



# **To Buy or Not to Buy:**

## **Timber procurement policies in the EU**

January 2004

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## **To Buy or Not to Buy: Timber procurement policies in the EU**

Written by Mike Garforth, on behalf of FERN.

Edited by Catherine Cotton.

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### **FERN**

FERN promotes the conservation and sustainable use of forests and respect for the rights of forest peoples in the policies and practices of the European Union.

1c Fosseyway Business Centre, Stratford Road, Moreton in Marsh, Gloucestershire GL56 9NQ.

Tel: +44 (0)1608 652895 Fax: +44 (0)1608 652878.

email: [info@fern.org](mailto:info@fern.org)

Web site: [www.fern.org](http://www.fern.org)

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## **FOREWORD**

It has, for some time now, been recognised that government procurement has great potential as an effective way of contributing to responsible forest management globally. According to WWF governmental purchase of timber and timber products is estimated to account for 18 percent of total timber imports into G8 countries. Worth \$20 billion annually, this constitutes a formidable economic force in the international timber market. This force was clearly recognised at the G8 meeting in 1998 when the United States, Italy, France, Germany and the UK, together with the other G8 countries, agreed to a range of actions to control illegal logging and the international trade in illegally harvested timber. These actions were to include an assessment of each nation's internal measures – including their procurement policies.

Given these agreements – now five years ago – FERN determined to assess to what degree these countries had started to develop 'green' timber procurement policies. Furthermore, since the EU is about to adopt new Directives on Public Procurement it seemed timely and useful to identify the possibilities and problems governments would encounter in implementing both these Directives, and the WTO's Government Procurement Agreement.

This report is the result of this research. It explores the relative possibilities and limitations for government procurement of 'legal and sustainable' timber offered within both the old and new EU Procurement Directives and the WTO's Government Procurement Agreement. It concludes that while these Agreements do not actively prevent green timber procurement, they certainly don't make it easy.

The report further investigates the timber procurement policies of 9 EU member states and of the USA. Unfortunately, the conclusion is that the power of the EU and its member states to contribute to responsible forest management globally is currently being undermined by weak - or more frequently, non-existent – timber procurement policies within most member states. Indeed, to date, only Denmark and the UK currently recognise the complexity of defining 'legal and sustainable' sources of timber, and provide guidance on EU and international procurement rules. Meanwhile, while Germany and the Netherlands are developing such policies, Finland, Portugal, Italy, France and Ireland are not.

With the revised Public Procurement Directives likely to be endorsed by the Council and Parliament this month, and with member states having 21 months to bring their domestic legislation in line with the EU policy, there is a clear window of opportunity that can be exploited. We hope that all EU members will use the year ahead to develop strong timber procurement policies that take maximum advantage of the Directives' potential, and that bring about tangible, positive results.

**Saskia Ozinga**  
Director FERN

January 2004

# 1 EXECUTIVE SUMMARY

Government purchases account for a substantial proportion of world trade in timber products. Governments thus have enormous power to exert influence through the supply chain to combat illegal logging and to promote responsible forest management. This report examines the timber procurement policies of European Union (EU) member states and the USA to see to what extent their governments are using this power. The report also examines the EU's and the World Trade Organisation's (WTO) rules on public procurement to determine what opportunities they offer and what constraints they impose.

Nine EU member states as well as the USA responded to a questionnaire sent to national government contacts. The USA and six out of the nine EU member states reported that they do not have a national policy on procurement of timber from legal and sustainable sources. EU countries without a meaningful policy include France, Germany and Italy which, in 1998, together with the USA and other G8 countries, agreed a range of actions to control illegal logging and the international trade in illegally harvested timber. These agreed actions included an assessment of internal measures such as procurement policies. Only the UK and Denmark are operating substantive policies that recognise the complexity of defining legal and sustainable sources and provide guidance on how to determine compliance. Denmark's policy is limited to timber products originating in tropical forests.

The various stages of the procurement process provide purchasers with opportunities to favour, or insist on, timber products deriving from legal and sustainable sources. The EU's rules (recently revised following agreement on new Directives governing public procurement) and the WTO's Government Procurement Agreement (GPA) do allow for green timber procurement but limit these opportunities to some extent.

The possibilities for EU member states to implement green timber procurement policies are threefold: i) to include 'legal and sustainable' as contract conditions; ii) to include 'legal and sustainable' in technical specifications; iii) to include 'legal and sustainable' in award criteria. The new EU Directive is, however, ambiguous regarding the last two possibilities. Authorities would need to specify, in terms that could be evaluated objectively, what they mean by 'legal and sustainable' sources. This is complex but not impossible; the work already done by the UK and Danish governments provides a basis for all EU member states.

Non-EU countries that are parties to the WTO's GPA also have the opportunity of specifying legality and sustainability of source as contract award criteria or as contract conditions. However, their inclusion in technical specifications may be ruled out by the GPA's linking of technical specifications to product performance and functionality.

Consideration of 'legal and sustainable' in technical specifications and at the contract award stage does give purchasing authorities greater flexibility than including them in contract conditions. In this way authorities would be able to invite tenders offering different levels of sustainability thus encouraging the market to gradually raise the overall level. In contrast, contract conditions would have to specify a single level, which could be raised by the authority in new contracts if the authority was certain that suppliers could comply.

Both EU and WTO rules allow authorities to rule companies out of tenders on grounds that could include breach of international and national laws on forest management, harvesting and timber trade. In spite of restrictions imposed by EU and WTO rules, therefore, governments do have substantial scope to insist on timber products from legal and sustainable sources. To assist EU members in this, the EU Commission should revise its current guidance on procurement as soon as possible to remove all remaining ambiguity. It should also include specific guidance in relation to the procurement of timber products. At the same time, however, the EU's member states should not wait for clarification; they and other countries should seize the opportunity offered by their purchasing power to combat trade in illegal timber and to promote responsible forest management.

## 2 INTRODUCTION

1. Government purchases account for a substantial proportion of world trade in timber products. A recent report for WWF<sup>1</sup> estimated that the governments of the G8 purchase 18 percent of the timber products imported to their countries, generating a bill of over 20 billion US dollars annually. Governments thus have enormous power to exert influence through the supply chain to encourage responsible forest management and reduce the demand for illegally sourced timber. But how many use this power, and how many feel constrained by, or use the excuse of, WTO and EU rules governing public procurement?

2. This report examines the timber procurement policies of EU member states and the USA to assess to what extent their governments are using the purchasing power of their public bodies to combat trade in illegal timber and to promote responsible forest management. The report also examines the EU's and the WTO's rules on public procurement to determine what opportunities they offer and what constraints they impose.

3. The information on governments' procurement policies has been compiled from responses to a questionnaire distributed to all 15 EU member states and the US Federal Government in November 2003. It was not possible to elicit responses from Austria, Belgium, Greece, Luxembourg, Spain or Sweden.

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<sup>1</sup> *The Timber Footprint of the G8 and China. Making the case for green procurement by government.* Paul Toyne, Cliona O'Brien and Rod Nelson. May 2002.

### 3 EU MEMBER STATE AND US TIMBER PROCUREMENT POLICIES

4. The existence and scope of timber purchasing policies (ie: the purchasing bodies and materials to which the policies apply) for the USA and all EU member states that replied to the questionnaire are summarised in Table 1. The questionnaire was addressed to the national government of each country and the study did not attempt to identify whether lower tiers of government had adopted policies. Therefore, where a country is recorded as not having a policy, it should not be inferred that lower tiers of government do not have a policy.

5. Only two of the countries that responded – Denmark and the UK – are operating timber procurement policies that recognise the complexity of defining ‘legal and sustainable’ sources and provide guidance on how to determine compliance. Their policies are described in detail in subsequent paragraphs. Germany has a policy of checking that purchases are accompanied by a reliable certificate but has no criteria for determining what is ‘reliable’, thus rendering the policy ineffective.

