

Pursuing Sustainable Development through Public Procurement

Workshop to identify and discuss key legal issues - 3 March 2011

European Parliament / Rue Wiertz / B-1047 Brussels / Room A1E-1

9.00 – 9.15 Introduction by Heide Rühle, MEP

Objective: To welcome participants and introduce the purpose and format of the workshop

9.15 – 10.45 Session I: Legal Background

- Professor Peter Kunzlik (City University London)
- Marc Steiner (Swiss Federal Administrative Court)
- Moderation: Janet Pritchard (ClientEarth)

Objectives: To provide the legal background for the current debate on social considerations in public procurement and to introduce and frame the key legal issues presented by the current debate in the context of the Lisbon Treaty.

10.45 – 11.00 Coffee Break

11.00 – 13.00 Session II: Operationalising Social Considerations in the Award Stage of the Procurement Process

- Klaus Wiedner (European Commission/ DG Markt)
- Marc Martens (Bird & Bird)
- Sophie Tind Nielsen (CPET - Central Point of Expertise on Timber)
- Mark Hidson (ICLEI)
- Gesa Wessolowski (City of Bremen)
- Moderation: Janet Pritchard (ClientEarth)

Objectives: To identify key obstacles to pursuing sustainable development through public procurement, in the experience of contracting authorities under the current procurement regime. To identify and frame key legal questions at issue in the current debate about social considerations in public procurement. To discuss how social consideration can be operationalised as part of the award stage of the procurement process, *i.e.*, the use of social considerations as technical specifications or other award criteria.

13.00 – 13.30 Wrap Up Panel

With contribution of Sergi Corbalán (Network for Sustainable Development in Public Procurement), Jo Versteven (Services Publics fédéraux Belge - Développement Durable), Klaus Wiedner (European Commission/ DG Markt) and Heide Rühle (MEP).

Objectives: To summarize and draw conclusions from the foregoing presentations and discussions. To clarify key issues for the directive revision process, and how they should be framed for consideration by stakeholders and lawmakers. To point to implications for next steps in the directive revision process.

Followed by Lunch

Pursuing Sustainable Development through Public Procurement

Session II
Operationalising Social Considerations
in the Award Stage
of the Procurement Process

Questions for Consideration

- (1) If social considerations are incorporated into technical considerations or other award criteria, what are the implications for the evaluation of tenders?
- What kinds of evidence would be needed?
 - Implications for transparency and proportionality?
 - What kinds of tools could facilitate the effective and efficient evaluation of social considerations at the award stage?

Questions for Consideration

- (2) How should “linked to the subject matter of the contract” be understood in the case of award criteria incorporating social considerations?
- How should horizontal procurement criteria be understood in relation to this requirement?
 - Relevant ECJ jurisprudence
 - Can social considerations be considered as part of a sustainable production process?
 - Is it meaningful to distinguish between performance/consumption characteristics and productions characteristics?

Questions for Consideration

- (3) How can the place and value of horizontal objectives in procurement be explicitly recognized and valued in procurement?
- Is the phrase “economically most advantageous tender” a useful formulation to achieve this?

Questions for Consideration

(4) Post-award verification of compliance with award criteria incorporating social considerations

- Why include social considerations at award stage?
- What sorts of social considerations are properly relegated to contract performance conditions?
- What tools/procedures could facilitate the effective and efficient verification of compliance with social considerations?
- What should be the consequences of failure to comply with social considerations?

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Notes – Bullet Point Style
Notetaker: Mathias Maucher, EPSU

9.00 – 9.15 Introduction by Heide Rühle, MEP

Objective: To welcome participants and introduce the purpose and format of the workshop

Goals and Objectives:

*The EC offers a restrictive interpretation of the Procurement Directives, particularly with regard to social considerations in public procurement (as illustrated by the Buying Social Guide). The **goal** of this workshop is to challenge the EC interpretation. We hope to build understanding regarding how the current directives should be interpreted, as well as how they could be strengthened to support efforts towards sustainable procurement. We hope that this understanding will lead to a comprehensive approach towards sustainable procurement, an approach that treats the social, environmental, and economic pillars of sustainable development in an integrated way.*

This will be achieved by:

- *identifying key concerns, areas of disagreement, and areas of agreement (between legal experts) regarding the interpretation of the EU Procurement Directives, in the context of the EU Treaty and relevant international commitments.*
- *identifying key obstacles that prevent greater levels of ambition and take-up of sustainable development criteria in public procurement.*
- *clarifying areas in which the current Procurement Directives could be strengthened in order to increase the uptake and level of ambition of sustainable public procurement.*

Heide Rühle, MEP: Welcome and Introduction

- We are at the beginning of a process to revise public procurement (PP) directives
- We have to look at the broader context of PP policy and necessary adaptations in the context of the EU 2020 Strategy
- As to green procurement (procedures; guidance; realisation) we are already rather far advanced, however lack of useful guidance on socially-responsible public procurement (SRPP)
- There is a new buzz word/concept, also promoted by DG ENTR, to use PP to promote economic and technological innovation
- It is important to highlight a conflict of interest between requirements/objectives of democracy/rather independent democratic decisions on a local and regional level on the one hand (and the autonomy and right to self-determination on local and regional issues for local and regional authorities as well as the principle of subsidiarity have been strengthened by the Lisbon Treaty; and local and regional tend to better take into account needs of sustainable development) and a strong and continuous push at EU-level with dynamics working in the opposite direction, other priorities and objectives on the other hand
- Today's seminar has a legal focus; it will be important to look closer into international law and agreements, as they might give alternative models and more flexibility as usually admitted at EU level that could be inspiring/useful when revising PP rules in view of more SRPP
- The seminar should also help to exchange on and learn which changes in the primary law, enshrined in the Lisbon Treaty, are instrumental to push towards more SRPP, both content-wise but also in view of procedural rules
- For the EP it is important to focus on practical problems, in particular for local and regional government, and how they could be overcome to encourage and push SRPP alongside green PP

9.15 – 10.45 Session I: Legal Background

Objectives:

- To provide the legal background for the current debate on social considerations in public procurement
- To introduce and frame the key legal issues presented by the current debate in the context of the Lisbon Treaty

