VERIFYING SOCIAL RESPONSIBILITY IN SUPPLY CHAINS
A PRACTICAL AND LEGAL GUIDE FOR PUBLIC PROCURERS
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This guide has been drafted on the basis of research on verification schemes as well as on procurement legislation and practices across Europe. However, no legal guarantee can be given by the authors and it is therefore recommended that any public authority seek additional legal advice on a case-by-case basis. The publisher does not take any liability whatsoever for the use of the information provided in this guide.

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LIST OF ABBREVIATIONS

CCC: Clean Clothes Campaign
CHOC: Chain of Custody
COC: Code of Conduct
CSR: Corporate Social Responsibility
DNAP: Dutch National Action Plan
ECJ: European Court of Justice
EKO: Ecolabel of The Netherlands
EU: European Union
FSC: Forest Stewardship Council
GOTS: Global Organic Textile Standard
GPA: Agreement on Government Procurement
ILO: International Labour Organisation
MEAT: Most economically advantageous tender
MSI: Multi-stakeholder initiative
NGO: Non-governmental organisation
PEFC: Programme for the Endorsement of Forest Certification Schemes
SEMCO: Swedish Environmental Management Council
SRPP: Socially responsible public procurement
SFM: Sustainable Forest Management
SWOT-ANALYSIS: Analysis of Strength, Weaknesses, Opportunities and Threats
WFTO: World Fair Trade Organisation
WTO: World Trade Organisation
INTRODUCTION

Socially responsible public procurement (SRPP) requires analysis of the supply chain for goods, services and works to identify ways to positively impact on working conditions. An example of this could be through enabling decent working conditions and ensuring the implementation of the International Labour Organisation (ILO) core conventions (see Annex 1 A 1). To achieve this, social supply chain criteria used in a tender such as the exclusion of child labour or measures related to health and safety need to be verifiable in a transparent and effective way.

This guide analyses different instruments of verification that can be used at the various stages of a procurement process (pre-procurement, selection or exclusion criteria, technical specifications, award criteria and contract performance clauses/contract management).

The described verification schemes have been developed and in some cases applied in European countries including Sweden (follow-up questionnaire), Germany (bidder declaration), the Netherlands (transparency and disclosure of information), Switzerland (external audits) and Austria (catalogue of measures). Other verification schemes described in this document are based on cooperation with multistakeholder initiatives (MSIs), certification schemes from labels such as Fairtrade International, Forest Stewardship Council (FSC) and XertifiX, and sector-specific approaches for timber, construction materials and textiles. The product groups have been chosen based on their practical relevance for public sector procurers and the potential to have a positive impact on working conditions along the supply chain.

OBJECTIVE OF THE LEGAL GUIDE AND GUIDING QUESTIONS

In order to provide some guidance for the practical application of verification schemes for socially responsible public procurement (SRPP) the main objective of the legal study is to determine:

a) if and how the proposed verification schemes can be applied in a legally permissible way;

b) at which stage of the procurement process the scheme can be applied.

Practice has shown that willingness to apply social criteria and verification schemes for SRPP in the tender process requires a clear view of legal admissibility. For that reason the guide is accompanied by legal expertise and opinions on how to best apply the proposed verification schemes.

From a legal point of view the guide addresses the following questions:

- How can the verification schemes be applied in a legally compliant manner?
What type of case law exists that relates to the described verification schemes?

What scope do contracting authorities have to reject forms of verification which they consider inappropriate?

What scope do contracting authorities have for awarding different points to bids according to the robustness of the verification used?

The legal framework in which the schemes are analysed is that provided by the EU Procurement Directives, EU Treaties, and relevant case law of the European Court of Justice (ECJ). Compliance with these instruments is deemed to meet the obligations arising under the Government Procurement Agreement (GPA) of the World Trade Organisation (WTO). National law of EU Member States, with the exception of German law, has not been taken into account for the purpose of this legal guidance.

The LANDMARK guide introduces a set of legal opinions on the verification schemes described. It provides legal conclusions highlighting the different legal opinions and points of agreement.

