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Identifying Opportunities for Sustainable Public  
Procurement Briefing Series

# Briefing No. 2: Horizontal Objectives in Public Procurement



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## Key Points

Any purchase made by a contracting authority will obviously have a functional objective, but 'horizontal' policies, while not necessarily arising from the particular function of a specific public authority, may nevertheless be advanced through public purchases too. The pursuit of horizontal objectives through purchasing behaviour is normal market behaviour and contributes to the effective functioning of the market.

This briefing argues that such horizontal objectives should not be seen as less important and that Member States have broad discretion to pursue such policies. EU competence is limited to regulating 'how to buy' not 'what to buy'.

In the revision of the EU procurement legislation, the legal uncertainties that have limited the take-up of more sustainable public procurement policies need to be recognised and addressed. Specifically, it should be clarified that award criteria and technical specifications in support of horizontal procurement objectives have equal status to those relating to the contract's functional objectives. This is consistent with the CJEU's reasoning in the *Concordia Bus* and *Wienstrom* cases.

However, a greater vision would be for lawmakers to seize this opportunity to put in place a legal framework that anticipates and facilitates the evolution of the next generation of sustainable public procurement tools and practices.

## 1. Introduction

It may seem a simple question - but what is it that public authorities buy through their procurement processes? This briefing explores the idea that public procurement can be used to promote social, environmental, and other societal objectives, alongside the acquisition of the procured items or services. The former might relate to such vitally important matters as protecting human health and safety, promoting human equality and dignity, conserving natural resources, or preventing climate change and are called 'horizontal objectives' because they are not uniquely associated with any particular contract or even necessarily arise from the function of the procuring public authority.

Due to lack of legal clarity there has been some suspicion about the use and legitimacy of horizontal objectives in public procurement policies. This briefing clarifies the scope of the EU's legal competence to regulate public procurement policies of Member States. Is it 'what to buy' or 'how to buy'?

And how far does the Member States' discretion to define their horizontal procurement policies extend? The Court of Justice of the European Union (**CJEU**) has looked at both social and environmental horizontal policies and in this briefing the key cases of *Beentjes*,<sup>1</sup> *Concordia Bus*<sup>2</sup> and *Wienstrom*<sup>3</sup> are examined and compared to Commission guidance on the topic.

Lastly, the potential of the revision of the EU procurement legislation<sup>4</sup> is briefly evoked. This is a chance for lawmakers to clarify some of the uncertainties around sustainable public procurement.

## 2. The equal status of functional and horizontal objectives in public procurement policies

Public procurement is the process whereby governmental bodies purchase the goods, works, and services they need. So, for example, when governments purchase the construction of bridges, cleaning services for government offices, or paper clips, government officials authorizing the purchase ('contracting authorities') are participating in the public procurement market.

Any purchase made by a contracting authority will obviously have a functional objective. For example, a transportation authority might procure the construction of roads, bridges, and bus services in order to perform the governmental function of facilitating public transport. Public procurement can also be used to promote social, environmental, and other societal objectives that

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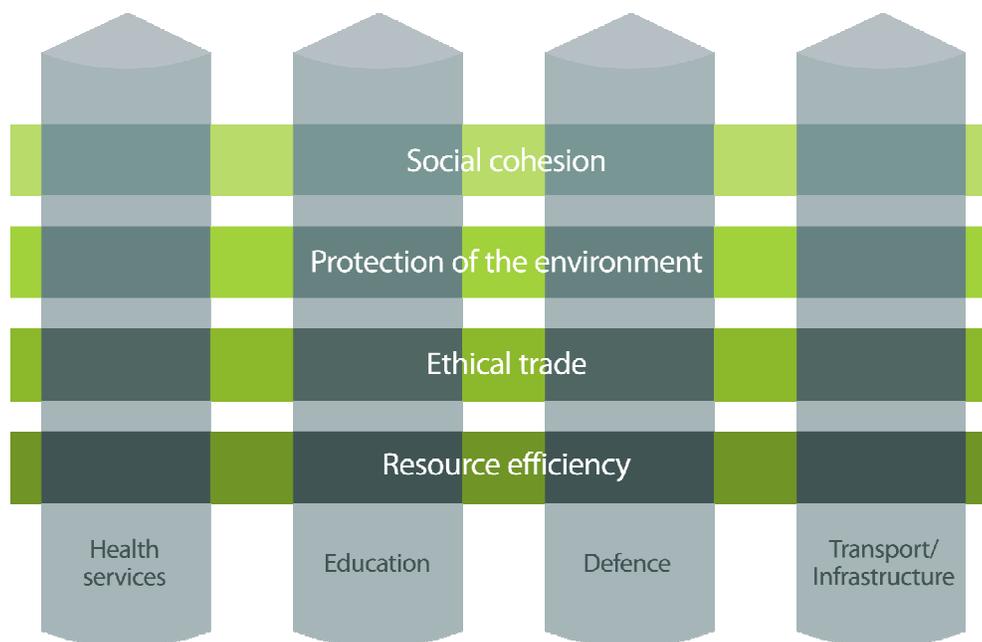
<sup>1</sup> Case 31/87 *Gebroeders Beentjes BV v. Netherlands* [1988] ECR 4635. (**Beentjes**)