Topics to be addressed

- **The historical development of the EU Procurement Directives** (Professor Peter Kunzlik, City University London)
 - *Their original objectives relating to opening up a single market for procurement*
 - *Continuous challenge of developing the use of public procurement to pursue horizontal objectives including sustainable development*
 - *How the Directives promote transparency and non-discrimination and the interface of these principles with other objectives of the Directives*
 - *Key milestones in the development of EU law governing public procurement, including key cases of the European Court of Justice as well as legislative revisions of the Directives*
- **Implications of relevant international commitments (e.g., ILO, WTO, UNDRIP) for EU procurement law** (Judge Marc Steiner, Swiss Federal Administrative Court)
- **Impact of the Lisbon Treaty** (Janet will see if Peter Kunzlik can address these issues within his presentation or otherwise ensure that they are outlined in summary comments to Session I)
 - *Key questions relating to EU procurement law, particularly in relation to single market, social and environmental agendas, and sustainable development*
 - *Legislative revision process (e.g., questions regarding legal competence and legal basis for procurement directives)*

WHAT THE INFORMAL NETWORK WISHES TO HEAR

<p>The historical development of the EU Procurement Directives and the impact of the Lisbon Treaty</p>	<ul style="list-style-type: none"> • EC cannot turn a blind eye to continuous trend towards the use of public procurement to pursue sustainable development (environmental AND social pillars) • The new legislation must be seen in light of the new EU Treaty commitments • The Integration Principle (reaffirmed by the Lisbon Treaty) and the EU Charter of Fundamental Rights require that any revision of the Procurement Directives be undertaken in a manner that fully supports and promotes the use of public procurement policies for sustainable development, including the social pillar, and that public procurement will be implemented in accordance with the rights articulated in the Charter.
<p>Implications of relevant international commitments (e.g., ILO, WTO, UNDRIP) for EU procurement law</p>	<ul style="list-style-type: none"> • EU cannot use WTO as an “excuse” not to pursue sustainable development via public procurement (WTO rules do not prevent this) • The ILO and UNDRIP, as well as the EU Charter of Fundamental Rights, obligate the EU to ensure that its legal framework for public procurement supports and promotes sustainable development, including the social pillar.

Peter Kunzlik (City University London): The historical development of EU procurement directives

N.B.: BULLET POINTS HAVE TO BE READ TOGETHER WITH SLIDE SET

- Traces of and anchorage for social and environmental policies in EU PP law
- In early phases environmental and social concerns have been seen as creating a context/pretext for protectionism
- Developments and major steps in the liberalisation process for public contracts
- None of the founding treaties of the European Communities mentioned PP. However, some Treaty provisions were relevant because they provided the basis for the subsequent legislation
- Various directives in 1962, 1965, 1970 and following years have opened up PP to minimum rules on non-discrimination (e.g. not allowed on basis of nationality)
- Coordination (for works and supplies only, not services) as second main trend after liberalisation (of public contracts); several elements of the co-ordination approach (slide 6)
- In the beginning two principles defined the design: non-discrimination and transparency. Later added: principle of equality of treatment
- Subsequent broadening of the scope of explicit European competence, e.g. via introduction of environmental competences, thus enabling the elaboration of cross-cutting horizontal policies that later could also be reflected in PP law/policy
- In 1985 White Paper on PP: "Completing the Internal Market". Two main problems emerged: compliance problem and restricted coverage of PP, as services were not covered
- Consecutive legislative activity led to an extension of the scope for PP for public service contracts and the coverage of services contracts in addition to works and supply, finally consolidated in the 2004 Directives 2004/17/EC and 2004/18/EC
- Alignment of European legislative rule with WTO Agreement on Government Procurement (GPA 1994)
- Changing contexts (slides 11-14), including trends to privatisation and outsourcing
 - Policy: First focus very much on single market, later high urgency of environmental problems, now climate change => environmental competence enshrined in Single European Act
 - Service provision: Trends to privatisation and outsourcing; here is a link to the issue of democracy as mentioned by H. Rühle: decision at local level on who is going to and how to provide services: in former decades government did government tasks within government structures/administration => in-house option; delegation/contracting out = focus on contractual arrangements and their control
 - Issue of domestic tax payers: should the change of actual delivery of services after outsourcing (i.e. no longer the local/regional authority) also influence the capacity of governments at different levels to pursue policies as decided by parliaments and governments? NO!
- Integration principle (Amsterdam Treaty) and effects on PP law/policy. This policy shift offered the possibility to pursue horizontal policy objectives (that should not be called "secondary policies" because there is not/should not be a hierarchy between economic and internal market objectives and other challenges/objectives (social; health; employment; housing; environment; fair trade) as they principally are as important as the economic ones
- Different stages at which horizontal policies might be pursued (slide 18)
- Restrictive interpretations by European Commission as to technical specifications and the use of most economically advantageous tender (MEAT) (slide 19) later reversed by ECJ
- Overview on key ECJ cases prior to 2004:
 - Beentjes (with social policy element => long-term unemployed; no appropriate selection procedure and award criteria)
 - NPdC (public works contract; public authority had included shares for the employment of long-term unemployed as award criteria; EC: not possible, not directly related to

- offer, no direct economic advantage for procuring agency; ECJ: possible, compliance with Treaty principles)
- PreußenElektra (request to buy electricity from renewable sources; energy generated in local area, impact on imports; ECJ held that this is completely lawful as environmental objectives can be included)
- Concordia Bus Finland (advantages for running bus services not exceeding pre-defined pollution or noise targets; EC claimed that controlling/lowering the pollution/noise level has no direct economic advantage for authority, saw no link to subject matter; ECJ: not too vague and no excessive discretion; contract can also be awarded if only a few providers can meet standards; ECJ ruling created modern framework for the inclusion of horizontal objectives in PP)
- EVN: legitimate to have as an award criterion to (also?/exclusively?) use energy from non-nuclear sources; credit for having and building up capacity to produce green energy beyond need and demand; EC: award criteria not linked to subject matter; supply capacity to supply also others than procurer
- Technical specifications: cases where procurement performance management is not related to consumption stage; invisibility fallacy of green electricity; it is clear that people want “cleaner” energy production and expect the procuring authority to procure for this product and also to “accept” higher prices; EC set course back
- PP has to allow democratically elected local authorities to spend local money according to policy priorities
- Is there space for mandatory standards?
- What can we learn from the US in the context of PP: where social policy objectives can be included in PP this is due to specific legislative provisions; EU could go some way down this track, too, to better balance social policy objectives/social concerns against others