LEGAL CONTEXT

A revision process for the EU Procurement Directives (2004/17/EC and 2004/18/EC) is currently underway with new legislation expected to be adopted by the end of 2012. Proposed drafts for the new legislation were published by the European Commission in December 2011, and these contain a number of provisions which would affect the way SRPP can be conducted. While these provisions are worthy of closer examination and discussion, they are not directly addressed in this guidance document. The current Directives are not due to be repealed until 2014, and it is still not known whether changes to the proposed drafts will be made. Thus any attempt to include the new measures in this guidance document would be both premature and potentially misleading for public authorities.

Another juridical development in the field of SRPP is a case currently before the European Court of Justice Commission v The Netherlands (C-368/10). This case concerns the reference made by a Dutch contracting authority in its tender documents to environmental and social labels (EKO and Max Havelaar). In her opinion delivered on 15 December 2011, Advocate-General Kokott indicates that while the manner in which the labels were referred to violated the requirements under Directive 2004/18/EC, the application of fair trade principles was not in itself contrary to the Directive or Treaty. It should be noted that these requirements (which included minimum prices, pre-financing and long-term contracts with suppliers) were treated as being contract conditions under Article 26 of Directive 2004/18/EC.

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1 2004/17/EC and 2004/18/EC. A revision process is currently underway for these Directives, with draft legislation expected to be published by the European Commission by the end of 2011.
and as being award criteria under Article 53 of Directive 2004/18/EC. According to the Advocate-General, the use of the requirements as selection criteria would also be compatible with Community law. While this opinion casts some interesting light on the ability of contracting authorities to include fair trade requirements in contract clauses, the judgment of the Court on these matters has not yet been delivered. Furthermore, the proposed provisions in the new Directives, which set out in more detail how social conditions can be included in tenders, have the potential to override any interpretation given in this case. For these reasons, the guidance in this document does not seek to reflect the specific reasoning in Case C-368/10.

**HOW TO READ THE GUIDE**

Section II describes the steps of the tender process and the relevance of verification schemes for the effective implementation of social supply chain criteria, with a focus on what can be asked for at each stage. In the countries examined, there is a wide range of procedures regarding the schemes to obtain evidence of compliance from bidders and suppliers. Some of them have already been applied in practice; others are currently at the planning stage.

Section III describes in detail each of the seven different verification schemes structured in a similar way for better orientation. Each legal instrument consists of:

- The background to its development
- Real or fictive examples of application
- Detailed legal assessment of the guiding questions of the guidance legal analysis. To allow the reader to clearly understand the challenges and opportunities of each verification process, several legal opinions are given on their implementation, along with a SWOT analysis (Strength, Weaknesses, Opportunities and Threats)
- Practical advices for public procurer on the basis of a SWOT analysis
- Success factors for each scheme

Section IV brings forward general conclusions for the practical work of public procurers working on SRPP.

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2 Paras. 99 et seq. of the opinion of the Advocate-General.

3 Paras. 125 et seq. of the opinion of the Advocate-General.

4 SWOT analysis is a strategic planning method used to evaluate the Strengths, Weaknesses/ Limitations, Opportunities, and Threats involved in a project or strategy. It involves specifying the objective of the strategy (in our case the different verification schemes) and identifying the internal and external factors that are favorable and unfavorable to achieve that objective.
TENDER PROCESS FOR SOCIALLY RESPONSIBLE PUBLIC PROCUREMENT (SRPP)

PRE-PROCUREMENT

Before tendering, public authorities may wish to conduct market research and/or consultation in order to understand the social risks associated with their planned purchase. Preliminary research may involve contacting other authorities or searching online databases such as TED\(^5\) and Standards Map\(^6\) to get an idea of suppliers who are active in the sector and the social risks addressed by existing standards.

Direct consultation with potential suppliers should be done in an open and transparent way. One option is to publish a prior information notice (PIN) in the Official Journal, outlining the planned purchase and requesting information from interested suppliers. A technical dialogue can be carried out to help identify potential risks in the supply chain and means of addressing these. A clear separation should be made between these activities and the start of a formal procurement procedure. If the technical dialogue or consultation is used to help develop specifications, it is important to ensure that this does not preclude competition or give an unfair advantage to certain suppliers.

Further information on pre-procurement methods can be found in the SMART SPP guidance available at [http://www.smart-spp.eu/guidance](http://www.smart-spp.eu/guidance).

DEFINITION OF THE SUBJECT MATTER

At this stage, the scope of the contract and its title need to be determined. Does the procurement relate to just a finished product, or are there services involved as well? This will affect who responds to the tender (e.g. retailers, wholesalers or manufacturers) and how they interpret the requirements.