<sup>2</sup> Case C-513/99 *Concordia Bus Finland Oy Ab v Helsingin Kaupunki and Hkl-Bussliikenne* [2002] ECR I-7123. (**Concordia Bus**)

<sup>3</sup> Case C-448/01 *EVN AG and Another v Austria (Stadtwerke Klagenfurt AG and Another, intervening)* [2003] ECR I-14527. (**Wienstrom**)

<sup>4</sup> The current EU procurement legislation is contained in Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L134, 30.4.2004, p.1) (as amended) and 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). While this briefing focuses mainly on Directive 2004/18/EC, many of the arguments developed will apply equally to Directive 2004/17/EC.

are not necessarily connected with the procured items' functional objectives. For example, a contracting authority may choose to honour human rights obligations through a policy prohibiting the purchase of supplies produced using child labour, to advance social cohesion by requiring public works contractors to employ ethnic minorities or long-term unemployed persons in the contracted work, or to pursue environmental objectives by requiring publically-procured paper to have a minimum recycled-fibre content. These sorts of procurement policy objectives are referred to as 'horizontal objectives'.<sup>5</sup> One commentator illustrates the relationship between functional and horizontal procurement policies by considering the specific functions of public authorities as organised into vertical 'silos', with societal objectives envisaged as involving cross-cutting 'horizontal' policies that, while not necessarily arising from the particular function of a specific public authority, might nevertheless be advanced through the way in which it conducts its functions.<sup>6</sup>



Horizontal procurement policies are sometimes referred to as 'secondary policies', implying that the primary objective of procurement is the purchase on competitive terms of a product or service meeting a particular functional need, and that factors relating to horizontal policies are 'secondary' in the sense that they do not relate directly to this need. The term 'secondary policies' also connotes that such policies are of secondary *importance*. However, horizontal considerations can be as important as, or even more important than, the functional objectives served by the procurement, particularly where horizontal objectives relate to such vitally important matters as protecting human health and safety, promoting human equality and dignity, conserving natural resources, or preventing climate change. Thus, an important principle informing the analysis of public

<sup>5</sup> For a general discussion of horizontal procurement policies under EU procurement law, see Sue Arrowsmith and Peter Kunzlik, 'Public procurement and horizontal policies in EC law: general principles,' in Sue Arrowsmith and Peter Kunzlik, eds., *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009).

<sup>6</sup> *Ibid.* at p.13.

procurement law is the *equal status of horizontal policies and the functional objectives served by procurement*.

The pursuit of horizontal objectives through purchasing behaviour, whether by public or private purchasers, is normal market behaviour and contributes to the effective functioning of the market. It requires market providers to better meet consumers' complex matrix of demands. This is illustrated by, for example, the growing demand for more sustainable and fair trade products over recent decades. When a consumer opts to purchase coffee that has been certified as compliant with fair trade principles over otherwise equivalent (and perhaps lower-priced) coffee, she is opting to purchase not only coffee but also the contribution her purchase makes towards the economic development objectives of coffee growers and a more equitable global trading regime. When she purchases recycled paper over otherwise equivalent paper, she is opting to purchase not only paper but also the contribution her purchase makes towards limiting the disposal of waste paper and the relatively higher use of resources that go into producing paper from virgin fibres. Such options allow consumers to incorporate horizontal values into their consumption choices.