Marc Steiner (Swiss Federal Administrative Court): The future of European Public Procurement Law and compliance with international obligation

N.B.: BULLET POINTS HAVE TO BE READ TOGETHER WITH SLIDE SET

- Switzerland applies the WTO GPA as main non-national legal framework for PP
- Basic assumption is that one is in breach with rules in pursuing social development objectives, but this can be reversed, burden of proof on tenderer
- Pursuit of objective of protection and preservation of environment is weaker than integration principle within EU
- Commitment to ILO Core Labour Standards (CLS); there is an obligation to respect them even in countries that have not ratified them (slide 10)
- Trade and labour in GPA context: international public law knows the notion of “fundamental guarantees in law” (comparable to the Charter of Fundamental Rights), they can be integrated into PP and used to outweigh trade logic as there is also the principle/legal concept of policy coherence
- Asking respect of ILO CLS in the context of PP is not the same as an import ban or a trade sanction in the general WTO context
- Trade and labour in EU context (slides 15, 16, 17 and 18): legal basis for the pursuit of secondary policies via definition of special conditions related to the performance of the contract, Art. 26 Directive 2004/18/EC + recital 33
- Interplay between GPA and EU law: applying it is interpreting the GPA
- Nature of GPA: setting of minimum standards in international trade (e.g. non-discrimination), no comprehensive PP codification (as at EU-level), not a policy making tool or an prescriptive instrument on how to shape non-trade related policies
- GPA allows to take account of ILO CLS at the stage of ability test for provider, therefore bidders not fulfilling certain standards can be excluded from the start; this is different to contract performance clauses that shift the problem to the implementation phase
- Ability exam for providers can comprise different elements, but it focuses on the compliance with minimum standards (such as the ILO CLS); however, Fair Trade is NO minimum

- criteria and therefore not “protected” at the same level as the ILO CLS (which consequences has this for the further development of PP?); suppliers also cannot be excluded if they cannot fulfil requirements not linked to the contract performance
- It is possible to impose criteria/enforcing measures related to the product or services of handicapped persons; as a “social aspect” they get in; this can serve as a justification to include other aspects than single market and trade concerns in PP; potential to use the GPA to justify policies directed at labour and environmental conditions in other countries?
 - In CH: bidder has to assure at least compliance with ILO CLS if the object of a contract is performed abroad; also sub-contractors and suppliers have to comply with ILO CLS
 - Art. 35 CFR is part of chapter IV on solidarity; is there a judge to monitor and decide on compliance with this article? Art. 35 is a social guarantee, no normal fundamental guarantee (procedural issues; these could be used to go to court), it is rather an objective of the EU as those enshrined in Art. 3 LT; social guarantees, however, are legally not on the same footing as fundamental guarantees
 - ILO CLS has been introduced as supporting measure in the context of globalisation and the development of non-European countries; but as they are minimum requirements they can be included in the ability test; general interest concerns can be used to limit the rule of internal market rules
 - What we can learn from looking at the GPA is that we have to bear in mind other directives when aiming at a revision of the PP rules
 - The GPA is optional, not compulsory, its signatories have an interest to increase the circle and therefore to give more flexibility
 - GPA panels take into account the international public law; another rule says that as long as no body of/from the signatories has protested things are state/administrative practice and legally in line with the PS
 - The ECJ recently and currently is dealing with cases related to PP which have an impact on fundamental rights

11.00 – 13.00 **Session II: Operationalising Social Considerations in the Award Stage of the Procurement Process**

Objectives:

- To identify key obstacles to pursuing sustainable development through public procurement, in the experience of contracting authorities under the current procurement regime
- To identify and frame key legal questions at issue in the current debate about social considerations in public procurement
- To discuss how social consideration can be operationalised as part of the award stage of the procurement process, *i.e.*, the use of social considerations as technical specifications or other award criteria

Questions for Consideration

- (1) *If social considerations are incorporated into technical specifications or other award criteria, what would be the **implications for the evaluation of tenders**?*
- *What kinds of evidence could be / would need to be considered in order to evaluate compliance with these award criteria?*
 - *What are the implications of considering the relevant evidence for concerns relating to the principles of transparency and non-discrimination?*
 - *What kinds of tools could facilitate the effective and efficient evaluation of social considerations at the award stage?*
 - *Framework contracts?*
 - *Preliminary and systematic screening and approval of certification schemes judged as providing prima facie evidence of compliance with sustainability criteria*
 - *e.g., experience of Dutch and UK sustainable timber procurement policies*
 - *also fair trade procurement examples?*
- (2) *How should the requirement that award criteria be “**linked to the subject matter of the contract**” in the case of award criteria incorporating social considerations be understood?*
- *Review of how the European Court of Justice has applied this requirement*
 - *What is the bearing of horizontal procurement criteria on this requirement?*
 - *Performance/consumption characteristics vs. production characteristics – how these concepts relate to supply contracts? to service/works contracts?*
 - *How do the relevant issues relate to life-cycle assessment of sustainability?*
 - *Critique European Commission’s concept of “invisible” product characteristics*
 - *Social considerations as part of a sustainable production process; towards a more integrated understanding of sustainable development through procurement*
- (3) *What are the terms of reference for determining an “**economically most advantageous**” tender?*
- *Is this a useful phrase/concept/formulation for weighing horizontal procurement criteria along with functional procurement criteria, or should it be revised?*
 - *How can the place and value of horizontal objectives in procurement be more explicitly recognised and valued?*
- (4) *Issues relating to the post-award **verification of compliance** with social considerations encompassing social considerations as well as with contract performance conditions encompassing social considerations*
- *Review of relevant ECJ cases*
 - *Contrast evaluation of social criteria including social considerations at the award stage vs. verification of compliance with social considerations at the contract performance stage*
 - *Why inclusion of social considerations at the award stage is preferable*
 - *Why verification of post-award compliance is essential*