In a works contract, a design team may be appointed first, which is then responsible for appointing the main contractor. In this case procurers need to think about how much control they wish to exercise over the subcontractors and materials used, and how to communicate these requirements to the design team.

The subject matter is an opportunity to clearly spell out the requirement that the product, service or work has been produced under decent and fair working conditions.

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Other factors to consider at this stage include the duration and volume of the contract, and whether subcontractors are likely to be involved. If there is uncertainty about the effect of social supply chain criteria on cost or other factors, it makes sense to build some flexibility into the contract. This can be done by awarding a contract with options or establishing a single or multi-operator framework agreement. In both cases, the procurer will be able to increase/adjust the scope of purchasing after assessing the initial contract in terms of social/environmental performance, cost and quality. Framework agreements can be established for a maximum period of four years under Directive 2004/18/EC.

SELECTION AND EXCLUSION CRITERIA

Selection and exclusion criteria are aimed at determining which economic operators are suitable to carry out a contract. There are two types of exclusion criteria: those for which exclusion is mandatory and those which allow procurers to exclude an operator. In the first category are certain serious breaches of law such as corruption, fraud or money laundering. The second category covers a number of other situations such as bankruptcy, professional misconduct and failure to pay taxes or social security contributions.7

Importantly, exclusion criteria must be applied to the economic operator who is a candidate or tenderer for the contract. This may be any form of company, a grouping or an individual – but does not include subcontractors unless they are part of a bidding consortium. So while it is possible to ask for declarations regarding compliance with social supply chain criteria from subcontractors, and to build this into contract performance clauses, it cannot be the basis for excluding certain operators from a tender procedure.

Selection criteria offer more scope for assessing subcontractors, as they relate to overall financial, economic, technical and professional capacity to carry out the contract. So, for example, procurers can ask about the proportion of the contract which the operator intends to subcontract and the technical and professional capacity of subcontractors. Where social criteria have been incorporated into specifications, this would include technical capacity to deliver against those social requirements. For example, a procurer could ask about educational qualifications to ensure the proper application of workplace health and safety requirements.

Both exclusion and selection criteria are listed exhaustively in the Directives – meaning that in general it will not be possible to apply other grounds to exclude operators from a competition.8 There is also an overall requirement to

7 For a complete list of the grounds of exclusion, see Article 45 (1) and (2) of Directive 2004/18/EC.
8 In Case C-538/07 Assitur the ECJ held that under Directive 92/50/EEC it was possible for Member States to apply “other grounds for exclusion intended to guarantee respect for the principles of equality of treatment and transparency, provided that such measures do not go beyond what is necessary to achieve that objective.” The exclusion provisions under Directive 2004/18/EC are nearly identical.
ensure that the criteria applied are related to and proportionate to the subject-matter of the contract.

It is not possible at selection stage to request certification under a particular social standard or management scheme. However, such certification may in some cases be relevant evidence in determining whether an operator has met the requirements for technical and professional capacity which have been set out. For example, if the procurer asks for educational and professional qualifications related to workplace safety, then a certification which includes this in its requirements could serve as evidence. Other forms of evidence must also be evaluated on their merits.

**TECHNICAL SPECIFICATIONS**

Technical specifications form the core of any tender procedure, with the exception of the competitive dialogue. In all other procedures, the contracting authority must define its needs either by a technical description, requirements for functionality and performance, or a combination of these approaches. Only tenders which comply with the specifications published can be assessed against the award criteria.

The procurement directives allow procurers to specify materials and production processes or methods for goods, services and works contracts.\(^9\) There is an overriding obligation not to be too restrictive in specifications – for example by referring to a material or method which is proprietary or only available to one operator.\(^10\) Technical specifications should describe the characteristics of the goods, services or works being purchased, and not the overall practices of the economic operator.

Verification schemes can play a vital role in helping to develop specifications which include social supply chain criteria. For example, if a procurer is uncertain of which materials to specify in a contract for the supply of uniforms, checking the third-party social certification schemes which apply to different types of cotton and synthetic fibres and the criteria underlying them can help to define the requirements (see section 2.6 on labels). Such schemes can be accepted as one form of evidence of compliance with the criteria. It is not allowed to insist on a certain certification or label to establish compliance with specifications – equivalent evidence must also be accepted.