**Table 1: Summary of Country Timber Procurement Policies**

| Country          | A policy is in force ? | Date present policy adopted | Scope of application/Comments   |
|------------------|------------------------|-----------------------------|---|
| Denmark          | Yes                    | June 2003                   | Serve as guidelines for ‘public and semi-public’ institutions. Cover raw materials, finished goods and intermediate products incorporating wood from tropical forests, whether they be natural forests such as rainforests, or plantations. Recycled wood and paper products are not covered.   |
| Finland          | No                     | -                           |   |
| France           | No                     | -                           | A report for WWF <i>The Timber Footprint of the G8 and China</i> <sup>2</sup> noted that in 2002 the French Minister for the Environment stated that: “The government has decided to include criteria in its public procurement practices which will favour the purchase of timber by FSC or equivalent certification systems”. There is no evidence of progress.   |
| Germany          | Yes                    | 1998                        | The Federal Government’s policy is to check that purchases of tropical timber are supported by reliable certificates. However, the government has not published any criteria for assessing whether a certificate can be considered ‘reliable’. The government is currently developing a broader procurement policy that will cover tropical wood and non-tropical wood. The policy will establish criteria to evaluate certification systems. The criteria will use the Forest Stewardship Council’s (FSC) system as a benchmark. |
| Ireland          | No                     | -                           | Enquiries to the Ministry of Finance, which is responsible for procurement policy, and searches of the Ministries of Finance and other government web sites revealed no evidence of a policy to take account of environmental considerations in procurement.  |
| Italy            | No                     | -                           |   |
| Netherlands      | No                     | -                           |   |
| Portugal         | No                     | -                           |   |
| United Kingdom:  |                        |                             |   |
| UK               | Yes                    | July 2000                   | Mandatory for all UK central government departments and executive agencies. Covers solid and engineered wood products and paper.  |
| Northern Ireland | No                     | -                           |   |

<sup>2</sup> *The Timber Footprint of the G8 and China. Making the case for green procurement by government.* Paul Toyne, Cliona O’Brien and Rod Nelson. May 2002.

|          |     |           |   |
|----------|-----|-----------|---|
| Scotland | Yes | July 1999 | Mandatory for all departments of the Scottish Executive. Serves only as guidance for other public authorities in Scotland. Covers solid and engineered wood products and paper.                 |
| Wales    | No  | -         | The Welsh Assembly's procurement policy <sup>3</sup> includes consideration of environmental and social factors in procurement although timber and timber products are not mentioned expressly. |
| USA      | No  | -         |   |

### 3.1 DENMARK

6. The Danish government's guidelines<sup>4</sup> are designed "to make it easier for public and semi-public institutions to ensure that the tropical timber they purchase is produced in a legal and sustainable manner". They are guidelines only and are not mandatory for any public authority. They were prepared by consultants under the guidance of a steering group<sup>5</sup> chaired by the Danish Forest and Nature Agency. A number of external parties were consulted during their preparation. The government has been considering extending the scope of its guidance to include non-tropical timber but no decision had been taken as of December 2003.

#### FOCUS ON 'LEGAL/SUSTAINABLE'

7. The guidelines recommend that purchasers specify three *variants*<sup>6</sup>: (i) legal and sustainable; (ii) legal and progressing towards sustainable; and (iii) legal. Purchasers are advised to accept timber that is clearly produced legally and is either partially sustainable or on the way towards sustainability, if fully sustainable timber cannot be obtained with adequate documentation. As a minimum, suppliers should be required to document that the timber has been legally produced. The guidelines include a checklist that purchasers are advised to ask suppliers to complete. The checklist sets out, in a structured way, the criteria for 'legal/sustainable' and the evidence required for determining compliance with these criteria.

#### CRITERIA FOR 'LEGAL/SUSTAINABLE'

8. The guidelines recommend that purchasers stipulate the following requirements for 'legal' as a minimum:

- The producer has had the necessary rights and permits to carry out logging of the given tree species, grades and dimensions, within the given timeframe and region.
- The producer has fulfilled all relevant national legislation regarding forest management and the effects of forest management on people and the environment in the country in question.
- Any due taxes and duties have been paid.
- All statutory declarations and permits from the authorities have been obtained, including CITES<sup>7</sup> permits if the tree species is covered by CITES.

<sup>3</sup> The Welsh Assembly's policy *Welsh Procurement Initiative – Vision of Success* can be found at <http://www.wales.gov.uk/subieconomics/content/bettervalue/visofsucc-e.pdf>

<sup>4</sup> Purchasing Tropical Timber: Environmental Guidelines. Published by the Danish Environmental Protection Agency and Danish Forest and Nature Agency, June 2003. Downloadable from <http://www.sns.dk/udgivelser/2003/tropical/default.htm>

<sup>5</sup> The steering group's composition was: Danish Forest Association, Danish Timber Trade Federation, Forbundet Træ-industri-Byg, Foreningen af offentlige indkøbere, Nepenthes, National Procurement Ltd.– Denmark, Træets Arbejdsgiverforening, Danish Ministry of Foreign Affairs, WWF-Denmark and the Danish Forest and Nature Agency (Chair).

<sup>6</sup> See paragraph 43 for a discussion of *variants*.

<sup>7</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora

9. The guidelines recommend that requirements for ‘sustainably produced’ tropical timber should be based on the principles set out in the 1992 UNCED<sup>8</sup> Statement of Forest Principles and the principles and criteria developed by the International Tropical Timber Organisation (ITTO) and Center for International Forestry Research (CIFOR). They recommend too the requirement that any specific standards have been developed in a consultative process, open to participation by all affected parties, including financial, environmental and social stakeholders.

#### IDENTIFICATION OF ‘LEGAL/SUSTAINABLE’

10. The supporting documentation recommended by the guidelines for each of these variants is as follows:

| Variant                                      | Documentation  |
|--|--|
| 1. Legal and sustainable                     | An FSC certificate guaranteeing that 100% of the wood comes from FSC-certified forest, or alternative and adequately supported documentation (see paragraph 12 below).   |
| 2. Legal and progressing towards sustainable | An FSC certificate guaranteeing that something less than 100% of the wood comes from FSC-certified forest, or an MTCC <sup>9</sup> certificate for the forest management together with an attached traceability certificate from Malaysia to a Danish purchaser. For example, this could be a traceability certificate from SGS, or other adequately supported documentation (see paragraph 12 below). |
| 3. Legal                                     | Alternative documentation (see paragraph 12 below).  |

#### REFERENCE TO CERTIFICATION SCHEMES

11. The guidelines comment on the adequacy of a number of certification schemes as evidence of ‘legal/sustainable’:

- ❑ **FSC** - *“at present FSC is the only certification system that is found to provide an adequate guarantee for legally and sustainably produced tropical wood”.*
- ❑ **MTCC** - *“is regarded as providing an adequate guarantee for legal forest management, on their way towards sustainability” and “marketing of MTCC certified wood in Denmark will require the attachment of a CoC<sup>10</sup> certificate from Malaysia”.*
- ❑ **LEI<sup>11</sup>** and **Keurhout** - *“are not in themselves, at present, regarded as adequate guarantees for legal or sustainable forest management in the tropics, but in combination with other supporting factors they can provide an adequate indication”.* The guidelines refer purchasers to a list of alternative documentation that might be considered as “other supporting factors” (see paragraph 12 below).
- ❑ **Swan** and **Flower** eco-labels – *“cover a number of relevant environmental factors in product life cycles. The requirement of sustainability for the underlying forest management for wood-based products is included, but not in detail. As of 1 April 2003, it was not possible to locate easily, any tropical wood products labelled with the Swan or Flower. These labels are therefore not presently seen as being relevant guarantees for legal or sustainable forest management in the tropics.”*