- Identifying the sorts of social considerations that are ineligible for award criteria and properly relegated to contract performance conditions
- What kinds of tools/procedures could facilitate the effective and efficient verification of compliance with social considerations?
- What should be the consequences of failure to comply with social considerations?
 - Supply chain liabilities
 - Contractual sanctions

WHAT THE INFORMAL NETWORK WISHES TO HEAR

<p>If social considerations are incorporated into technical specifications or other award criteria, what would be the implications for the evaluation of tenders?</p>	<ul style="list-style-type: none"> • Contracting authorities should be able to choose between tenders on the basis of social considerations. • Evidence that would allow contracting authorities to choose between tenders on the basis of social considerations can be obtained and assessed in line with the principles of transparency, non-discrimination, and proportionality. • The revised Directives should allow and promote tools that can make the consideration of sustainable procurement criteria, including social considerations, easier and more efficient for contracting authorities (e.g., framework contracts, systems to pre-assess whether or not established certification systems conform with sustainable procurement criteria). • Contracting authorities should be able to consider “a priori” evidence on bidders (“track record”) at the award stage
<p>How should the requirement that award criteria be “linked to the subject matter of the contract” in the case of award criteria incorporating social considerations be understood?</p>	<ul style="list-style-type: none"> • Social considerations refer to the ethical characteristics of the subject matter of the contract. • The interpretation of what “product characteristics” is should not be limited to “physical characteristics”, the “Green Electricity” precedent should lead to a review of the approach by the EC. • Social considerations are part of the production process of products and relevant to a determination of whether a product has been sustainably produced. Such production process issues do not fit into the contract performance clauses.
<p>What are the terms of reference for determining an “economically most advantageous” tender?</p>	<ul style="list-style-type: none"> • “Economically most advantageous” must be interpreted to allow and promote horizontal EU objectives, including sustainable development objectives. • Alternative legislative language that would better promote this goal should be considered
<p>Issues relating to the post-award verification of compliance with social considerations encompassing social considerations as well as with contract performance conditions encompassing social considerations</p>	<ul style="list-style-type: none"> • It is difficult and costly to cancel and re-issue a tender where the awardee fails to deliver sustainable procurement objectives. Therefore, it is important that contracting authorities be allowed to assess relevant information “a priori” on bidders, including bidders’ prior track record or demonstrated commitment to sustainable development objectives. • Contracting authorities should have the tools to effectively be able to implement “ex post” (when contract has been already awarded) the social considerations, include contract penalties for failing to deliver on social development objectives in accordance with the criteria indicated in the contract.

Moderation: Janet Pritchard (ClientEarth)

N.B.: BULLET POINTS HAVE TO BE READ TOGETHER WITH SLIDE SET

Issues

- How to work towards an EU framework that supports policy objectives?
- Legal perspectives and perspectives of those that implement legislation and policy
- How to enable greater take up and achievement of SR PP

Questions to be considered

- How to understand production processes and limitations put until now?
- Has EMAT been the appropriate concept and provided sufficient legal quality?
- What type of recourse in case of non-compliance
- EU has an ambition and intention – how to best include concerns of SRPP

Marc Martens (Bird & Bird)

- Environment criteria can be extrapolated into SR criteria
- Example of the link to the subject matter
- How can specific criteria linked to the subject matter, first accepted as performance criteria, as secondary award criteria in CdP, then as consumption criteria, then finally production process issues have been accepted
- Criteria related to production process can be put that are not only of economic matter; EC interpreted that there must be a physical trace; intrinsic characteristics are not changed
- What is the link to the subject matter: it is necessary
- Extrapolation to social criteria: human resource to produce shoes is necessary
- Let us try and see what the ECJ will say about this, to enlarge acceptance of criteria that could be used in TP or AW that are sufficiently linked to subject clause

Sophie Tind Nielsen (CPET - Central Point of Expertise on Timber)

- UK: Timber has to come from legal and verified sources, voluntary partnership projects
- Definition on what is meant by legal and sustainable, needed to assess compliance
- Different approached
- National criteria developed and realised based on internationally accepted criteria (MCPFE)
- Initially social criteria were left out, later social criteria can be included in contract clauses/contract performance stage as long as they are not included in the specification stage
- List of criteria, based on definition of sustainable, reference to ILO criteria
- Implementation via model specifications/timber procurement advice note, clarification of what evidence (certification scheme) is accepted
- Social criteria must not be included in the TS, but only in the contract conditions
- Need to comply with contract conditions
- Sources: certification schemes
- In practice: certification schemes need to ensure compliance with social criteria
- Confusion across public sector buyers, contract managers; lack of understanding why social criteria can't be included upfront
- In pp on timber long road down, up to forest management

Mark Hidson (ICLEI)

- At national level encouragement to do SRPP, but restrictions perceived in EU PP Law
- Shifts towards more SR PP within many public authorities

- Are the directives still serving the purpose; purchasing the most appropriate product or the cheapest
- Additional requirements will initially increase cost, in life-cycle cost can be lower
- Actually avoiding the inclusion of social issues because it's badly understood
- What criteria can be classified to subject matter and production process and characteristics, art. 33 of the directive not clear for them
- Why social issues only in the contract award (Guide SRPP pushes for that), why not also in TS
- Narrow interpretation of existing EU legislation due to lack of guidance, training the managers is key to get across the SR criteria

Gesa Wessolowski (City of Bremen)

