will use to determine the life-cycle costs on the basis of those data.[...]

Article 70/87** Conditions for performance of contracts**

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract within the meaning of Article 67.3/**82.3** and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment related considerations.