**AWARD CRITERIA**

Award criteria determine the outcome of a competition, and can send a clear signal about the importance of social considerations. The ‘most economically advantageous tender’ (MEAT) award basis allows for assessment of social

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\(^10\) In certain cases, where only one operator can be awarded the contract, the negotiated procedure without publication of a contract notice may be used (See Article 31(1)b of Directive 2004/18/EC).
performance beyond the minimum specified. There are a number of requirements for formulating and applying award criteria, including transparency (publishing criteria and weightings in advance) and fairness (award criteria must not be discriminatory or allow for an arbitrary decision). In addition, there is the requirement that award criteria be ‘linked to the subject matter of the contract’ – i.e. they must not relate to matters outside of its scope.

With these requirements in mind, award criteria can be developed which will help to distinguish between tenders with different levels of social value. For example, a procurer may wish to award marks for proposals which offer preferable working conditions to staff directly involved in the production and delivery of the goods, services or works. To do this, the way in which bids will be assessed needs to be clear – for example if higher marks will be awarded to tenderers who include staff training in their methodology for carrying out the contract.

It is forbidden to include criteria which violate any of the Treaty principles, for example by discriminating directly or indirectly based on the place of establishment of the operator. Also consider how compliance with the criteria can be monitored or enforced during the execution of the contract – can they be included in the contract terms?

**CONTRACT PERFORMANCE CLAUSES/CONTRACT MANAGEMENT**

The procurement directives explicitly mention the possibility of including social considerations in the conditions for performance of a contract. Such conditions can play a vital role in underlining commitments made by tenderers and providing appropriate remedies in case of breach. They may also be used to incentivise operators to deliver higher levels of performance, by linking progressive improvements to bonus payments for example.

However, contract performance clauses are likely to be more effective, and also more transparent, where they relate to matters which have already been examined as part of the competitive tender process. As was made clear by the ECJ in *Nord Pas de Calais*, contract performance clauses in themselves cannot be the basis for rejection of a tender. Case law also indicates that changes to contract performance clauses during the lifetime of a contract may lead to the requirement for a new tender procedure. So it is important to consider from the outset what role contract performance clauses can play in implementing social criteria. Procurers should also be realistic about the scope for actively managing and monitoring commitments.

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12 Case C-225/98 *Commission v France*
13 See in particular Case C-496/99 *P Commission v CAS Succhi di Frutta* [2004] ECR I-03801 paras. 115-121; Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-04401, and Case C-91/08 *Wall AG v Stadt Frankfurt am Main*. Where changes to a contract after award constitute material amendments which would have allowed for the admission of tenderers other than those originally admitted or the acceptance of an offer other than that originally accepted, a new contract award procedure may be required.
3 VERIFICATION SCHEMES

1. BIDDER DECLARATION (GERMANY)

1.1 DESCRIPTION OF THE VERIFICATION SCHEME

In Germany it is common practice to place social criteria – if any – within contract clauses. A bidder declaration is a signed document, a self declaration by the bidder used to verify compliance with certain criteria. The aspects declared can be included into the actual contract clauses of the contract between the contracting authority and the successful bidder. Bidder declarations are predominantly taken as a means to integrate labour and social standards into the international production process. However, some of the bidder declarations significantly differ in their specific details. Some municipalities work with graduated bidder declarations, which allow suppliers to adopt targeted measures to improve their supply chain practices, while others insist on the presentation of evidence that such measures have already been introduced. Representatives of non-governmental organisations (NGOs) argue in favour of making the specific formulation of the bidder declarations appropriate to the product group as well as the corresponding complexity of the supply chain and the existence of alternatives produced in a socially responsible way.

First it is important to understand that bidder declarations can have different functions. They can be used for the inclusion of social criteria in the contract performance clauses and therefore can amend the general and specific contract conditions. As a second function bidder declarations can also be used as proof of compliance with social criteria, at any stage of the procurement process. Furthermore a bidder declaration can have the function that the bidder declares what kind of independent evidence will be submitted for the verification of social criteria. This normally would take place at the selection stage.

1.2 A PRACTICAL EXAMPLE

For the guide two separate bidder declarations were checked by different lawyers. In their legal opinions a number of debatable points arose which are discussed in section 1.3.2.