- Project of applying social standards to public purchasing
- Reorganisation to green procurement rather easy, a shift to strengthen social responsible public procurement, however, rather difficult
- City/State of Bremen demand application of regional legislation on working and pay condition (*German: verpflichtende Vorgabe seitens des Landesgesetzgebers: Anwendung des Tariftreuegesetzes*) and compliance with pertinent collective agreements
- ILO Core Labour Standards have been applied when purchasing photocopy machines; danger of not functioning effectively as/when they don't apply for whole supply chain and/or compliance with this requirement can't be effectively controlled; for the same purchase green procurement criteria have also been included/applied
- Local authorities would benefit considerably from having at their disposal standard contracts (*German: Mustervertrag*); there are some examples for guidelines that are also actually used, such as a guideline on how to practically do so issued by the German Federal Ministry for Development Cooperation (*German: BMZ*)
- Proof of compliance with social and green standards (ideally: down the supply chain) is asked for at customs services (entry into EU)
- When asking specific or high standards it has been sometimes difficult for the City/State of Bremen to find appropriate suppliers; however, what often worked was a dialogue with potential suppliers/providers that as a rule was instrumental in clarifying the requirements
- In this context also NGO played a decisive role to identify suppliers/providers that can comply with criteria set, that would inform about existing certification system/explain what they actually assess; these proofs are needed to also justify higher prices; cooperation is also needed to deal with complexity and frequent changes that can't be followed by all procurement agencies at local and regional level
- City of Bremen moved (back) towards a centralisation of the organisation of cleaning services under public control; one important reason was that only thereby compliance with regional legislation on working and pay condition and the pertinent collective agreements could be guaranteed
- Experience in Bremen showed the key role of functioning/effective work councils and shop stewards to support the implementation of policies and processes supportive of public procurement promoting sustainable development goals

Klaus Wiedner (European Commission/DG Markt)

N.B.: BULLET POINTS HAVE TO BE READ TOGETHER WITH SLIDE SET

- What can be done more to foster integration of social criteria
- Mindset of Commission changed
- Guide of buying social: Things linked to the subject matter
- Problem we facing in going forward: keep the link to subject matter and the performance of the contract, go as far as we can to include social criteria, perhaps some clarifications needed

- Change of enterprise policy (e.g. minority quota; women quota high employment of unemployed), then focus on shift to policy of enterprise and not to content and quality of contract, here seeing risks, also because bigger enterprises can react quicker/SME “protection”
- Environmental issues largely linked to subject matter, social always also change of policy
- Access to tender, also as SME, self-declaration enough; as more as you include at the first step can you rely on self declarations from third countries down the supply chain; additional burdens for enterprises because they would first need certification, careful not to promote a specific label, openness for different systems of certification
- Training crucial, more resources at national level, need a knowledgeable body at national level

Moderation: Janet Pritchard (ClientEarth)

N.B.: BULLET POINTS HAVE TO BE READ TOGETHER WITH SLIDE SET

- 4 central issues
 - 1: What is the real nature of the link to subject matter and how linked to production process in a meaningful way, question of scope
 - Noting a change in Commission perspective vis-à-vis a stance, more open in a way that social criteria can be part of/related to the production process; how broad can we become
 - 2: Where do we include social criteria in the procurement process; far back in the production stream, where does it make sense to include in view of verification process
 - 3: How to define criteria for sustainable products, how to find the supplies, is this a place for award criteria, to be opened to those above the edge to change the market due to policy achievements, pp to be a promoter for this
 - 4: Acknowledgement that green pp had more success, but desire to catch up as to social criteria, how can we learn from this? Include knowledge and evidence from production processes to include social standards

Discussion

Peter Kunzlik, City University London

- No change in Guide as to invisible effect/characteristics on product
- What is linked to the subject matter is the product, in TS you tell what you want to buy; things need to be in technical specifications, if they are in contract conditions difficult to select out a bidder; you can only wait until they reach the conditions and then sue, only ex post; this is why change is needed, procurement lawyers and officer are risk averse; can't put PPM in TS unless they affect the final product; needed: clarification to put it in the TS or set out what legal consequences of other approach are

Marc Hidson, Bird & Bird

- Social aspects for some should be better in award stage; being at award stages (knowledge) allows to make a proper assessment of bidders, if criteria are in TS does not allow it; you might not get what you want, but only know it ex post

Marc Steiner, Legal Expert/Judge Swiss Federal Administrative Court

- Behaviour of enterprise changes if its aware that the consumer approach (market) has changed; EU clothing industry learnt that they had to face quality requests; we need quality elements included in the pp

Marc Martens, Bird & Bird

- Supply of contracts how performed? Production process done in the past and is not linked necessarily to the performance of the contracts

Tind Nielsen, CPET

- Alternative forms of production can only be assessed on the basis of criteria, self declaration not to be accepted when it comes about social criteria, risk assessment element needs to be in
- MEAO is also about getting the environmental and social benefits

Bertrand Wert, DG ENTR

- Innovation policy perspective, Bremen/timber/supply chain examples
- At EU level political commitment to go further in PP, budget consequences, associating the demand of procurers to budgets

Klaus Wiedner, DG MARKT

- How to link subject matter with social criteria
- Consultation paper
- Drawing the line that if PP is to change enterprise policies is not acceptable
- Turn around the perspective, pa can influence markets and have the right to do so in view of policy objectives, not single/personalised to enterprises
- Competitiveness consists in addressing the new demands from the market
- What are the consequences of not encouraging, downward spiral, because enterprises are allowed to cut wages, lower working conditions
- Do we want to lead with objective and goals and then define the legal framework or the other way around
- Wienstrom case; what matters is what you get from providers; limits as to where to educate enterprises

Marc Steiner, Legal Expert/Judge Swiss Federal Administrative Court

- Related ECJ backing verification, how to judge compliance, not enough to keep them in the performance clause, don't have the same clout, how to introduce compliance/control more upfront
- Other ways of looking at the challenge of verification

Penny Clarke, EPSU

- GP quote
- Economic logic of private against public below, need to have values upfront
- Encourage public authorities to do things
- Reliance on work councils to achieve verification, not needed to control everything from the start, can be put up on the way
- Market being rationale not correct, take away from rights of enterprises to compete to political will of public procurers

Mark Hidson, ICLEI

- It is more difficult to verify social aspects, mainly in Developing Countries.
- It is important the relationship with the suppliers, which is usually underestimated
- Sophie Tind Nielsen, CPETW refers to two schemes, which cover a lot of other schemes
- Need to have a mix of verification policies; self declaration, third party certification, penalties; supplier relationship as important criteria
- Guidance: model criteria to see what can be included where, for MS and LA to be used for implementation
- Social criteria often build into legislation

Bertrand Wert, DG ENTR

- Market failure, rational to use innovation PP as a tool to start innovation

- 4 lead markets linked to sustainable development
- Citizens are consumers and express a preference
- It is a choice or do we want binding rules that every procurers
- Shouldn't it be up to the individual procurer to define things leaving choices
- How transparent is policy making through pp, better to give subsidies to pursue policy objectives
- EC state aid policy curtails purchasing discretion of purchasers
- 2004 starting with horizontal policy