<sup>8</sup> United Nations Conference on Environment and Development

<sup>9</sup> Malaysian Timber Certification Council

<sup>10</sup> Chain of Custody

<sup>11</sup> Lembaga Ekolabel Indonesia

### Alternative documentation

12. The guidelines list a number of possibilities that could be considered as 'alternative documentation', though they qualify the list by stating that it is not possible to stipulate simple, well-defined minimum requirements. It is therefore not clear whether listed items may be considered adequate on their own or only in combination with other items. The listed items are:

- ❑ Certificates or verification schemes other than FSC and MTCC, e.g. LEI or Keurhout.
- ❑ Export permits, certificates of origin, other declarations from the authorities and from suppliers and sub-suppliers.
- ❑ Concession agreements.
- ❑ A documented eco-management system in accordance with ISO 14001 or EMAS II or another documented eco-management system<sup>12</sup>.
- ❑ Specification of the standards and guidelines used for forest management, including information about whether they have been developed in a consultative process, open to participation by financial, environmental, and social stakeholders.
- ❑ Specification of the overriding principles and criteria guiding the forest management, indicating who has developed these.
- ❑ Specification of the method for monitoring compliance with the standard and the entity responsible for such monitoring.
- ❑ Documentation for legally produced tropical wood in accordance with a bilateral agreement between Denmark or the EU and the supplying country (not yet developed, as of 1 June 2003).

13. The guidelines recommend that, where possible, "*alternative documentation be submitted for assessment to an impartial third party with market insight and knowledge of forestry conditions in the tropics*". The guidelines note that "*there are, as yet, no established systems for doing this, but it is assumed that it would be possible to request such an assessment from one of the enterprises already accredited to perform forestry certification, e.g. SGS, DNV, Smartwood, SCS, Soil Association, etc.*".

### IMPLEMENTATION EXPERIENCE

14. The guidelines were published only six months ago and it is too early for the government to assess their effectiveness.

## 3.2 UNITED KINGDOM

15. UK policy on timber procurement goes back to the publication of the government's "Environmental Action Guide" in 1991. The guide set out a framework for environmental management of buildings and land with each government department being required to develop strategies – including for the procurement of timber from sustainable sources – by the end of 1992. In 1997 the then Department for the Environment, Transport and the Regions issued voluntary guidance to government departments advising that they should seek to purchase sustainably-produced and lawfully-obtained timber and timber products.

16. Since 1999, competency for sustainable development policy – including greening of government procurement – has been devolved to the Northern Ireland, Scottish and Welsh administrations. The pre-devolution policy regarding timber procurement was formalised and made mandatory for UK

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<sup>12</sup> ISO – International Organisation for Standardisation; EMAS – Eco-Management and Audit Scheme

government departments in July 2000. Separate policies are in force in Scotland [and Wales]. Northern Ireland does not have a policy and has no plans to develop one<sup>13</sup>.

### 3.2.1 UK GOVERNMENT

17. Present UK Government policy is set out in a statement made by the then Environment Minister on 28 July 2000<sup>14</sup>. The statement binds all central government departments and agencies “*actively to seek to buy timber and timber products from sustainable and legal sources.*” The statement refers to sources certified under the FSC scheme as an example of ‘legal and sustainable’ sources. The statement also binds each central government department to report annually on its timber purchases and to explain what steps it is taking to pursue this objective; the quantity and types of its purchases; and what assurances it has received that the source of timber is sustainable and legal.

18. The statement was followed in August 2000 with the guidance “*Timber: Buyers’ Questions Answered*”<sup>15</sup>. The guidance recommends that government bodies “*purchase sustainably produced timber (and timber products such as joinery, fittings, furniture and veneers) by, for example, specifying in orders and contracts that suppliers provide documentary evidence (which has been, or if necessary can be, independently verified) that it has come from sustainably managed sources. That is, the timber has been lawfully obtained and has come from forests and plantations which are managed to sustain their biodiversity, productivity and vitality, and to prevent harm to other ecosystems and any indigenous or forest-dependent people. The documentary evidence asked for might take the form of a certificate issued under a credible, preferably independent, verification scheme, or other documents which demonstrate the operation of an environmental management system incorporating forest management criteria that conform with internationally recognised principles such as the Helsinki Guidelines.*” Buyers are also required to ensure that timber procurements are in accordance with international agreements such as CITES.

### IMPLEMENTATION EXPERIENCE

19. Departments were slow to implement the policy and NGOs exposed failures by individual departments on two occasions. As a consequence the then Environment Minister wrote to central government departments and asked that they review all their projects that involved timber to ensure the procurement policy was being implemented.

20. In July 2002 the House of Commons Environmental Audit Committee published a highly critical report. In its conclusions the Committee said:

- “*While government rhetoric has been laudable, we see no systematic or even anecdotal evidence of any significant change in the pattern of timber procurement since July 2000. The permissive wording of the policy has left those not committed to implementation free to pay it little more than lip service*”;
- “*The government has failed to provide officials with adequate guidance on legal and sustainable timber procurement or the regulatory framework*”;
- “*Lethargy in the provision of guidance on certification demonstrates a lack of commitment on the part of the government*”;
- “*The government failed to undertake adequate research or preparatory work prior to or immediately after its July 2000 commitments on timber procurement. As a result it hugely underestimated the scale and complexity of the challenge it was facing and failed to commit adequate priority or resources to implementation. This in turn led to an abject failure to deliver on the promises made*”.

<sup>13</sup> The UK Government policy applies to the Northern Ireland Office but not to the Northern Ireland Executive.

<sup>14</sup> [http://www.press.dtlr.gov.uk/pns/DisplayPN.cgi?pn\\_id=2000\\_0516](http://www.press.dtlr.gov.uk/pns/DisplayPN.cgi?pn_id=2000_0516)

<sup>15</sup> The guidance can be found at <http://www.sustainable-development.gov.uk/sdig/improving/partf/timber/buyers/index.htm>

21. In November 2002 the Office of Government Commerce issued an information notice<sup>16</sup> to Departments reminding them of the government's policy and enclosing model clauses for inclusion in their contracts. This made clear that anyone who was developing or managing a public-private partnership, including Private Finance and Investment (PFI) projects involving capital investment, should take account of the policy when writing their specifications. The model contract clauses contained in the guidance are in (Box 1).

### Box 1: UK Model Contract Specification Clause

#### Timber and products containing wood supplied under the Contract

The Contractor shall ensure that no timber or wood contained in any product it procures shall have derived from any species of tree that is protected under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) unless the supplier can prove, by producing official documentation, that he has complied with the CITES requirements that permit trading in the particular species of tree so listed under that Convention.

All timber and wood, other than recycled timber and wood, supplied to the Contractor shall derive from trees or other plants that have been harvested and exported in strict accordance with the applicable law or laws of the country in which the trees or other plants grew. The Contractor shall require the supplier to obtain documentary evidence to prove such legality and to prove that the evidence does in fact match the products supplied by establishing a chain of custody from the source of the timber and wood through to delivery of the final product. The Contractor shall ensure that only timber and wood that derive from trees or plants that were grown in forests or plantations that were managed to (a) sustain their biodiversity, productivity and vitality and (b) to prevent harm to other ecosystems and any indigenous forest-dependent people is used. The Contractor shall obtain documentary evidence to demonstrate that this requirement has been met.