In Annex 1 you can find a bidder declaration edited and used by the City of Bremen. The bidder declaration of Bremen has already been applied in practice for different product groups but has not yet been evaluated. In Annex 2 you can find a model bidder declaration\(^\text{14}\), which is written for the delivery

\(^{14}\) The model bidder declaration was developed by the German NGOs – CIR and WEED on the basis of the legal opinion of Krämer/Krajewski (2010). For further information on the legal opinion please see: Krämer/Krajewski (2010) in CIR/CorA/WEED (2010): p. 7-32
of clothes\textsuperscript{15}. In Annex 3 you can find the ILO standards required in the model bidder declaration. In Annex 4 you can find the criteria for independent evidence and membership in a multistakeholder initiative (MSI).

The \textbf{model bidder declaration} (Annex 2) has two functions. With the first declaration the bidder obliges himself to prove compliance with the social criteria by providing independent evidence e.g. membership in a multistakeholder-initiative. The second declaration is used for the inclusion of social criteria when no independent evidence can be provided. The bidder declares to undertake targeted measures in order to comply with the social criteria instead of providing evidence for this.

The \textbf{Bremen bidder declaration} has three kind of declarations out of which the bidder can select one or more to provide the necessary verification. The third declaration is a self-declaration. The bidder declares that he fulfils the ILO core labour standards but without undertaking targeted measures or providing independent evidence. He has to declare that he will inform himself about working conditions and will communicate his suppliers to the contracting authority in case of request.

\textsuperscript{15} In the case of the clothing sector some reliable verification already exists. However, the existing verification schemes are not yet in market-wide use. Especially when procuring products with specific technical requirements, independent evidence may be demanded. Also the product group IT is well suited for bidder declarations. In the case of IT there do not exist any reliable certifications or labels yet. As Apple only recently became a member of Fair Labour Association (FLA), it is too soon to evaluate the consequences of this step. In the future we will see if the company can prove social responsibility in their factories within the membership as part of the FLA. For more information on model bidder declarations regarding IT products please see: CIR/CorA/WEED (2010): 35-44.
## 1.3 LEGAL ANALYSIS

### 1.3.1 SWOT ANALYSIS FROM A LEGAL PERSPECTIVE

<table>
<thead>
<tr>
<th>STRENGTHS</th>
<th>WEAKNESSES</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The use of bidder declarations is compatible with Community law and with the GPA.</td>
<td>• If the contracting authority does not ask for independent evidence it still has the burden of verification at the contract performance stage.</td>
</tr>
<tr>
<td>• The use of targeted measures and graduated bidder declarations is a possible way to implement the ILO core labour standards in product groups where independent evidence of compliance is presently not available before the award of the contract. In these cases the verification would need to be enforced as part of the contract management.</td>
<td>• Bidder declarations used in the contract performance clauses can not be applied as disguised technical specifications or award criteria – meaning they cannot be assessed in detail as part of the tender process.</td>
</tr>
<tr>
<td>• The use of bidder declarations to integrate social standards into additional contract terms is the safest way at present.</td>
<td>• A bidder declaration will normally only apply to the main contractor and there may be limits on the extent to which the contracting authority can seek enforcement of provisions against subcontractors, due to privity of contract considerations.</td>
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<tr>
<td>• Bids from tenderers who have not accepted the contract performance clauses must be excluded.</td>
<td></td>
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<tr>
<td>• Contract performance clauses create legally binding obligations for the successful bidder and, where proportionate and compliant with national law, its subcontractors.</td>
<td></td>
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<tr>
<td>• Targeted measures allow certified and uncertified companies to participate in the tendering procedure.</td>
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<tr>
<td>OPPORTUNITIES</td>
<td>THREATS</td>
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<tr>
<td>• Bidder declarations may – like all contract clauses – be adapted to the characteristics of the tender (e.g. product group).</td>
<td>• At present, the use of graduated bidder declarations is still legally debatable. (see section 1.3.2)</td>
</tr>
<tr>
<td>• Bidder declarations may also be applied at other stages of the procurement process, taking into account the different rules which apply at these stages.</td>
<td>• In order to be as legally secure as possible, bidder declarations need to be clear, proportionate and verifiable. This demands a lot from both the contractor and the contracting authority.</td>
</tr>
<tr>
<td>• Graduated bidder declarations can also be used for product groups for which socially responsible purchasing alternatives do not exist yet, by introducing targeted measures.</td>
<td>• It is debatable to what extent the inclusion of trade unions into the measures can be explicitly required and whether this is proportionate. The inclusion of trade unions and human rights organizations can only be required where these exist in the countries or regions of production.</td>
</tr>
<tr>
<td>• Requirements beyond compliance with the ILO core labour standards may be integrated. See 4.3.2</td>
<td>• National law in the country of the contracting authority must also be consulted in order to ensure that levels of contract penalties and any requirements on subcontractors are permitted.</td>
</tr>
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1.3.2 COMPLIANCE WITH RELEVANT LAW