Heide Rühle MEP

- Ermöglichung getrennter Behandlung von Politikzielen in anderen Gesetzen
- It is important that public authorities can choose what to pursue: they do not have to be obliged

Sergi Corbalán, FTAO

- The current framework and the EC interpretation create confusion to public authorities on how to introduce sustainable dev. considerations in public procurement and in case of doubt, public authorities will drop introducing sustainable development considerations altogether.
- EU rules should allow public authorities to "call a cat a cat" (e.g. if they want Fair Trade products or sustainable forest timber, they should allowed be transparent and indicate it in the subject matter and technical specifications). Contracting authorities should be able to ask for the products and service they wish by the front door: this will in the long-run reduce costs, but for this clear legal framework and transparency

Hannah Reed, TUC

- Equally the promotion of equality and promotion of skills should be included in a manner that pp law includes it
- Inequalities of pay and high unemployment also affect of market failures, let governments use their purchasing power to address market failures
- ECJ Rüffert ruling creates a situation of unfair competition, non-domestic providers are able to undercut standards also creating unfair competition

13.00 – 13.30 Wrap Up Panel

With contributions from

- Sergi Corbalán (Network for Sustainable Development in Public Procurement)
- Jo Versteven (Services Publics Fédéraux Belge - Développement Durable)
- Klaus Wiedner (European Commission/ DG Markt)
- Heide Rühle (MEP)

Objectives:

- To summarize and draw conclusions from the foregoing presentations and discussions.
- To clarify key issues for the directive revision process, and how they should be framed for consideration by stakeholders and lawmakers.
- To point to implications for next steps in the directive revision process.

Sergi Corbalán, FTAO, on behalf of Informal Network for Sustainable Development in Public Procurement (INSDPP)

- The network for Sustainable Development in Public Procurement is an informal group of organisations that share the objective to render the EU public procurement rules a tool to achieve the EU sustainable development objectives. An initial submission has been sent to Commissioner Barnier in November 2010.
- EU cannot use WTO Government Procurement Agreement an excuse not to support sustainable development in public procurement, since the GPA, as confirmed by Judge Steiner, is a “minimum standards technical international treaty” while the EU Public Procurement is a comprehensive piece of legislation which should also take into account the wider EU Treaty Objectives in light of the integration principle.
- This is an issue of democracy: Local, Regional and National authorities have the right to choose which products and services they want: EU rules should not prevent or make this difficult.
- EU PP rules, as stated by Prof. Kunzlik, are about HOW to procure, not preventing political decisions on WHAT to procure.
- It is important to listen at this very important moment to the practical difficulties that public authorities (in particular small ones) have when wishing to introduce sustainable development in public procurement
- In terms of the evaluation of offers, we should reflect on the “Most Economically Advantageous Tender” concept and how it should be interpreted to serve horizontal EU Treaty objectives
- Compliance: let’s put ourselves in the shoes of procuring agencies. If social issues are relegated to contract performance clauses, contracting authorities find it difficult to demand from the awarded bidder compliance with the social considerations, once the contract has been awarded.
- The members of the network for Sustainable Development in Public Procurement look forward to working with EU institutions and other stakeholders during the important upcoming discussions of revision of the EU public procurement rules.

Jo Versteven, SPF DD (B)

- Social issues need to be included anyway as to the ILO CLS
- Swiss law example useful, reference to ILO CLS relevant, to better address verification issues
- Subject matter and tension on influencing companies or markets
- Self-declaration can be used when risk is not too high
- Competition between labelling schemes
- Difference between TS (selection) and qualification issues and performance issues (working with a selected company)
- Need to better integrate social aspects into qualification process

- Better work with suppliers
- Procurers often chose the safe way not to take risks
- New paradigm, before purely economic perspective, now discussion of SRPP

Klaus Wiedner (European Commission/DG Markt)

- Try to get away with the link? PP rules have been oriented towards to this for last 40 years; other idea is to purchase something, don't care about the quality of the product
- Where at the stage of the procurement process should social criteria be taken into account? Selection of bidders could be done in view of criteria you want them to perform
- Are there different levels of compliance with legal requirements
- Verification schemes, difficulty what to do when you have competing system, does this also include risk assessment, what are alternatives way of verify

Heide Rühle MEP

- Discussion of life-cycle cost due to innovation cost, environmental cost – also needed in view of social costs
- Need to go towards EMAO, cheap offer confused a lot, used to misinterpret EU rules
- Especially in social sector this has brought up a lot of competition against the purpose of social and health policy objectives
- EU framework reference/EU database for labels to define a sort of orientation
- Subject matter
- Working with the suppliers, more negotiated procedures
- Heide Rühle will be EP rapporteur on Green Paper on Public Procurement

* * *

Social Considerations in Public Procurement

3 March 2011

Klaus Wiedner, Head of Unit
DG Internal Market & Services
Directorate C: Public Procurement Policy

European Commission 
Internal Market & Services DG

1

Public procurement and sustainable development

Public Procurement (PP)

- represents around 17% of EU GDP
- has the potential to steer the market in a more socially and environmentally responsible direction

European Commission 
Internal Market & Services DG

2

Socially responsible public procurement: current rules and new challenges

- current EU PP directives : large number of possibilities to take into account social considerations in the PP process
- Guide on taking account on social considerations in PP: aims at
 - explaining these possibilities further:
 - improving awareness about the potential benefits of socially responsible PP
- Green Paper (GP) on the modernisation of PP rules:
 - many questions about how to use PP to better respond to new societal challenges, e.g. climate change, improving social conditions and more generally promoting sustainable development.

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Internal Market & Services DG

3

Link with the subject matter/performance of the contract

- = important condition : ensures that purchase itself is central to the procurement process
 - = to guarantee efficient use of public money
- Relaxation of this requirement might influence the undertakings' general policy towards social inclusion and environmental considerations, but triggers risks such as:
 - creating discrimination and restricting competition
 - affecting convergence between PP and State aid rules
 - creating additional burdens for SMEs

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Internal Market & Services DG

4

Link with the subject matter/performance of the contract

The Green Paper asks stakeholders' views about :

- the need for relaxation of this condition + possible corrective mechanisms in order to mitigate risks
- the most appropriate stage of the procurement process for softening the need of a link with the subject matter of the contract

Some stakeholders suggest:

- allowing public purchasers to apply selection criteria on characteristics not linked to the subject matter of the contract,
- but permitting to verify to a larger extent the “social morality” of candidates
- however, appropriate safeguards = necessary to avoid discrimination.