It is the Contractor's responsibility to produce documentary evidence, in respect of these requirements, that will enable the Authority to verify the authenticity and credibility of the claims being made. The Contractor shall, if requested by the Authority, obtain independent verification of the claims being made and shall meet the full costs involved in so doing. In this context "independent" means a body or organisation that is accepted by the Authority as having the competence and capacity to provide an objective assessment of the evidence presented and as having no interests that would conflict with their duty to provide impartial advice. One way in which the Authority will accept that the Contractor has met his obligations in proving the source of his timber and wood products is if those products are certified, by properly accredited organisations, as meeting the standards set by the Forest Stewardship Council or such other standards set by such other bodies as are listed in the Contract Specification.

22. On 5 June 2003 the environmental organisation Greenpeace mounted a demonstration at a government construction site where the government's contractor was using wood from Indonesia for temporary site works. In response, on 6 June the Department for Environment, Food and Rural Affairs (DEFRA) wrote to central departments to confirm that the policy extended to timber used by contractors while working on government premises even if ownership of the timber remained with the contractor.

23. The Sustainable Development in Government Group (SDIG) in its annual report for 2003 observed that departments had *"made considerable advances in implementing the government's policy and 66 percent of all reported timber purchases were now certified, with a total of 99 percent having some evidence of sustainable sourcing"*. The SDIG also commented that there was *"currently no consistent methodology for assessing the quality of the evidence provided for sustainable timber procurement if it is not certified"*.

24. The government expects to issue new guidance shortly on how to ensure that sources are legal and sustainable. The guidance will draw from the findings of a study<sup>17</sup> commissioned in October 2000,

<sup>16</sup>The OGC guidance can be found at [http://www.ogc.gov.uk/embedded\\_object.asp?docid=1000061](http://www.ogc.gov.uk/embedded_object.asp?docid=1000061)

<sup>17</sup> The report, by Environmental Resources Management, can be found at <http://www.forestforum.org.uk> under Forum Activities/Trade/Timber Trade.

which addressed, among things, the issue of assessing the credibility of suppliers' claims on the source of the timber supplied and the provision of expert help for buyers. The study was carried out by consultants under the direction of the Inter-Departmental Timber Buyers Group. Consultations open to all interested parties were carried out at two stages. The approach underlying the new guidance will be a 'stepwise' policy; the minimum requirement will be 'legally' sourced timber but preference will be given to legal and sustainable'. The government is also proposing to set up a Central Source of Expertise to set green standards for purchases of timber and products made from wood.

## PAPER

25. The UK Government's policy on purchasing paper emphasises recycled content rather than the source of any virgin fibre. The government buys two main types of paper: 'desktop' paper for printers and photocopiers and paper for printed publications.

26. The SDIG reported that in 2001-02, seven departments (out of a total of 23) purchased more than 70 percent of their desktop paper made of minimum 80 percent post-consumer waste. In 2002-03, 11 departments purchased over 75 percent of their desktop paper which met this specification. However, overall, less than a quarter of the 8 million reams of desktop paper purchased during 2002-03 met the 80 percent post-consumer waste specification. One reason for this was that two departments<sup>18</sup> which account for 52 percent of all desktop paper bought, bought only three percent meeting the specification. Departments who purchase smaller amounts of paper generally bought a higher proportion of paper that meets the specification. In general, less information is available on paper bought for printed publications because purchase is often not made centrally or else is contracted out. In 2002-03 11 Departments recorded data on the proportion of such paper that exceeded 75 percent recycled fibre content; this ranged from less than two percent to 100 percent. Since 1st November all new contracts for paper across central government have had to meet the following standards:

- Copying paper: 100 per cent recycled content, minimum 75 percent post-consumer waste;
- Paper for printed publications: minimum 60 percent recycled content, of which 75 percent post-consumer waste; and
- Kitchen and toilet tissue: 100 percent recycled content.

### 3.2.2 SCOTLAND

27. The Scottish Executive's overall procurement policy<sup>19</sup> seeks, among other things, to ensure "*that any products derived from wildlife such as timber, plants and leather goods are from sustainable sources, and comply with European Commission (EC) and international trading rules (such as CITES)*". Moreover, it stipulates that specifications for goods and services should "*take full account of sustainable development objectives. For example, in specifying the use of recycled materials or materials from renewable or sustainably managed sources wherever possible*". Specific policies<sup>20</sup> have been developed for wood (solid and engineered wood products) and for paper. The Executive's procurement main web page<sup>21</sup> refers to the UK Government guideline publications *Green Guide for Buyers* and *Timber: Buyers Questions Answered* as useful sources of information but notes that in case of any conflict Scottish Executive guidance takes precedence.

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<sup>18</sup> Ministry of Defence and Department of Work and Pensions.

<sup>19</sup> The Scottish Executive's procurement policy can be found at <http://www.scotland.gov.uk/about/FCSD/PCSD-POL/00017839/procpolicy.aspx>

<sup>20</sup> The policies on wood and paper can be found at <http://www.scotland.gov.uk/environment/greeninggovernment/wood.asp> and <http://www.scotland.gov.uk/environment/greeninggovernment/paper.asp>.

<sup>21</sup> The Scottish Executive's procurement main web page is <http://www.scotland.gov.uk/about/FCSD/PCSD-POL/00017839/policyintro.aspx>

28. The Executive's **policy on wood** is to:

- ❑ *“specify in orders and contracts that suppliers must provide evidence that timber and timber products have been lawfully obtained from forests or plantations that are being sustainably managed;*
- ❑ *“where feasible:*
  - ⇒ *consider buying reclaimed timber or products made from reclaimed timber where it is cost effective and practical;*
  - ⇒ *when specifying chipboard and medium density fibreboards (MDF), indicate a preference for those made with a minimum percentage of 80% recycled material.”*

There are no targets associated with the policy.

29. The Executive has set **targets for paper** to:

- ❑ increase the use of recycled paper for general use to 90% by March 2003; and
- ❑ reduce the amount of paper purchased annually for general in-house daily use by 10% by March 2004.

To achieve its objective the Executive's **policy** is to:

- ❑ use recycled paper containing at least 75% genuine post-consumer waste (including agri-pulp) for all non-specialist papers;
- ❑ ensure that any virgin pulp used in its manufacture comes from sustainably managed woodlands and that both the virgin pulp and the recycling process is elemental chlorine-free and preferably totally chlorine-free. That is to say that it is manufactured using non-chlorine bleaching agents such as oxygen, peracetic acid, sodium peroxide and more efficient pulping techniques;
- ❑ ensure that material published or printed by the Scottish Executive is sealed using a water-miscible varnish (not a plasticised finish) and is bound using a water-based adhesive or other material which does not impede recycling. Inks shall be recognised as environmentally friendly, such as vegetable oil-based or sustainable equivalents;
- ❑ promote the reduced use of paper, eg by double-sided printing and copying, using waste paper as scrap paper before recycling, and maximising the use of alternative technologies and electronic media.

#### **INTERPRETATION OF 'LEGAL AND SUSTAINABLE'**

30. The Scottish Executive has no established criteria for 'legal' or 'sustainable'. The policy requires purchasing authorities to ensure that suppliers provide documented or certified evidence under a credible scheme that demonstrates:

- ❑ the operation of an environmental management system, incorporating forest management criteria that complies with internationally recognised principles;
- ❑ certification under a national or country specific scheme which is approved by one or more internationally recognised umbrella or accreditation schemes;
- ❑ that the timber has been acquired in accordance with national legislation in the country of origin and any applicable international agreements (CITES).

Where this requirement cannot be met, purchasers must obtain full assurance that the timber or timber product has come from a sustainably managed forest or a viable alternative.

#### **REFERENCE TO CERTIFICATION SCHEMES**

31. Scotland's policy does not make any reference to specific certification schemes and does not provide criteria for evaluating certification schemes or other forms of evidence beyond the statements in paragraph 30 above.