In the case of the public procurement of supplies, horizontal policies aimed at increasing demand for more sustainable products - thereby shaping the broader market for the goods at issue - can have significant impacts beyond the government's functional use of the goods procured. For example, demanding higher energy-efficiency standards for publicly-procured products can profoundly shift market standards and overall energy use by a class of goods in the public and private sectors alike. In 1993 the US federal government decided to purchase only Energy Star-compliant computer equipment. The US federal government purchases more computers than any other single purchaser in the world, and it is estimated that this decision played a significant part in shifting the vast majority of computer equipment on the global market towards Energy Star compliance.<sup>7</sup>

In the case of procurement contracts for public works or services, contracting authorities could choose to promote the highest standards of employment practices through its procurement contracts, carefully monitoring tenderers for their compliance with labour laws but also reaching beyond legal minimum standards to model more ambitious ideals for quality employment. While this can be expected to impact favourably on the quality of the works and services delivered, it also directly serves the horizontal objective of sustainable development, most specifically the social pillar.

Integration of sustainability objectives into public procurement policies is consistent with the 'integration principle': various provisions of the EU Treaties require that sustainable development objectives be taken into account in all EU policies and activities.<sup>8</sup> As explained in section **Error! eference source not found.** below, it is also wholly consistent with the jurisprudence of the CJEU on EU procurement law.

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<sup>7</sup> European Commission, *Buying Green!: A Handbook on Environmental Public Procurement* (Luxembourg: Official Publications of the European Communities, 2004) at section 3.3.3 (citing <http://www.energystar.gov/>).

<sup>8</sup> In particular see Article 3(3) of the Treaty on the European Union and Articles 9, 10 and 11 of the Treaty on the Functioning of the European Union. For a further discussion of the EU Treaties and the 'integration principle', see section 2.2.1 and following in ClientEarth, Legal Briefing, *Briefing No. 1: Sustainable Development as a Key Policy Objective of the European Union* (October 2011) accessible at [www.clientearth.org/sustainable-public-procurement-briefings](http://www.clientearth.org/sustainable-public-procurement-briefings)

### 3. Member State discretion and EU competence to regulate public procurement

Regulators should not consider horizontal objectives in public procurement policies as inherently suspicious or illegitimate. Rather, a procurement criterion promoting horizontal objectives should be considered permissible unless there are special reasons to curtail it. In EU law, such special reasons are found in the tendency of governments to favour national industry for reasons that are directly contrary to the single market. Beyond this, however, any restraints need to be carefully considered.

The functioning of the internal market in public contracts is implemented mainly through directives which require authorities to award contracts using transparent procedures. The relevant directive for most procurement contracts is Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (the **Procurement Directive**).<sup>9</sup>

To properly interpret the role of the EU framework regulating public procurement, it is important to clarify the scope of the EU's legal competence to regulate public procurement policies of Member States. As an initial matter, Member States have broad discretion to define their horizontal procurement policies. This is consistent not only with their role as purchasers, as discussed above, but also with the subsidiarity principle. The subsidiarity principle requires that political power be exercised by the smallest or least central unit of government. Under this principle, the EU should regulate only where it can provide better regulation than the Member States, for example due to the scale or transnational nature of the relevant issues.

The legal bases for the Procurement Directive, as specified in the preamble to the Directive, are Article 53(1), Article 62, and Article 114 of the Treaty on the Functioning of the European Union (TFEU).<sup>10</sup> These articles authorise the adoption of measures which have as their objective the establishment and functioning of the internal market. The Procurement Directive is best understood as an effort towards negative harmonization, in that its aim is to eliminate Member State policies that present a hindrance to trade in the public procurement market.<sup>11</sup> The Procurement Directive maintains Member States' discretion to define the subject matter of their procurement and the EU has only limited competence to regulate Member State procurement policies to ensure that the policies do not hinder the internal market. Accordingly, it is *not* an objective of the Procurement Directive to regulate the balance between horizontal objectives and other procurement policy objectives. Such direct regulation of Member States' procurement policy objectives is not something the EU is competent to pursue on the basis of Article 53(1), Article 62, and Article 114 of the TFEU.

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<sup>9</sup> 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).

<sup>10</sup> Ex-Article 47(2), ex-Article 55, and ex-Article 95 of the Treaty Establishing the European Community. See also Preamble of the Procurement Directive.

<sup>11</sup> See Case C-19/00 *SIAC Construction Ltd v. County Council of the Count of Mayo* [2001] ECR I-07725, paragraph 32 ('[T]he purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State').