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5

Verification of requirements

- Current rules :
 - specific certification schemes (e.g. forest certifications, social certificates) = acceptable as possible means of proof,
 - but equivalent means must also be accepted
 - = permits access to public contracts also to undertakings that cannot afford certification, but comply with CA requirements
- Problem: capacity of public purchasers to verify compliance and reliability of alternative means of proof provided by candidates.
 - = issue particularly relevant where part of the supply chain is situated in a third country (e.g. how to verify absence of child labour during the production of stones used for the construction of public works).

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6

Verification of requirements

- Green paper asks
 - how to facilitate effective and efficient verification of compliance with social/environmental considerations
 - but without additional administrative burden and prohibitive certification costs for SMEs.
- = much easier if trade instruments would permit to guarantee that all products entered on the EU market are produced with the respect of certain social and environmental standards
- = much too complex, therefore PP legislation must find effective solutions to deal with uncertainty as regards reliability of means of proof submitted by tenderers

Conclusion: we hope that this debate and the contributions received during the public consultation will permit to identify the most adequate solution.

European Commission 
Internal Market & Services DG

Sustainability and Public Procurement – Legal Background

Judge Marc Steiner,
Swiss Federal Administrative Court

Brussels, 3rd March 2011

1

Preliminary remark I: GPA in Switzerland

Contrary to EU member states for Switzerland the WTO Government Procurement Agreement constitutes the most important non-national legal framework.

Brussels, 3rd March 2011

2

Preliminary Remark II: GPA in the EU context

The contracting authorities ... which apply [this Directive] ... should therefore be in conformity with the [Government Procurement] Agreement (Recital 7 Directive 2004/18/EC).

Brussels, 3rd March 2011

3

GPA 1994 as a plurilateral agreement

Other agreements, as revised in the Uruguay Round, became part of the WTO ... applicable to all WTO members. ... The result of the GPA negotiations, by contrast, was a plurilateral agreement.

Brussels, 3rd March 2011

4

GPA 1994: Basic principles (I)

Two non-discrimination pillars:

- national treatment
- most favoured nation obligation

Article III:2(b): "... entities shall not discriminate against locally-established suppliers on the basis of the country of production of the good ..."

GPA 1994: Basic principles (II)

These prohibitions affect, most notably, secondary policies directed at supporting non-competitive domestic industries (Arrowsmith, Government Procurement in the WTO, p. 328)

GPA 1994: Basic principles (III)

Sustainable Public Procurement is not by definition directed at supporting non-competitive domestic industries, but there is a potential for abuse.

Brussels, 3rd March 2011

7

Balance of interests and Sustainability

Marrakesh Agreement Establishing the WTO:
... While allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking ... to protect and preserve the environment ...

Brussels, 3rd March 2011

8

Balance of interests: Trade and Labour

WTO approach:

We renew our commitment to the observance of .. ILO core labour standards. ... We reject the use of labour standards for protectionist purposes

(Singapore Ministerial Declaration 1996)

Brussels, 3rd March 2011

9

Balance of interests: Trade and Labour

ILO approach:

Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the ILO, to respect ... the [ILO core labour standards] (1998 ILO Declaration on Fundamental Principles and Rights at Work).

Brussels, 3rd March 2011

10

Balance of interests: Trade and Labour

ILO and public contracts:

The ILO-Convention (94) on Labour Clauses in Public Contracts is not exactly a success (International Labour Office, General Survey concerning the Labour Clauses Convention and Recommendation, Geneva 2008).

Brussels, 3rd March 2011

11

Trade and Labour in the general WTO context

The problem of the admissibility of trade sanctions to enforce core labour rights divided the member states and still does (Werner Meng, in: Benvenisti/Nolte 2004, p. 381).

http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm

Brussels, 3rd March 2011

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Trade and Labour in the general WTO context

These conflicts need to be resolved if international law is to provide a reliable and credible system of norms (Christine Kaufmann, Globalisation and Labour Rights, 2007, p. 272).

Trade and Labour in the GPA context

Asking the respect of ILO core labour standards in the context of public purchasing is not the same as a import ban or a trade sanction in the general WTO context.

Trade and Labour in the EU context

Secondary policies / Legal basis

Art. 26 Directive 2004/18/EC:

Conditions for performance of contracts

Brussels, 3rd March 2011

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Trade and Labour in the EU context

Contracting authorities may lay down special conditions relating to the performance of a contract. ... The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

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Trade and Labour in the EU context

For instance, mention may be made, ... of the requirements ... to comply in substance with the provisions of the basic ILO Conventions, assuming that such provisions have not been implemented in national law (Recital 33 Directive 2004/18/EC).

Brussels, 3rd March 2011

17

Legal coherence: Limitations on secondary policy criteria

Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents (Recital 33 Directive 2004/18/EC).

Brussels, 3rd March 2011

18

Interplay GPA and EU Directives

The contracting authorities ... which apply [this Directive] ... should therefore be in conformity with the [Government Procurement] Agreement (Recital 7 Directive 2004/18/EC). -> **Applying EU law is interpreting the GPA!**

Brussels, 3rd March 2011

19

Secondary policies / purity principle

According to the purity principle one purpose of public procurement regulation would be to establish a system that reduces as far as possible the insertion of non-economic criteria into the procurement process (definition by Sue Arrow-smith / Christopher McCrudden discussing the GPA).

Brussels, 3rd March 2011

20

GPA: Setting of minimum standards or comprehensive procurement codification?

Review of the GPA:

The objective of simplification and improvement was thought to be a key element in attracting wider membership and thus improve the multilateral aspect of the Agreement (Trepte, p. 1161).

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21

Art. VIII GPA – Qualification of Suppliers

Art. VIII(b): Any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capacity to fulfil the contract in question.