#### **IMPLEMENTATION EXPERIENCE**

32. Experience reported by the Scottish Executive's Procurement Directorate is that *"once a policy is in place there is generally no problem other than the normal education of the customer into following the policy"*.

## 4 EU AND WTO RULES ON PUBLIC PROCUREMENT

33. Procurement policies and legislation of EU member states' public bodies have to comply with the EU Procurement Directives and the WTO's GPA, to which all EU member states and the European Community are signatories<sup>22</sup>. The USA is a signatory to the GPA and is therefore also bound by its rules.

34. In 2000 the European Commission (EC) proposed two new Public Procurement Directives to replace the present ones. Adoption of the proposed Directives fell under the *Co-decision Procedure*<sup>23</sup>. The Parliament and Council arrived at a common position in December 2003 after conciliation on a number of points of disagreement. Member states will have to bring their domestic legislation into line with the new Directives within 21 months after their entry into force; therefore probably in 2005. In the meantime they must continue to comply with the present Directives. This section of the report describes the present EU Directives and the new Directives together with the WTO's GPA and the impact of these on timber procurement policies.

### 4.1 PRESENT EU LAW ON PUBLIC PROCUREMENT

35. The EU Public Procurement Directives establish specific procedures to guarantee that procurement contracts above a certain value are awarded in a competitive, transparent and non-discriminatory manner<sup>24</sup>. The present Directives are:

- ❑ Directive 92/50/EEC on public service contracts;
- ❑ Directive 93/36/EEC on public supply contracts;
- ❑ Directive 93/37/EEC on public works contracts (other than in the water, energy, transport and telecommunications sectors).

36. In 2001 the EC published an Interpretative Communication aimed at clarifying how environmental factors can be incorporated into public procurement whilst complying with the Directives<sup>25,26</sup>. This communication interprets and aims only to clarify existing legislation – it does not introduce new requirements.

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<sup>22</sup> Competence for international trade policy lies with the EU, which negotiates and signs agreements that are binding on all member states.

<sup>23</sup> The Co-decision Procedure denies the Council the right to adopt its common position if efforts to reach agreement with the Parliament fail. If the Parliament makes amendments to the Council's common position at its second reading and the Council rejects the amendments, a Conciliation Committee is convened with the aim of achieving a workable compromise that can be adopted by the required majorities in Council and Parliament.

<sup>24</sup> The detailed rules stemming from the public procurement Directives do not apply to contracts not covered by the Directives. European Community law leaves it to the member states to decide whether or not public procurement not covered by the Directives should be subject to national procurement rules. Within the limits set by the Treaty and Community law, member states are free to adopt their national legislation. It will therefore depend on the national legislation as to whether public procurement may, or even shall be used to fulfil other objectives than the "best value for money" objective of the public procurement directives. This means, among other things, that when tenders are evaluated, award criteria may be defined freely by a purchasing authority, as long as the Treaty rules and Community law principles are observed, and the criteria remain objective, transparent and non-discriminatory.

<sup>25</sup> *Interpretative communication on the community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement*. COM (2001) 274 of 04/07/2001.

<sup>26</sup> The Commission has also published guidance on integrating social considerations into public procurement: *Interpretative communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement*. COM (2001) 566 of 15/10/2001.

#### 4.1.1 INCORPORATING ENVIRONMENTAL CRITERIA INTO THE PROCUREMENT PROCESS

37. There are distinct stages in any competitive public procurement process, namely:
1. Definition of the subject-matter of the contract and technical specifications
  2. Selection of suppliers who are able to fulfil the contract
  3. Evaluation of bids and contract award
  4. Contract execution, in particular specifying any conditions with which suppliers are required to comply

#### WHEN DEFINING THE SUBJECT MATTER OF THE CONTRACT AND TECHNICAL SPECIFICATIONS

38. The Commission's Interpretative Communication offers the following guidance:
- ❑ **Works contracts** ...*"The best opportunities for contracting authorities to take into consideration environmental concerns are to be found in the phase of the design and the conceptual work. Contracting authorities could give clear instructions to the architects and / or engineers to design for example, a low-energy consuming administrative building, not only taking account the insulation and the use of specific construction materials, but also the installation of solar cells for the generation of warmth. They could equally require that the building be designed so that the use of elevators is necessary only to a limited extent and that the orientation of offices and tables limits the use of artificial lamps."*
  - ❑ **Service contracts** ...*"the nature of these contracts implies also a possibility to prescribe a mode of performing. Contracting authorities could, for example, prescribe a specific method of building cleaning, using only those products that are least harmful for the environment. They could also define that, for instance, public transport services are to be carried out by electric buses. They could also prescribe the method for the collection of household waste."*
  - ❑ **Supply contracts** ... *"relate, generally, to the purchase of final or end products. Therefore, apart from the basic and essential choice of the subject matter of the contract ("what shall I purchase?"), the possibilities to take into account environmental considerations in addition to this choice are not as extensive as for works and service contracts."*

The Communication summarises by stating: *"Contracting authorities are free to define the subject matter of the contract, or alternative definitions of the subject matter through the use of variants, in the way that they consider to be the most environmentally sound, provided this choice does not result in a restricted access to the contract in question to the detriment of tenderers from other Member States."*

39. The Directives oblige contracting authorities to specify the characteristics of the subject in a manner such that it fulfils the use for which it is intended by the contracting authority. The Commission's communication states that *"technical specifications include all characteristics required by the contracting authority in order to ensure that the product or service fulfils the use for which it is intended"*<sup>27</sup>. *These technical specifications give objective and measurable details of the subject matter of the contract and therefore have to be linked to the subject matter of the contract"*.

40. The Communication goes on to state that *"the Directives prohibit mentioning products of a specific make or source or of a particular production because these generally favour or eliminate certain undertakings. The indication of trade marks, patents, types, or of a specific origin or production is authorised only in cases where the subject of the contract may not be sufficiently precise and intelligible to all parties concerned. Such indication must always be accompanied by the terms "or equivalent" where the directives provide such exceptions. Contracting authorities can depart from these rules and refrain from the reference to standards or comparable instruments. This is notably the case where the contract is of a genuinely innovative nature for which the use of such instruments would not be appropriate."*

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<sup>27</sup> Author's emphasis.

### Reference to specific production processes

41. According to the Communication, “contracting authorities may require the use of a specific production process if this helps to specify the performance characteristics (visible or invisible) of the product or service<sup>28</sup>. The production process covers all requirements and aspects related to the manufacturing of the product which contributes to the characterising of the products without the latter being necessarily visible in the end-product. **This implies that the product differs from identical products in terms of its manufacture or appearance (whether the differences are visible or not) because an environmentally-sound production process has been used, e.g. organically-grown foodstuffs, or “green” electricity.** Requirements which do not relate to the production itself, like the way in which the firm is run, are not technical specifications and can therefore not be made mandatory”.

### Reference to Eco-labels

42. According to the Communication “contracting authorities can define the technical specifications related to the environmental performances in line with Eco-label criteria and may indicate that products having these Eco-label certificates are deemed to comply with the technical prescriptions of the contract documents. Contracting authorities have to be careful not to limit the means of proof only to Eco-label certificates. They shall accept also other means of proof, like test reports. This is of particular relevance in the case of national and private Eco-labels, to ensure that the specification and the means to assess the conformity with the specification would not result in the reservation of the contract to national / local companies.”

### The use of variants

43. The Communication advises the use of “variants” “as a way of balancing their financial considerations, on the one hand, and their objectives of greening their purchases, on the other hand. When using variants, contracting authorities first define a standard definition for the subject matter of the contract that lays down the minimum requirements. In addition to this standard definition, contracting authorities can define one or more variants, laying down alternative definitions of the subject matter, for example a higher environmental performance or the use of a specific production process which was not a requirement in the standard definition”.

