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FSC comments and proposals for EU Directives on Public Procurement

Introduction:

On the 20th of December, 2011 the European Commission published proposals for three Directives on Public Procurement¹. They are to become the core of the EU legal framework, setting out both opportunities and limits for procurement policies for all public authorities in the EU, except for small tenders.

An important departure from existing legislation is that the drafts do not only focus on EU-wide open and transparent procedures to ensure the functioning of the internal market and best value for public money. They have a second objective: to promote “Europe 2020”, the overarching agenda for the EU to promote “*smart, sustainable and inclusive economic growth*”. This means that public authorities are allowed, within limits, to use their money to promote environmental and social innovation and sustainability.

FSC’s interest

Public authorities have an enormous potential to boost the demand for products derived from sustainably harvested forest materials, as their joint purchasing represents some 18% of EU GDP. In addition to this, they can set a good example for commercial and private consumers.

More and more national, regional and local authorities have introduced public procurement policies which support environmental objectives and/or sustainable development. This often includes the requirement that forest products (construction wood, windows, furniture, paper, etc) originate from sustainably-managed forests, where FSC certificates can be used as evidence of this.

The European Commission is supporting such initiatives with its guidance on Green Public Procurement. It is important that the new Directives allow and encourage such green or sustainable procurement systematically rather than undermining or restrict it.

FSC’s overall assessment

The Commission proposals are positive in principle as they allow governments to include environmental and social impacts in their purchasing decisions. In this way, public procurement can become a vehicle to promote sustainable development. However, the draft Directives need fine-tuning to increase the potential positive impacts and to prevent both green-washing and unhelpful restrictions. Restrictions could even undermine the (in some countries already quite advanced) green/sustainable public procurement policies that can include FSC certificates as evidence of sustainably-sourced wood-based products.

¹ [COM\(2011\)896](#) on public procurement
[COM\(2011\) 895](#) final, on procurement by entities operating in the water, energy, transport and postal services
[COM\(2011\) 897](#) final, on the award of concession contracts

Three sets of FSC proposals²

1. Ensure consistency

According to the EU Treaties the EU promotes sustainable development, including “a high level of protection and improvement of the quality of the environment”, “the combat of social exclusion”, and “the promotion of social justice and protection”. They also require that environmental protection has to be “integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development”³

The EU Sustainable Development Strategy, adopted by the European Council in June 2006, also set as explicit objective to move forward with Green Public Procurement.

And, in December 2011 the EU Council of Ministers endorsed a new EU Biodiversity Strategy, and explicitly called to “integrate and mainstream targets on biodiversity in the development and implementation of all relevant EU and national sectoral policies”.

FSC also believes that the new Public Procurement Directives should be consistent with the above: it is therefore not enough to **allow** public procurement policies that aim for integrated approaches, which would mean that a non-integrated approach, which can cause environmental degradation and social hardship, is also still allowed.

A stronger push for green and sustainable procurement would also be an appropriate response to the impressive array of national policies of a growing number of EU Member States and many individual (local/regional) authorities. The Directives should clearly recognise the wish of such public authorities, and their citizens, to be certain that products and components of works or services are being produced in an environmentally and socially appropriate manner.

Therefore, in the view of FSC and many other organisations, the draft directives should be amended so that public tenders and the selection process ensure that the winning bid reflects the mission of public authorities to promote sustainable development.

*In particular Article 66/76/39 should be amended so that the award of public contracts shall always be based on “the most **broadly** economically advantageous tender”, referring to the interests of the public authority and its citizens as well as all other people related to the production and use of the supply/works/service.*

Specific amendments FSC proposes:

² References to articles are first to the general directive; second to the directive on public services; third the one on contracts. The last draft directive does not have language about labels so is not referred to in the 3rd proposal. Amendments were developed in cooperation with the Fair Trade Advocacy Office.

³ Treaty on European Union, article 3.3.; Treaty on the Functioning of the European Union, article 11

Article 66/76/39

1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which contracting authorities shall base the award of public contracts shall be focussed on ~~one of the following:~~

~~(a) the most broadly economically advantageous tender;~~

~~(b) the lowest cost.~~

Costs ~~shall~~ may be assessed, on the choice of the contracting authority, on the basis of ~~the price only or using~~ a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article (67/77/40).

[add “broadly” systematically to “economically advantageous tender” throughout the text, as well as change, where appropriate “may” into “shall” as above]

2. Correct the scope of production process requirements

It is encouraging to see that the Commission proposals allow for including requirements for production processes, including “raw material acquisition or generation of resources”. However, there is a strong emphasis on elements that can be “monetised and verified”. The requirement of monetisation may restrict requirements to sustainable forest management, as this includes an ambition to maintain and enhance biodiversity, something which can only partly be translated into financial loss or gain.

There is also an explicit limitation for social elements. First, contracting authorities may only include social criteria as award criteria and not as technical specifications. Second, only certain social criteria are permitted which relate to the working conditions of the persons directly participating in the process of production. An essential element of sustainable forest management is that it includes respect for the rights and interests of communities that are living in, are dependent on and/or are affected by the activities, even if they are not part of the staff of the management unit.

