

'Life-cycle characteristics' explained

The term 'life-cycle characteristics' has been coined to express the idea that characteristics can result from social and environmental impacts that arise during the production phase or at disposal of a product, even if you cannot see them in the product itself.

It goes without saying that comparing the characteristics of two products allows you to make a choice between them, but exactly what constitutes a 'characteristic'?

- What is the difference between a nurse's uniform stitched by a child and one stitched by an adult?
- What is the difference between a table made out of wood from a sustainably managed forest and one sourced from a forest that will never be replanted?
- What is the difference between a floor that is cleaned by a product which is toxic to aquatic life once it ends up in the river system and a floor that is cleaned with a product that isn't?
- What is the difference between a fair trade coffee and a coffee made from coffee beans harvested by underpaid workers?

The difference in each case is not discernible when using the product; yet these products are not identical.

The difference comes from the choices made in relation to production and the impacts stemming from these choices – be they environmental or social. And such a difference therefore characterises the products.

Clarity is needed in the revised Directive

In the revised Directive, it is important to clearly acknowledge that these impacts/differences are embedded in the product as characteristics. And further, it needs to be emphasised that, although such characteristics may not be apparent in the physical or functional qualities of the product, they are on an equal footing with those that are apparent.

This is what 'life-cycle characteristics' represent in the public procurement context: the ability to take into account the impacts of production and disposal on society and on the environment. For any consumer – public or private – who wants to promote sustainable development through his or her purchases, these characteristics are relevant and meaningful. A contracting authority (who wishes to do so) should be able to evaluate more fully whether a product or a service contributes to their strategic objectives as well as their functional need.

Where any given difference (i.e. the characteristic) is important to the contracting authority concerned and where the contracting authority can comply with the principles of transparency and equal treatment, the revised Directive on public procurement needs to provide legal certainty that such characteristics can be incorporated into the procurement process in a meaningful way. Introducing the concept of 'life-cycle characteristics' can achieve this aim.

The Commission's proposal is not sufficient

According to the Commission's proposal, reference to 'a specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle' is

permitted in the technical specifications.¹ However, this wording does not completely eliminate the current legal uncertainty.

For example, the wording leaves room for doubt about whether the conditions of the transactions relating to a product (such as those involved in fair trade) are considered as a 'process'. Further, if an objective is targeted but no one specific process is preferred, how would an acceptable technical specification be drafted? For example, the reduction of greenhouse gas emissions could be achieved using various different methods...

Environmental and social – the same approach

In respect of including social factors in technical specifications and award criteria, the official position under the current Directive² has always been conservative – with the justification that the link to the subject matter could not be established.³ So, under the Commission's wording, does a 'specific process' include, for example, respecting the right of association for workers producing the product, or the non-employment of children in the production?

Since the decision in the *Wienstrom*⁴ case (which dealt with renewable energy) the link to the subject matter is accepted in respect of environmental considerations at the production stage. However, it was in the decision in the recent *North Holland*⁵ case that there was a breakthrough in respect of social factors. In that case the Court held that, in principle, an award criterion favouring fair trade ingredients would be permissible. Further, the Court stated 'it must therefore be accepted that contracting authorities are also authorised to choose the award criteria based on considerations of a social nature, which may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons.'⁶ Therefore, the possibility that social factors are linked to the subject matter is now confirmed. Although there must be a case by case approach, it should be anticipated that environmental and social impacts during the production phase will be treated in the same way in future.

That said, although the Court in *North Holland* accepted that award criteria could include social considerations, it rejected the idea that they could be technical specifications. Their interpretation of the current Directive's requirement was that only intrinsic characteristics of a product are permitted as technical specifications. It is therefore not possible to use this judgment to support the argument for social criteria in technical specifications.

However, in practice, the different approach to technical specifications is hard to justify. Going back to the earlier examples, if a contracting authority recognises that one product is different from another product (even if there is no difference in taste or appearance) and this recognition is accepted when it come to award criteria, why is it not accepted when it comes to technical specifications? By defining the term 'life-cycle characteristics' and using it in both

¹ Article 40(1) subparagraph 2, Proposal for a Directive of the European Parliament and of the Council on public procurement, 20 December 2011, COM(2011) 896 final.

² Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L134, 30.4.2004, p.114) (as amended).

³ For example, the Commission's 2011 '*Buying Social*' guide states 'the labour conditions of the workers building the school cannot be part of the subject-matter of the contract, as they are not linked to the object of the contract', available at <http://ec.europa.eu/social/main.jsp?catId=331&langId=en&furtherPubs=yes> p. 23.

⁴ Case C-448/01 *EVN AG and Another v Austria (Stadtwerke Klagenfurt AG and Another, intervening)* [2003] ECR I-14527.

⁵ Case C-368/10, *Commission v Kingdom of the Netherlands*, judgment of 10 May 2012.

⁶ *Ibid*, para 85.

Article 66 (on award criteria) and Article 40 (on technical specifications), this will show that the Court's approach is no longer relevant under the revised Directive.⁷

Life-cycle characteristics – circumscribed by the link to the subject matter

The definition of 'life-cycle characteristics' is intentionally broad in order to cover both environmental and social aspects, as well as human rights issues. However, the definition is not without limits – the constraints of the link to the subject matter and the principles of transparency and non-discrimination act as safeguards.

For a life-cycle characteristic to be a valid technical specification or award criteria it must be linked to the subject matter. It is important that this rule should be affirmed in order to prevent public procurement from becoming a 'back door' for additional requirements that are totally unrelated to the procurement itself. As discussed above, case-law shows that the link to the subject matter should be interpreted broadly and that in principle characteristics resulting from social and environmental impacts in the production process can be linked to the subject matter. Logically the same analysis would follow for impacts at other stages of the life-cycle.

Further, if a contracting authority cannot describe or define a characteristic sufficiently clearly for all reasonably informed and diligent tenderers to interpret it in the same way, it will not be able to specify it in its contract notice.⁸ Similarly, a criterion can only be used if the contracting authority is in a position to verify effectively the information provided by the tenderers.⁹

The Commission had already defined the term 'life cycle' in its proposal. Although it is true that the majority of frequently given examples relate to impacts that occur at the production phase, a product can also have social and environmental impacts at the end of its life – perhaps because it contains toxic substances that will escape when it is destroyed. Similarly, often a significant part of a product's carbon footprint can be attributed to its transportation. Therefore, to ensure that it is understood that contracting authorities can take into account impacts at all stages of the life cycle, the term 'life-cycle characteristics' is appropriate.

ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

This briefing builds on ideas elaborated in the ClientEarth briefing series 'Identifying opportunities for sustainable public procurement' in which ClientEarth identified particular areas that need to be addressed in the revision of the procurement legislation.

The briefing series and other publications related to sustainable public procurement are available at <http://www.clientearth.org/public-procurement/publications/>

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⁷ For further discussion of this point, please see ClientEarth, Legal briefing, *Distinguishing technical specifications and award criteria on the basis of role, not content* (May 2012) available at www.clientearth.org/public-procurement/public-procurement-publications/distinguishing-technical-specifications-and-award-criteria-on-the-basis-of-role-not-content-1868

⁸ For further discussion of this point, please see section 3.1, ClientEarth (October 2011), Legal briefing, *Briefing No 3: The guiding principles of public procurement - transparency, equal treatment and proportionality*, available at www.clientearth.org/sustainable-public-procurement-briefings

⁹ *Ibid.* section 3.3.4.