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Art. VIII GPA – Qualification of Suppliers

Art. VIII(h): Nothing in subparagraphs (a) through (g) shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations, provided that such an action is consistent with the national treatment and non-discrimination provisions of this Agreement.

Secondary Conditions

However, it is arguable that the rules on qualification criteria do not allow suppliers to be excluded because they cannot comply with requirements unconnected with contract performance (Arrowsmith, Government Procurement in the WTO, p. 336 s.).

Art. XXIII GPA: Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of ... unjustifiable discrimination ..., nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures ... relating to the products or services of handicapped persons ...

Brussels, 3rd March 2011

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Art. XXIII GPA: Exceptions

Can Art. XXIII.2 not be used to justify policies directed at labour or environmental conditions in other countries – for example, requirements relating to working conditions where the workers concerned are based in other GPA states?

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Swiss finish (federal level; since 2010)

If the task being the object of the contract is performed abroad, the bidder has to assure at least the respect of the ILO Core Labour Standards (Swiss Federal Ordinance on Public Procurement [VöB])

Swiss finish (federal level; since 2010)

The procuring entity requires that subcontractors and suppliers also comply with the ILO Core Labour Standards. This is assured by a contractual transfer of this obligation from the bidder to important suppliers and subcontractors (Recommendations on Sustainable Procurement).

Swiss finish (federal level; since 2010)

Recommendations (publication details):

<http://www.bbl.admin.ch/bkb/02617/02632/index.html?lang=de>

Swiss Federal Procurement Commission,
Sustainable procurement –
Recommendations for the federal
procurement offices, 2010

Charter of Fundamental Rights

Article 35

“[...] A high level of human health protection shall be ensured in the definition and implementation of all the Union’s policies and activities.”

Is this a fundamental guarantee or rather an objective like those enshrined in Art. 3 TEU?

Treaty on the Functioning of the EU

Article 7

The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.

Brussels, 3rd March 2011

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Contact

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The Historical Development of the EU Procurement Directives

Prof. Peter Kunzlik

The Treaty of Rome

- None of the founding treaties mentioned procurement – resulted from failure to reach agreement – preference policies highly sensitive
- But several provisions were relevant
 - Non-discrimination on grounds of nationality
 - Art 48 (free movement workers), 52-66 (freedom of establishment and to provide services)
 - Art 30 prohibited quantitative restrictions on imports and measures having equivalent effect.

The Treaty of Rome

- Arts 52 – 66 required Member States progressively to abolish restrictions on freedom of establishment of nationals of other member States
- These provisions provided a Treaty basis for subsequent legislation on procurement

General Programmes

- Council adopted two General programmes showing how restrictions on access to government contracts would be reduced over time (1962)

Directives

- Liberalisation (public contracts)
- Co-ordination (works & supplies *only*)

Co-ordination - approach

- Limit the extent to which technical specifications could be used to restrict participation
- Enhance transparency by rules requiring advertising
- Rules for selection of tenderers
- Restriction of award criteria to lowest price of most economically advantageous ('M.E.A.T.')

Subsequent Events

- Cecchini Report – The Cost of Non-Europe - 1985 White Paper ‘Completing the Internal market’)- The ‘1992 Programme’
- Subsequent broadening of the scope of explicit European competence

1985 White Paper, ‘Completing the Internal Market’ COM (85) 310 Final

- The compliance problem
- Restricted coverage (utilities, services not covered)

The Single Market Onwards – A Burst of Legislative Activity

- Improvements / amendments to existing texts
- Consolidation of existing texts
- Extension of scope – public services contracts
- Extension of scope – utilities works, supply, then services contracts
- Addressing the compliance problem – remedies re public, and later utilities contracts
- Alignment with GPA 1994

The 2004 Legislation

- 2004/17 – public works, supply, services
- 2004/18 utilities works supply services

Changing Context

- Recognition of urgency of environmental imperatives – acid rain, ozone depletion, climate change
- Evolution of the European Entity – not just an internal market – a wide range of policy areas
- Geographical expansion

Changing Context

- Trend to privatisation and outsourcing
- C- 324/98 Telaustria – applying Treaty principles to procurements not covered by the Directives

Extension of the Scope of European Law – Environmental Competence – The Single European Act

- Art 130s EC objectives of environmental policy & 'Principles' (precautionary, polluter should pay, remedy at source)
- A Legislative basis for environmental measures – Art 130r EC
- The 'integration principle' environmental protection requirements shall be a component of the Community's other policies: Art 130r(2) EC

The 'Integration Principle'

- Treaty of Amsterdam:

Environmental protection to be integrated into the *definition* and *implementation* of other Community policies: Art 6 EC as amended

Prior to 2004...

- Silence of the Directives as regards environmental and social policies in procurement
- Commission 'Guardian of the Treaty'- concern to limit purchasers discretion so as to avoid national preferences

Stages at which horizontal policies might be pursued

- Decision as to what to purchase
- Specifications
- Contract Performance Conditions
- Selection/Qualification
- Award Criteria

The Commission's restrictive interpretations

- Specifications – can only specify production processes and methods are regards supplies if the PPMs affect the consumption characteristics of the products.
- Award Criteria – where M.E.A.T. criteria are used, each criterion must confer a 'direct economic benefit' on the contracting authority

Key cases prior to 2004

- Contract performance conditions:
 - 31/87 Beentjes 1988
- Contract award criteria:
 - C-225/98 Nord-Pas-de-Calais 2000

Key cases prior to 2004

- The Integration Principle as regards environmental protection:
 - C-379/98 PreussenElektra 2001
- Contract award criteria:
 - C-513/99 Concordia Bus Finland 2002
 - C- 48/01 EVN 2003

Technical Specifications

- Impact of the case -law as regards technical specifications: PPMs, the invisibility fallacy, the revised invisibility fallacy, a new approach?

The impact of events & new approaches

- Climate Change - Energy Security – Energy Policy
- Procurement for a better environment, Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan, GPP.
- EU standards, labels and obligations – Community horizontal policy?

Key cases since 2004

- Interaction with directives
 - C-6/05 Medipac- Kazantzidis AE v Venizelio-Pananio (2007)
 - C- 346/06 Ruffert v Land Neidersachsen (2008)
- T- 331/06 Evropaiki Dynamiki etc v European Environment Agency (2010)