Therefore, the draft directives should be amended

- *The relevant social dimension restrictions in recital 41/47/29 should be expanded, allowing for requirements regarding the social impacts of the resource generation and production processes beyond the direct impacts for workers, to include also other people whose livelihoods are affected.*
- *Article 66/76/39 should present an extended scope for requirements on “specific process of production....” including environmental and social impacts which are not only “directly involved in these processes”.*
- *The text in article 67/77/40 should be changed so that external environmental costs that are hard to monetise but that can be verified through qualitative instruments (such as certification) are included.*

Specific amendments FSC proposes:

Recital (41/47/29) Furthermore, in technical specifications and in award criteria, contracting authorities should be allowed to refer to a specific production process, a specific mode of provision of services, or a specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the public contract. In order to better integrate social considerations in public procurement, procurers may also be allowed to include, in the award criterion of the most economically advantageous tender, characteristics related to the working conditions of the persons directly participating in the process of production or provision in question as well as impacts of production processes on the surrounding environment and adjacent communities.

Those characteristics ~~may only concern~~ include, among others, the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. Any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services²² and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. For service contracts and for contracts involving the design of works, contracting authorities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this may affect the quality of contract performance and, as a result, the economic value of the tender.

Article 66/76/39

2(d): the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point (22) of Article 2, to the extent that those criteria are specified in accordance with paragraph 4 and they concern factors directly involved in, and affected by these processes and characterise the specific process of production or provision of the requested works, supplies or services.

Article 67/77/40

1. Life-cycle costing shall to the extent relevant cover the following costs over the life cycle of a product, service or works as defined in point (22) of Article 2:

(a) internal costs, including costs relating to acquisition, such as production costs, use, such as energy consumption, maintenance costs, and end of life, such as collection and recycling costs and

(b) external environmental costs directly linked to the life cycle, where possible expressed provided their in verifiable monetary value ~~can be determined and verified~~, which may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs as well as impacts on biodiversity and/or ecosystems.

(c) external social costs

3. Whenever a common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, it shall be

applied where life-cycle costing is included in the award criteria referred to in Article 66(1). This obligation does not count when a Contracting authority chooses on purpose a methodology that contains more life-cycle elements than the common methodology.

3. Clarify the position of multi-stakeholder based private labels

Proposals include the option for contracting authorities to refer to labels as, not exclusively, proof of compliance with certain requirements. However, the requirements pose two potential problems for FSC certificates and similar multi-stakeholder driven labels.

The proposals require that “*the labels are established in an open and transparent procedure in which all stakeholders, including government bodies, consumers, manufacturers, distributors and environmental organisations, may participate*”. It is indeed important to safeguard the quality of the sustainability criteria for such labels by allowing citizens’ organisations which represent common interests, including social organisations, to play a decisive role. On the other hand, the Directives should recognise the value of private initiative, which means that involvement of “*government bodies*” should not be a requirement.

Furthermore, it is confusing that the criteria for a label “*are set by a third party which is independent from the economic operator applying for the label*”. This contradicts the earlier requirement that manufacturers should be part of the stakeholder decision-making process.

Therefore the draft directives should be amended

- *By making the involvement of government bodies in Article 41/55 an option instead of a requirement.*
- *By adapting Article 41/55 so the focus comes on third party attribution and verification of labels whose requirements are, as laid down already in 41/55 1.c., in multi-stakeholder processes or governmental processes with substantial multi-stakeholder input.*

Specific amendments FSC proposes:

Article 41/55

1. Where contracting authorities lay down environmental, social or other characteristics of a works, service or supply in terms of performance or functional requirements as referred to in point (a) of Article 40(3) they may require that these works, services or supplies bear a specific label, provided that all of the following conditions are fulfilled:

- (a) the requirements for the label ~~only~~ concern characteristics 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 requirements for the label are drawn up on the basis of scientific information or based on other objectively verifiable and non-discriminatory criteria;
- (c) the labels are established in an open and transparent procedure in which all stakeholders, including ~~government bodies~~, consumers, manufacturers, distributors and environmental and social organisations, may participate, have a substantial role,

- (d) the labels are accessible to all interested parties;
- (e) the ~~criteria of the label are set~~ the attribution and verification of the label are undertaken by a third party ~~which is independent from the economic operator applying for the label~~.

Contracting authorities requiring a specific label shall accept all equivalent labels that fulfil the requirements of the label indicated by the contracting authorities. For products that do not bear the label, contracting authorities shall also accept a technical dossier of the manufacturer or other appropriate means of proof of equivalence.

Finally, it is important that the 1st amendments of FSC are adopted, extending the scope of production process requirements, to avoid the unfortunate situation that existing labels, such as FSC and Fair Trade, would be considered as having requirements in excess of what is permitted by EU law.

What is FSC?

The Forest Stewardship Council (FSC) is an independent, non-governmental, not for profit organization established to promote the responsible management of the world's forests. FSC is a unique forum where stakeholders from around the world meet and through strong multi-stakeholder processes define essential social and environmental criteria for forest management. These fundamental principles are realized in forests worldwide through FSC certification. Through programs, services and solutions that support FSC certification, the Forest Stewardship Council empowers organizations, businesses and communities to support forest management that meets the social, economic and ecological needs of present and future generations. Find more information at www.fsc.org.

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