Accordingly, the Procurement Directive is not concerned with what contracting authorities buy, but with how they buy it. In short, a contracting authority must act fairly in the course of public procurement. Acting fairly means following the principle of equal treatment (or non-discrimination), which means that all competitors should have an equal opportunity to compete for the contract. To ensure this level playing field, the principle of *transparency* must also be applied. The transparency provisions set out in the Procurement Directive essentially require contracting authorities to use objective criteria, and to explain the criteria and how they will be used to evaluate the tenders in the tender notice. These requirements are procedural, rather than substantive.<sup>12</sup> The contracting authority is free to define the substance of the contract in any way that meets the public's needs, including through criteria promoting horizontal policies.

The Procurement Directive is not intended to restrict the subject matter of a contract, but rather to ensure that the principles of equal treatment and transparency are fully complied with in the course of procuring the contract. In addition, EU procurement rules are concerned to remove certain other restrictions on access to the market - even non-discriminatory restrictions - that are considered disproportionate in light of their objectives, in keeping with the *proportionality* principle, which requires that government should not take any regulatory action beyond that which is necessary to perform the objective of the regulatory action.<sup>13</sup>

## 4. Jurisprudence on horizontal public procurement policies

### 4.1. Recognition of horizontal social objectives: *Beentjes*

An early case in which the CJEU recognised contracting authorities' discretion to use public procurement contracts in service of horizontal policies is *Beentjes*. In that case, the Court held that, under the relevant EU directive regulating the procurement contract at issue,<sup>14</sup> a specific condition relating to the employment of long-term unemployed was permissible, provided that this condition was notified to the bidders in the tender notice. The contract at issue was for a public works contract in connection with a land consolidation operation.

Clearly, the contracting authority's interest in using the contract to provide opportunities for the long-term unemployed was a horizontal procurement policy, and not directly related to the functional objectives of the contract. In *Beentjes*, this horizontal policy was declared to be a specific condition (also known as a contract performance condition).<sup>15</sup>

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<sup>12</sup> For further discussion of these principles in the context of public procurement, see ClientEarth, Legal Briefing, *Briefing No. 3: The Guiding Principles of Public Procurement - Transparency, Equal Treatment and Proportionality* (October 2011) and ClientEarth, *Legal Analysis: Transparency Requirements for Public Procurement in the European Union* (November 2010) accessible at [www.clientearth.org/sustainable-public-procurement-briefings](http://www.clientearth.org/sustainable-public-procurement-briefings)

<sup>13</sup> For a further discussion of the application of the proportionality principle to the public procurement context, see ClientEarth, *Legal Analysis: The Proportionality Principle and Sustainable Timber Procurement Policies* (November 2010) and ClientEarth, Legal Briefing, *Briefing No. 3: The Guiding Principles of Public Procurement - Transparency, Equal Treatment and Proportionality* (October 2011) accessible at [www.clientearth.org/sustainable-public-procurement-briefings](http://www.clientearth.org/sustainable-public-procurement-briefings)

<sup>14</sup> Council Directive 71/305 of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ English Special Edition 1971 (II) p.862).

<sup>15</sup> For further discussion of specific conditions, see ClientEarth, Legal Briefing, *Briefing No. 8: Specific Conditions* (October 2011) accessible at [www.clientearth.org/sustainable-public-procurement-briefings](http://www.clientearth.org/sustainable-public-procurement-briefings)

The question that the Court was asked in *Beentjes* was whether a tender could be rejected on grounds on inability of the contractor to employ long-term unemployed persons. The Court commented:

As regards the exclusion of a tenderer on the ground that it is not in a position to employ long-term unemployed persons, it should be noted in the first place that such a condition has no relation to the checking of contractors' suitability on the basis of their economic and financial standing and their technical knowledge and ability or to the criteria for the award of contracts [...].<sup>16</sup>

The *Beentjes* case preceded the *Concordia Bus* and *Wienstrom* cases (discussed below) and the Court has subsequently not had an occasion to squarely consider whether objectives relating to composition of the workforce for a public works contract might also be incorporated into technical specifications or award criteria.<sup>17</sup> The revision of the Procurement Directive provides an opportunity to clarify that such criteria can be included as technical specifications or award criteria (as well as contract performance conditions) in order to serve sustainable development objectives, provided that the criteria at issue are linked to the subject matter of the contract.<sup>18</sup>

## 4.2. Recognition of horizontal environmental policies: *Concordia Bus*

The CJEU held in its 2002 decision in the *Concordia Bus* case that, under the procurement directives in force at the time,<sup>19</sup> a contracting authority organizing a tender procedure for the operation of city bus services could include, among the award criteria for awarding the contract on the basis of the 'economically most advantageous tender', criteria that take into account the nitrogen oxide emissions and noise level of the bus fleet offered by parties seeking the tender.