44. The author has not been able to determine how the different variants offered by tenderers should be evaluated and compared at the contract award stage (see section 4.1.3 below).

## 4.1.2 WHEN SELECTING CANDIDATES WHO ARE ABLE TO FULFIL THE CONTRACT

45. The Directives lay down rules governing the selection of those candidates whom the contracting authority considers able to execute its contract. The rules concern: (1) the grounds that justify a candidate’s exclusion from participating in a public contract; (2) the candidate’s financial and economic standing; and (3) the candidate’s technical capacity. The first two rules do not offer any scope for taking environmental considerations into account. The third rule enables, to a certain extent, environmental considerations to be taken into account, by for example, defining a minimum level of equipment or facilities, or guaranteeing the correct execution of the contract. This seems to offer no scope for bringing the source of timber and timber products into the selection of candidates.

### Consideration of tenderers’ environmental management systems

46. A tenderer’s environmental management system may be used as proof of technical capacity, but only where the system has an impact on the quality of the supply or the capacity of a company (eg: the

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<sup>28</sup> Author’s emphasis.

equipment and technicians) to execute a contract with environmental requirements (eg: a works contract for which the contractor has to deal with waste on the construction site).

#### 4.1.3 WHEN EVALUATING BIDS AND AWARDING THE CONTRACT

47. The public procurement Directives contain two options for the award of contracts: either the lowest price or the ‘most economically advantageous tender’. The aim of the second option, according to the Communication, is to help contracting authorities get the best value for money. In order to define which tender should be considered the most economically advantageous, the contracting authority has to indicate beforehand which criteria will be decisive and will be applied. The criteria must be mentioned either in the contract notice or in the contract documents, and should be, where possible, in descending order of importance.

48. The Directives give examples of the criteria that may be applied in order to define the most economically advantageous tender<sup>29</sup>. The Communication states that other criteria are possible including ones that express the “*environmental soundness of products or services*”. Criteria should be “*specific, product-related and economically measurable*” and should relate to the “*quality or performance of the product or the execution of works or services (i.e. quality or technical merit)*”. In its judgement of the Concordia bus case (Box 2) the European Court of Justice (ECJ) found that purchasing authorities “*may take criteria relating to the preservation of the environment into consideration, provided that they are linked to the subject matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mention in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination*”.

#### Box 2: The Concordia Bus Case

This case, referred to the ECJ in 1999, concerned a tender launched by the city of Helsinki for bus transport operations within the city. The city explicitly stated that it included environmental criteria, principally air and noise emissions and a certified Environmental Management Standard (EMS), within the award criteria and that it would allocate a number of points therein. This was subsequently challenged by one of the unsuccessful bidders who argued that allocating additional points for equipment whose nitrogen oxide emissions and noise levels were below certain limits was unfair and discriminatory and that, in the overall assessment of the tenders, there could be no question of applying environmental factors which had no direct connection with the subject of the call for tenders – ie an EMS.

One of the key elements of the case, therefore, was whether environmental criteria could be included in award criteria, and, more specifically, whether they must have a direct economic advantage for the contracting authority and be of direct relevance to the contract.

In its judgment of 17 September 2002 the ECJ ruled that “*where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.*”<sup>30</sup>

<sup>29</sup> Price, delivery date, delivery period, period for completion, running costs, cost-effectiveness, quality, aesthetic and functional characteristics of the goods or services, after-sales service, technical assistance, profitability, technical merit.

<sup>30</sup> European Court reports 2002 Page I-07213

### **The principle of “economic advantage”**

49. In its Interpretative Communication the Commission posed the question: *“whether the concept of ‘economically most advantageous tender’ implies that each individual award criterion has to have an economic advantage which directly benefits the contracting authority, or that each individual award criterion has to be measurable in economic terms, without the requirement of directly bringing an economic advantage for the contracting authority in the contract at stake.”* The Commission supported the first interpretation noting that contracting authorities retain the possibility to integrate into technical specifications their environmental preferences linked to eventual indirect economic advantages, including through the use of variants. The Commission’s position was effectively set-aside by the judgement of the ECJ in the Concordia bus case: *“[the Directive] cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature. It cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority. That conclusion is also supported by the wording of the provision, which expressly refers to the criterion of the aesthetic characteristics of a tender.”* Thus, a contracting authority may include award criteria that are not of a purely economic nature, but they must be linked to the subject matter of the contract.

### **Consideration of whole life-cycle costs of products**

50. The Communication states that, when assessing the economically most advantageous tender, authorities may take into account those costs incurred during the life cycle of a product that will be borne by the authority. It also notes that costs incurred up to the point at which a product is supplied are reflected in the price paid by the authority and should not be taken into account a second time.

### **Consideration of “externalities”**

51. The Communication defines externalities as: *“The costs and benefits which arise when the social or economic activities of one group of people have an impact on another, and when the first group fail to fully account for their impact”*. It also notes that *“as a general rule, externalities are not borne by the purchaser of a product or service, but by society as a whole and therefore do not qualify as award criteria”*. Furthermore, it goes on to say that contracting authorities have the possibility to integrate their environmental preferences, linked to the eventual occurrence of external costs, either in their definition of the subject matter of a contract or else in the conditions relating to the execution of the contract.

### **Additional criteria**

52. The concept of “additional criteria” was first set out in ECJ Case 31/87. One of the points at issue was whether the employment of long-term unemployed persons might be included as an award criterion. The ECJ found that this point had neither a relationship to the checking of a candidate's economic and financial suitability or the candidate's technical knowledge and ability, nor a connection with the award criteria as listed in the Directives. However, the Court did find that these criteria were, nevertheless, compatible with the Directives as long as they complied with all relevant principles of Community law. In a subsequent case (C-225/98) the ECJ held that such a criterion could be applied but only where the said authorities had to consider two or more economically equivalent bids. The Communication notes that the ECJ’s findings *“could be equally applicable to conditions relating to environmental protection or performance”*.

## Variants

53. Neither the Directives nor the Interpretative Communication offer any guidance as to how variants should be evaluated and compared. The *Guide to Community Rules on Public Supply Contracts* states that “a variant can be fairly assessed and compared with tenders meeting different requirements only by examining the tenders from several viewpoints, which means that several assessment criteria must be used”. It could be inferred from this statement that if an authority provides for variants in its technical specification, some or all of the elements that may be varied should be admissible as contract award criteria, thus ruling in environmental characteristics that would otherwise be considered “externalities”. This view is supported by EJC’s judgements regarding additional criteria (see above) that additional conditions could be applied as accessory criteria once bids had been compared from a purely economic point of view.

### 4.1.4 IN THE CONDITIONS GOVERNING CONTRACT EXECUTION

54. The Directives do not cover contract clauses, though such clauses must observe the general EU Treaty rules and principles, notably the principle of non-discrimination. The Communication notes that “contract clauses may not be (disguised) technical specifications, selection criteria or award criteria. They relate merely to the execution of the contract itself. This means that all applicants, should they eventually be awarded the contract, must be in a position to execute these clauses. As a matter of transparency, they should be announced in advance to all applicants”. The Communication goes on to state that “authorities have a broad range of possibilities for defining contract clauses having as their object the protection of the environment” and lists some examples of conditions that have a bearing on the performance or execution of the contract and that ultimately meet general environmental objectives. Of particular interest, a contracting authority may “require that the transport of products to be delivered be effected by a certain type of transport”, implying that authorities are allowed to take account of environmental impacts that may occur in the supply chain before a product comes into the possession of the authority.