The *Concordia Bus* case squarely answered the question of whether award criteria could reflect horizontal as well as functional procurement objectives. The applicant argued that, if the objective of

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<sup>16</sup> *Beentjes* at paragraph 28

<sup>17</sup> The question of whether such horizontal policies could be addressed through technical specifications or award criteria is taken up in respectively ClientEarth, Legal Briefing, *Briefing No. 5: Technical specifications* (October 2011) and ClientEarth, Legal Briefing, *Briefing No. 6: Selection Criteria* (October 2011) accessible at [www.clientearth.org/sustainable-public-procurement-briefings](http://www.clientearth.org/sustainable-public-procurement-briefings)

<sup>18</sup> For further discussion of the requirement that technical specifications and award criteria be related to the subject matter of the contract, see ClientEarth, Legal Briefing, *Briefing No. 4: Clarifying the Link to the Subject Matter for Sustainable Procurement Criteria*, (October 2011) accessible at [www.clientearth.org/sustainable-public-procurement-briefings](http://www.clientearth.org/sustainable-public-procurement-briefings)

<sup>19</sup> Directive 93/38/EEC provided in Article 34(1) that:

- the criteria on which the contracting entities shall base the award of contracts shall be:
- the most economically advantageous tender, involving various criteria depending on the contract in question, such as: delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments with regard to spare parts, security of supplies and price; or
- the lowest price only.

*Concordia Bus* at paragraph 6, (quoting Article 34 of Directive 93/38/EC of 14 June 1993 Coordinating the procurement procedures of entities operating in the water energy, transport, and telecommunications sectors (OJ 1993 L199/84)). See also paragraph 88, which noted that Article 36 of Directive 92/50 of 18 June 1992 relating to the coordination of procedures for the award of public contracts is substantially the same.

the contracting authority is to satisfy environmental or other considerations, recourse should be had to regulatory mechanisms other than a public tender procedure.<sup>20</sup> In contrast, the defendant contracting authority, along with Member States submitting observations to the Court, argued that it is permissible to include environmental criteria in criteria for the award of a public contract, noting that the factors listed in the relevant directive governing public procurement in the transport sector<sup>21</sup> were examples only, and not exhaustive of the factors that could be taken into consideration; that Article 6 of the Treaty of the European Community (the ‘integration principle’, now expressed in Article 11 of the Treaty on the Functioning of the European Union<sup>22</sup>) requires environmental protection to be integrated into the other policies of the Community; and that the Court’s previous caselaw had affirmed contracting authorities’ discretion to choose the criteria regarded as relevant for assessing tenders.<sup>23</sup> However, the European Commission supported the applicant’s contention that award criteria for assessing the ‘economically most advantageous tender’ must be of direct economic advantage to the contracting authority.<sup>24</sup>

Thus, the question before the Court was whether a contracting authority could include horizontal procurement criteria promoting environmental policy objectives, even if these criteria did not contribute to the direct economic advantage of the contracting authority, or whether instead such objectives could only be pursued through other regulatory mechanisms. Citing the ‘integration principle’,<sup>25</sup> the Court held that public procurement criteria could include horizontal procurement objectives. Specifically, the contracting authority could take into consideration environmental criteria such as toxin and noise pollution levels of the procured bus services provided that the criteria complied with the general requirements of equal treatment and transparency and did not ‘confer an unrestricted freedom of choice on the authority’.<sup>26</sup> The Court further held that where, as in *Concordia Bus*, additional points are awarded to tenders that meet certain specific and objectively quantifiable environmental requirements, this does not confer an unrestricted freedom on the contracting authority.<sup>27</sup>

The Court also held that award criteria must be ‘linked to the subject-matter of the contract’.<sup>28</sup> The Court found that ‘criteria relating to the level of nitrogen oxide emissions and the noise level of the buses ... must be regarded as linked to the subject-matter of a contract for the provision of urban bus transport services.’<sup>29</sup> This clarifies that being ‘linked to the subject-matter of the contract’ is *not* limited to the functional objectives of the contract (in *Concordia Bus*, the provision of bus services),

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<sup>20</sup> *Concordia Bus* at paragraph 44.

<sup>21</sup> See, *supra*, note 19.

<sup>22</sup> For a fuller discussion of the ‘integration principle’ see section 2.2.2 of ClientEarth, Legal Briefing, *Briefing No. 1: Sustainable Development as a Key Policy Objective of the European Union* (October 2011) accessible at [www.clientearth.org/sustainable-public-procurement-briefings](http://www.clientearth.org/sustainable-public-procurement-briefings)

<sup>23</sup> *Concordia Bus* at paragraph 45 (citing *Beentjes, C-324/93 R v. Secretary of State for the Home Department, ex parte Evans Medical and MacFarlan Smith* [1995] ECR I-563 167, 190).

<sup>24</sup> *Ibid.* at paragraph 52.

<sup>25</sup> *Ibid.* at paragraph 57.

<sup>26</sup> *Ibid.* at paragraph 64.

<sup>27</sup> *Ibid.* at paragraph 66.

<sup>28</sup> *Ibid.* at paragraph 64.

<sup>29</sup> *Ibid.* at paragraph 65.

but can also encompass *environmental externalities* arising from the procured goods or services (in *Concordia Bus*, the pollution effects of the procured bus services).<sup>30</sup>

### 4.3. Recognition of horizontal criteria relating to production characteristics: *Wienstrom*

In the *Wienstrom* case, the CJEU extended its jurisprudence in *Concordia Bus* to allow award criteria based upon the production characteristics of supplies procured. The Court held that EU public procurement law<sup>31</sup> does not preclude a contracting authority from applying, in the context of a contract for the supply of electricity, an award criterion with a weighting of 45% in favour of electricity produced from renewable energy sources.<sup>32</sup> Noting that the promotion of electricity produced from renewable energy sources is a high Community priority,<sup>33</sup> the Court emphasised that the fact that the criterion does not necessarily serve to achieve the functional objective pursued by the procurement is irrelevant.<sup>34</sup>

*Wienstrom* also reconfirmed the Court's settled jurisprudence on horizontal policies in EU procurement law more generally. The Court emphasised a contracting authority's discretion to define criteria to determine the most economically advantageous tender, and that a criterion chosen by a contracting authority can be struck down only where it is shown to violate the principles of equal treatment, transparency, or proportionality, and not merely upon a contention that the contracting authority's balance between various horizontal and functional policy objectives should be struck differently. In relation to whether it was lawful to give the criterion favouring renewable electricity a weighting of 45%, the Court held that 'contracting authorities are not only free to choose the criteria for awarding the contract but also to determine the weighting of such criteria',<sup>35</sup> emphasizing that 'given the discretion enjoyed by the contracting authority in its identification of the most economically advantageous tender, only a weighting which resulted in an unjustified distortion would be unlawful'.<sup>36</sup>

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<sup>30</sup> For further discussion of sustainability criteria as 'linked to the subject matter of the contract' see ClientEarth, Legal Briefing, *Briefing No. 4: Clarifying the Link to the Subject Matter for Sustainable Procurement Criteria*, (October 2011) accessible at [www.clientearth.org/sustainable-public-procurement-briefings](http://www.clientearth.org/sustainable-public-procurement-briefings)

<sup>31</sup> Directive 93/36 provided in Article 26 that:

the criteria on which the contracting authority shall base the award of contracts shall be:

...

(b) or, when award is made to the most economically advantageous tender, various criteria according to the contract in question: e.g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance.

*Wienstrom* at paragraph 3 (quoting Article 36 of Directive 93/36 of 14 June 1993 co-ordinating procedures for the award of public supply contracts (OJ 1993 L199/1)).

<sup>32</sup> *Wienstrom* at paragraph 30-34.

<sup>33</sup> *Ibid.* at paragraphs 40 and 41.

<sup>34</sup> *Ibid.* at paragraphs 53.

<sup>35</sup> *Ibid.* at paragraph 39.

<sup>36</sup> *Ibid.* at paragraph 36. See also *ibid.* at paragraph 37 (noting further that '[i]t must be recalled that according to settled case-law it is open to the contracting authority when choosing the most economically advantageous tender to choose the criteria on which it proposes to base the award of contract, provided that the purpose of those criteria is to identify the most economically advantageous tender and that they do not confer on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer' and citing *Beentjes*, paragraphs 19 and 26; Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraphs 36-37; and *Concordia Bus*, paragraphs 59 and 61).

The award criteria at issue in *Wienstrom* had to do with the *sustainable production* of the supplies procured. As explained above, enabling Member States to pursue horizontal policies advancing sustainable development objectives is an aim of EU procurement law. *Wienstrom* plainly confirms that sustainability criteria be used to compare the relative sustainability of different production processes.