### 4.1.5 WHAT THE OLD DIRECTIVES MEAN FOR TIMBER PROCUREMENT

55. The old Directives provide public bodies with opportunities to specify legal and sustainable sourcing at three stages of the procurement process: (i) technical specification; (ii) contract award; and (iii) contract execution, as contract conditions. They also allow authorities to exclude companies that have breached laws on timber trade.

56. **In the technical specifications** defining the subject matter of the contract, authorities can specify production processes and may use eco-labels as a reference. The admission of production processes is made in the Commission’s Interpretative Communication, not in the Directives themselves. Some Member States have interpreted the guidance to mean that they may specify certain production processes for timber and timber products by reference to terms such as “legally produced” or “sustainably produced”; this interpretation has not been challenged so far.

57. **At the contract award stage**, purchasers may evaluate tenders using criteria that are not purely economic, including criteria that consider protection of the environment, provided they have been announced at the time that tenders are invited. Tenders should be evaluated in terms of the relative advantage to the contracting authority; according to the Commission’s guidance, costs and benefits not incurred directly by the contracting authority may not be taken into account in the evaluation. The ECJ case, outlined in Box 2, clearly shows that ecological criteria that are linked to the subject matter of the contract may be taken into consideration. This then would allow for the use of legally and sustainably produced timber.

58. **In the conditions of the contract.** The Commission’s guidance appears to allow contracting authorities to express the legality and sustainability of the source of wood and wood products as contract conditions. However, authorities would have to choose between incorporating such

considerations into the technical specification or into the contract conditions. The Interpretative Communication links technical specifications to the performance characteristics of products. Although it may be difficult to make the case that the source of wood has a bearing on the performance characteristics of products made from that wood, and hence be dealt with in the technical specifications, it is not impossible. It is however simpler, and possibly more consistent with the spirit of the Directives, to specify legal and sustainable sourcing in the contract conditions (this is the approach taken by the UK Government in its model contract clauses for public works contracts – see above). However, a disadvantage of expressing the legality and sustainability of the source of wood in the contract conditions (rather than in the technical specifications) is that it would remove the possibility of specifying variants, which have the advantage of allowing authorities to invite and compare tenders that offer different levels for the sustainability of source forests. Instead, authorities would have to specify a precise requirement.

## 4.2 THE NEW DIRECTIVES

59. In December 2003 the European Parliament and the Council reached agreement on two new Directives proposed by the Commission in 2000. The first proposal, the ‘general directive’<sup>31</sup>, sought to improve and update the procedures for awarding public supply, public service and public works contracts by clarifying and merging the three existing directives into a single text and by introducing new electronic purchasing mechanisms and procedures to reflect modern requirements. The second proposal, the ‘sectoral directive’<sup>32</sup>, aimed to coordinate the procurement procedures of the water, energy and transport industries to take into account the opening up of these sectors to competition. Key points raised during the negotiations between the Parliament and Council in relation to timber procurement were:

1. **Environmental considerations versus opening up of competition.** The Parliament argued that protection of human, animal or plant life or health and of public morality, public policy and public security should be paramount; also that that the Directives should emphasise the integration of environmental policy into procurement policy.
2. **Environmental considerations in technical specifications.** The Parliament argued for changes in relation to technical specifications that, among other things, expressly would allow authorities to prescribe specific environmental characteristics and production processes and methods. The Commission had not concluded such provisions in its original proposal.
3. **Environmental considerations in contract performance conditions.** The Parliament argued for changes to clarify further that contract performance conditions may be intended to achieve, amongst other things, specific environmental goals.
4. **Evaluation of economic advantage at the contract award stage.** The Commission’s original proposal made it compulsory to state the relative weighting of each criterion in the notification of tender or in the contract documents, and expressly confined determination of the economically most advantageous tender to “*for the contracting authorities*” and “*directly linked to the subject of the public contract in question*”. The proposal added “*environmental characteristics*” as an example of a criterion. The Parliament argued that authorities should be able to take account of costs and benefits to the wider public, that production methods should be allowed as award criteria, and that authorities should be obliged to list criteria in order of importance but should not be obliged to weight them.

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<sup>31</sup> Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts. COM(2000) 275 final/2. 30 August 2000.

<sup>32</sup> Directive of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy and transport sectors. COM(2000) 276 final/2. 31 August 2000.

60. The Council accepted the Parliament's arguments on points (i) to (iii) and the draft Directives were amended accordingly. Point (iv) went to conciliation<sup>33</sup> where the Parliament and Council agreed a compromise:

- ❑ The Directives will refer expressly to ECJ case law on award criteria which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in relation to environmental or social considerations;
- ❑ The Directives will list production method, and/or specific environmental effects of product groups or services as examples of environmental characteristics that authorities may lay down in technical specifications;
- ❑ Authorities will be required to assess the most the economically advantageous tender *from the point of view of the contracting authority using criteria linked to the subject matter of the contract*<sup>34</sup>.

#### 4.2.1 WHAT THE NEW DIRECTIVES MEAN FOR TIMBER PROCUREMENT

61. By comparison with the old Directives, the new Directives increase, to some small extent, , the powers of public bodies to take account of environmental considerations in the procurement process:

1. **Technical specifications.** The new Directives allow purchasing authorities to include the method by which timber products<sup>35</sup> are produced and the environmental effects of timber products. This could be taken to mean that authorities could specify, for example, that timber and timber products must be from legal and sustainable sources, provided that they also define "legal" and "sustainable" in a manner that allows the conformance of specific materials to be evaluated objectively. If that interpretation is correct, it would follow from other provisions of the Directives that authorities could indicate certification schemes that would be acceptable evidence of meeting their definitions of 'legal' and 'sustainable' but not to the general exclusion of other evidence not identified within the tender documents. Authorities could specify, for example, 'FSC or equivalent'; or they could specify sustainability criteria and indicate certification schemes that would be accepted as suitable proof of meeting those criteria. The new Directives, like the old ones, link technical specifications to the performance and functional characteristics of the product. This may make it difficult to include legality and sustainability in the technical specification. However the Commission's Communication, which relates to the old Directives, interprets the old Directives as allowing for environmentally sound production processes. One could therefore assume this would remain the same for the new Directive.
2. **Contract conditions.** Authorities may require contractors to supply timber products from legal and sustainable sources and to provide evidence to that effect.

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<sup>33</sup> The Council supported the Commission, which argued that: (i) removal of the words "for the contracting authorities" would enable various, often non-measurable, elements to be taken into account in relation to a possible benefit to "society" in the broad sense of the word. Such award criteria would no longer fulfil their function, which is to permit an evaluation of the intrinsic qualities of tenders in order to determine which of them offers the purchaser the best value for money. This would completely disrupt the objective of the public contracts Directives and would amount to the institutionalisation of this legislation to the benefit of sectoral policies, while also introducing serious risks of inequality of treatment; (ii) the contract award stage is not the appropriate time at which to choose a less polluting [production] method. Less polluting production methods can be prescribed once the subject of the contract has been defined in the technical specifications when the purchaser chooses to purchase the solution causing the least pollution. If he wishes to compare different solutions and evaluate the advantages/cost of lower- or higher-pollution solutions, he may allow or insist on the presentation of variants; (iii) the introduction of a provision which makes weighting obligatory is an important element of the proposal and is designed to prevent manipulations, encountered in practice, favouring certain operators, and to enable any tenderers to be reasonably informed in accordance with the principles laid down by the Court in the "SIAC" case (Judgement of 18 October 2001 in case C-19/00, 2001 ECR I-7725). It is essential that the weighting of the criteria be indicated in advance.

<sup>34</sup> Author's emphasis.

<sup>35</sup> The Commission's Interpretative Communication admitted specification of production processes. The new Directives therefore simply confirm the guidance in this regard but do not extend the intent of the old Directives.

62. Authorities' powers with regard to variants appear to have been reduced. The new Directives permit authorities to allow variants, but authorities should specify only the minimum requirements, leaving it to tenderers to draw up variants that meet those requirements. The Commission's guidance in connection with the old Directives implied that authorities could define the variants themselves.

63. The rules regarding inclusion of environmental characteristics of timber products at the **contract award stage** are open to different interpretations. Award criteria have to be linked to the subject matter of the contract, which could be taken to mean that any characteristic of the product that is addressed by the technical specification may also be included as a contract award criterion. Tenders must be assessed from the point of view of the contracting authority (and, following case law, the assessment does not have to be of a purely economic nature) but this does not necessarily permit an authority to apply criteria related to environmental or social impacts that are of no direct economic concern to the authority, for example harm to the environment or people of other countries caused by irresponsible management of forests from which the authority's suppliers source timber products.

### **The WTO Government Procurement Agreement**

64. The WTO's GPA was signed in Marrakech on 15 April 1994. The GPA is one of the 'pluri-lateral' agreements included in Annex 4 to the Agreement establishing the WTO, meaning that not all WTO members are bound by it. Both the European Community and the EU member states, as well as the USA, are signatories to the GPA.

65. Signatories to the Agreement undertake to provide national treatment and non-discrimination to goods, services and suppliers of the other signatories, ensuring through detailed procedures, a real chance to compete for government contracts. The Agreement applies to covered procuring entities independently of the place of the contract performance (even if such a place is, as in the case of Iraq, a non-WTO country).

66. The WTO's GPA lays down rules guaranteeing fair and non-discriminatory conditions for international competitive tendering. Participating governments are required to put in place domestic procedures by which aggrieved private bidders can challenge procurement decisions and obtain redress in the event such decisions are found to be inconsistent with the rules of the agreement.

### **Technical Specifications**

67. The WTO's GPA includes production processes and methods as examples of technical specifications. It states that technical specifications *"shall, where appropriate: be in terms of performance rather than design or descriptive characteristics; be based on international standards, where such exist; otherwise, on national technical regulations, recognized national standards, or building codes. There shall be no requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as 'or equivalent' are included in the tender documentation"*.

### **Selection of candidates**

68. Authorities may exclude a supplier on grounds such as bankruptcy or false declarations.

### **Contract award**

69. The purchasing authority must award the contract to the tenderer *"who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic products or services, or products or services of other Parties, is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous"*.

#### 4.2.2 IMPLICATIONS OF THE WTO GPA FOR TIMBER PROCUREMENT POLICY

70. The WTO's GPA offers less scope than the EU Directives for including 'legal and sustainable' in technical specifications by virtue of the phrase "*shall, where appropriate: be in terms of performance rather than design or descriptive characteristics*", although the words "*where appropriate*" may offer authorities considerable flexibility.

71. Breach of forest or timber trade law would presumably be considered grounds for excluding a supplier.

72. The GPA's rules regarding contract award offer far greater scope for taking legal and sustainable sourcing into account; the criterion of "most advantageous" is not limited in any way.

73. None of the GPA's provisions rule in or rule out the inclusion of contract conditions such as 'legal and sustainable'. Specifying 'legal and sustainable' in contract conditions is therefore possible.

**Table 2: An overview of possibilities for specifying legal and sustainable timber**

| Allowing for green timber procurement in:  | Old EU rules  | New EU rules  | WTO rules  |
|--|---|---|--|
| Stage I: Definition of the subject matter of the contract and technical specifications   | Ambiguous. The Directives link technical specifications to the performance of a product in its intended use. However its official interpretation allows for inclusion of specific production processes "if this helps to specify the performance characteristics of the product...". This implies that the product differs from identical products in terms of its manufacture or appearance because an environmentally sound production process has been used. | Strengthened by the inclusion of explicit reference to production processes.  | Yes. Although technical specifications are linked to performance rather than descriptive characteristics the formulation "where appropriate" allows for flexibility. |
| Stage II: in the selection of suppliers:<br>Possibility to rule out companies in breach of international or national laws on forest management, harvesting and trade | Yes   | Yes   | Yes  |
| Stage III: In the contract award stages  | Ambiguous, but clarified to some extent by ECJ case law which allows authorities to include environmental considerations as contract award criteria provided the criteria are linked to the subject matter of the contract. It is still not completely clear whether the rules about technical specifications would admit the source of timber as being linked to the subject matter of the contract.   | Still ambiguous, though the power to include 'legal and sustainable' as contract award criteria is strengthened by the inclusion of ECJ case law. | Yes  |
| Stage IV: In the conditions governing contract execution   | Ambiguous.  | Yes. Authorities can require suppliers to supply products from legal and sustainable sources and to provide evidence to that effect.              | Yes. Authorities can require suppliers to supply products from legal and sustainable sources and to provide evidence to that effect.                                 |

## 5 CONCLUSIONS

74. The EU's and the WTO's GPA rules on public procurement do allow for green procurement but limit, to some extent, governments' powers to favour timber products from legal and sustainable sources in technical specifications and at the stage of awarding the contract:

- ❑ EU and WTO rules allow authorities to specify production processes in their **technical specifications**. EU rules also allow environmental characteristics to be included. EU and GPA rules link the technical specification to the performance/functional requirements of the product; this may prevent authorities from specifying, for example, that timber contained in products that are procured through supply contracts or that are used by suppliers in service or works contracts, must be from sustainable and/or legal sources. Technical specifications that include the legality and sustainability of the source of wood and wood products could be challenged under both EU and GPA rules. However, the Commission's guidance in relation to the old Directives introduces some ambiguity on this point, which the Commission should remove at the earliest opportunity.
- ❑ WTO rules offer greater flexibility than EU rules with regard to **contract award** as they do not restrict governments' determination of the most advantageous tender. It is not clear whether EU rules allow authorities to include the legality or sustainability of source as an award criterion, even though these may have been included in the technical specification. The approach underlying the new EU Directives appears to be that such "externalities" should be addressed in the technical specification. Award criteria that include the legality and sustainability of the source of wood and wood products could therefore be challenged under EU rules.

75. The possibilities open to purchasing authorities are summarised in Table 2. EU and WTO rules are at their least ambiguous regarding contract conditions; they do allow authorities to include environmental considerations such as the legality or sustainability of the source of wood and wood products as contract conditions.

76. The best possibility for purchasing authorities to implement green timber procurement policies appear, therefore, to include 'legal and sustainable' as a contract condition. Their inclusion in technical specifications and/or in award criteria is possible, but could potentially be subject to a legal challenge. Assuming that this conclusion is correct, authorities would need to specify, in terms that could be evaluated objectively, what they meant by 'legal and sustainable' sources. This is complex but not impossible; the work already done by the UK and Danish governments provides a basis for all EU member states, and other countries, to implement green timber procurement policies.

77. Consideration of 'legal and sustainable' at contract award stage would give purchasing authorities greater flexibility; they would be able to invite tenders offering different levels of sustainability (as in, for example, the Danish guidelines) and in this way encourage the market to gradually raise the level. In contrast, contract conditions would have to specify a single level, which could be raised by the authority in new contracts if it was certain that suppliers could comply.

78. In spite of the restrictions imposed by EU and WTO rules, governments have substantial scope to insist on timber products from legal and sustainable sources. It can therefore only be institutional inertia, or, more kindly, the ambiguity of the EU's rules, that has prevented all but a very small number from implementing substantive timber procurement policies. The EU Commission should revise its guidance as soon as possible to remove all remaining ambiguity and should include specific guidance in relation to procurement of timber products. The EU's member states should not wait for clarification; they and other countries should seize the opportunity offered by their purchasing power combat trade in illegal timber and to promote responsible forest management.