## 5. Legal uncertainty generated by Commission guidance on horizontal procurement policies

European Commission guidance has sometimes advanced a restrictive approach to horizontal policies in procurement, over-reaching the EU's limited competency to regulate public procurement and encroaching on Member State discretion to determine the subject matter of their procurement contracts and the content and scope of their horizontal procurement policies.

Commission guidance does not provide legally definitive statements on the basis of which Member States could securely develop their public procurement policies. Indeed, in key respects, the Commission's restrictive interpretation of horizontal procurement policies set forth in 2001 has since been rejected by the CJEU. During the legislative process for the 2004 procurement directives, launched in May 2000, the Commission produced two parallel Communications on horizontal policies in procurement. These were the Commission interpretative Communication on the Community law applicable to public procurement and possibilities for integrating environmental considerations into public procurement<sup>37</sup> (**Communication on Environmental Considerations**), published in July 2001, and the Commission interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement<sup>38</sup> (**Communication on Social Considerations**), published in October 2001. The Communication on Environmental Considerations stated, with regard to the possibilities for taking into account externalities, that 'as a general rule, externalities are not borne by the purchaser of a product but by society as a whole and therefore do not qualify as award criteria.'<sup>39</sup> This supposition was clearly rejected by the Court in *Concordia Bus* and *Wienstrom*. Likewise, the Communication on Social Considerations sought to limit award criteria to the functional objectives and corresponding consumption characteristics of the procured goods, works, or services, stating that the criteria 'should generate an economic advantage for the contracting authority' and 'must allow the intrinsic qualities of a product or service to be assessed'<sup>40</sup> - two more positions squarely rejected in *Concordia Bus* and *Wienstrom*.

Procurement policies that include horizontal objectives to promote sustainable development will typically define the subject matter to include sustainability concerns by, for example, calling for the procurement of a *sustainable* widget rather than merely a well-functioning widget. Where

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<sup>37</sup> European Commission, 'Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement', COM (2001) 274 final.

<sup>38</sup> European Commission, 'Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement', COM (2001) 566 final.

<sup>39</sup> See *supra*, note 37, at section 3.3.

<sup>40</sup> See *supra*, note 38, at section 1.4.1.

Commission guidance indicates that technical specifications and award criteria relating to sustainability are impermissible, this is essentially an attempt to regulate *what* Member States procure rather than simply *how* they procure supplies and services. As explained above, the Procurement Directive maintains Member States' discretion to define the subject matter of their procurement and the EU has only limited competence to regulate Member State procurement policies to ensure that the policies do not hinder the internal market. Thus, Commission guidance limiting horizontal procurement objectives encroaches on Member State discretion to define the subject matter of procurement, including the horizontal as well as functional policies linked thereto.

The revision of the Procurement Directive provides an opportunity to put an end to the legal uncertainty generated by the Commission's 2001 communications. The Commission and the European legislature should revise the Procurement Directive in a manner consistent with *Concordia Bus* and *Wienstrom*, clarifying that award criteria and technical specifications in support of horizontal procurement objectives have equal status to those relating to the contract's functional objectives.

## 6. Creating an enabling framework for sustainable public procurement

Public procurement is being increasingly called on to serve EU sustainable development objectives.<sup>41</sup> In order to maximise the potential of public procurement to this end, it is essential that the revision of the Procurement Directive results in an *enabling framework* for more sustainable public procurement. This means, first, that the European Commission and the EU legislature should strive to clarify the legal uncertainties propounded by some Commission communications that have been stifling the development and greater take-up of sustainable public procurement policies. But beyond this, the legal framework resulting from the revision should not be limited to the relevant tools, products, and data sets that exist presently. Rather, it should anticipate and provide an enabling framework for the next generation of sustainable public procurement tools and practices to evolve. Not forgetting, of course, that the general requirements of equal treatment and transparency still need to be applied - a discussion of these principles can be found in *Briefing No. 3: The Guiding Principles of Public Procurement - Transparency, Equal Treatment and Proportionality*.<sup>42</sup>

To this end, it is important to bear in mind that, only fairly recently, policy tools and concepts such as life-cycle costing or even the term 'sustainable' were not yet coined or well understood. Yet these concepts have evolved in response to the urgent need to reform our consumption patterns to remain within the planet's ability to supply the needs of a growing and more affluent global population. In turn, the tools to implement necessary reforms, such as the data sets needed to accurately calculate cradle-to-grave life-cycle costs, are also being developed in response to this need. Using public procurement to spur innovation for sustainability means not only using procurement criteria to incentivise market actors to develop and supply more sustainable goods and

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<sup>41</sup> See section 3 of ClientEarth, Legal Briefing, *Briefing No. 1: Sustainable Development as a Key Policy Objective of the European Union* (October 2011) accessible at [www.clientearth.org/sustainable-public-procurement-briefings](http://www.clientearth.org/sustainable-public-procurement-briefings)

<sup>42</sup> ClientEarth, Legal Briefing, *Briefing No. 3: The Guiding Principles of Public Procurement - Transparency, Equal Treatment and Proportionality* (October 2011) accessible at [www.clientearth.org/sustainable-public-procurement-briefings](http://www.clientearth.org/sustainable-public-procurement-briefings)

services; it also means providing a legal framework that will incentivise development of additional tools needed to design and implement more ambitious and effective sustainable procurement criteria.

## 7. Conclusion

EU procurement law is clearly meant to preserve Member States' discretion to define the content and scope of their procurement policies. As shown above, the CJEU has upheld the right of contracting authorities to pursue horizontal procurement policies to promote sustainable development.

This briefing is the second in a series of ClientEarth briefings entitled *Identifying Opportunities for Sustainable Public Procurement*. In the remaining briefings to this series, we will point to how the EU procurement legislation could be clarified and revised to enable contracting authorities to bring horizontal criteria into each stage of the procurement process. All briefings are accessible at [www.clientearth.org/sustainable-public-procurement-briefings](http://www.clientearth.org/sustainable-public-procurement-briefings)

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.

As legal experts working in the public interest, we act to strengthen the work of our partner organisations. Our work covers climate change and energy system transformation, protection of oceans, biodiversity and forests, and environmental justice.

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## Identifying Opportunities for Sustainable Public Procurement Briefing Series

The European Commission is expected to propose a revision of public procurement legislation<sup>1</sup> by early 2012.<sup>2</sup> A primary objective of this revision is to allow procurers to make better use of public procurement in support of common societal goals, including protection of the environment, better resource and energy efficiency, combating climate change, promoting innovation and social inclusion, and ensuring the best conditions for the provision of high quality public services.

ClientEarth's briefing series, *Identifying Opportunities for Sustainable Public Procurement* aims to consolidate, clarify, and expand opportunities to use public procurement to contribute to sustainable development objectives. Where appropriate the current legal situation is analysed, focussing on the Procurement Directive.<sup>3</sup>

**The briefings can be found at:**

[www.clientearth.org/sustainable-public-procurement-briefings](http://www.clientearth.org/sustainable-public-procurement-briefings)

This briefing series seeks to foster the development of new EU procurement legislation that fulfils the following aims:

- *Provide an enabling framework for sustainable public procurement.* To this end, the legal framework should not be limited to the tools, products, and data sets that exist presently. Rather, it should anticipate and provide an enabling framework for the next generation of sustainable public procurement tools and practices to evolve.
- *Ensure legal certainty* as to how sustainability criteria can be brought into each stage of the procurement process.
- *Strive for greater flexibility and simplification* of procurement processes, to enable greater take-up of sustainable public procurement possibilities.
- *Ensure compliance with the principles of transparency, non-discrimination, equal treatment, and proportionality.* While public procurement is increasingly utilized to serve horizontal objectives including sustainable development, the initial aim of the EU procurement legislation—to ensure a transparent and non-discriminatory single market for procurement within the European Union—must also continue to be secured.

The series is comprised of four introductory briefings discussing (1) the sustainable development objectives of the European Union, (2) the concept of horizontal procurement objectives and the scope of the EU's authority to regulate the procurement activities of Member States, (3) how the principles of transparency, equal treatment and proportionality are understood in the context of procurement, and (4) understanding how sustainability criteria are 'linked to the subject matter' of contracts for sustainable goods and services. These are followed by four briefings discussing opportunities for incorporating sustainability objectives into each stage of the procurement process: (5) technical specifications, (6) selection criteria, (7) award criteria and (8) specific conditions (also known as contract performance conditions).

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<sup>11</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L134, 30.4.2004, p.1) (as amended) and 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).

<sup>2</sup> *The Green Paper on the modernisation of EU public procurement policy*. 27 January 2011, COM(2011) 15 final, p.3.

<sup>3</sup> Many of the arguments developed in the briefings will apply equally to Directive 2004/17/EC.