The use of bidder declarations is compatible with Community law and with the GPA. The use of bidder declarations to integrate social standards into additional contract terms is currently the most legally compliant way to do so.

Contracting authorities must keep in mind the following requirements when drafting a bidder declaration:

- It must be comprehensible and precise.
- It must respect the principle of proportionality, in particular with regard to extent and volume of the contract, the probability of a violation of labour and social standards, the complexity and transparency of the supply chain and existing procurement alternatives.
- It must respect the principle of equal treatment and not discriminate actual or potential bidders in an impermissible manner.
- It must include the required actual link to the subject matter of the contract.
- And it must be communicated in accordance with transparency requirements taking into account European and national regulations, in particular with regard to the tender documents.

If these requirements are met, bidder declarations represent a reliable and appropriate way of implementing social criteria into a tender procedure.
Nevertheless, there are still some potential legal issues regarding the formulation of the bidder declarations and some debatable points which generate different legal opinions given the lack of case law in this regard. These debatable points are listed below in the form of questions:

**Does the contracting authority have to verify the information the contractor included in the declaration?**

The third option in the bidder declaration of the City of Bremen (see Annex 1) is still debatable. Mosters (2012: 22-24) came to the conclusion that contracting authorities can only demand what they can verify given that it would not be legally permissible to list requirements that do not lead to the desired results. A national measure is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.

A self declaration on the part of the bidder cannot meet the requirements set out in the call for tenders if the contracting authority does not systematically verify the information contained in the self declaration. Buchmüller/Falke (2012b) and Zieres (2012) conclude that the requirements of verification are fulfilled with the bidder declaration of Bremen given that the contractual obligation does not depend on the verification of compliance (Buchmüller/Falke 2012b: 3).

**How to prevent a bidder declaration being seen as a disguised technical specifications/award criteria? Is it possible to require a validation before awarding the contract?**

First it is important to mention that if the bidder declaration is used at the stage of contract performance clauses, it is not legally permissible to make a selection between those bidders who have provided “better” independent evidence, including more criteria than other declarations and those who have not. It is also not legally permissible to eliminate a bidder from the contract awarding process because he chose to undertake targeted measures while other bidders can provide independent evidence.

Mosters argues that the European Commission defines contract performance clauses as clauses which everybody should be able to fulfil during the contract performance process (Mosters 2012: 26). So the possibility of asking for a validation or proof of ability attached to the bidder declaration is still debatable (see Article 1 a in the model bidder declaration). Buchmüller/Schnutenhaus (2012) point out that “the contracting authority may also ask for a validation or proof of ability attached to the bidder declaration. In practice, this is what happens for example in the context of the procurement of green electricity: The contracting authority may oblige the tenderer to name – in his tender – the power plant that produces the green electricity which is to be delivered. After the delivery period the tenderer is obligated – according to the contract clauses – to prove that he delivered green electricity that was produced in the power plant he named in his tender. Maybe this “two step-approach” could be adapted and used in the context of “social procurement”.”
Krämer and Krajewski point out that compliance with the conditions set out in the contract is not relevant in the process of awarding the tender, however, they also clarify that compliance does have a differentiating quality among the tenderers without being disguised as technical specifications or selection criteria. They argue even more that it is legally permissible to ask for a validation/proof of ability before awarding the contract as eventually only those tenderers expecting to be able to meet the conditions can apply. In order to minimize the risk that the tenderer cannot comply with the criteria (leading to a lengthy delay of the contract which would not be proportionate), the possibility of checking the ability of the tenderer in advance has to be created. According to Krämer/Krajewski the public authority is therefore allowed to ask the possible client for evidence of plausibility (Krajewski/Krämer 2010: 28-30).

Can local authorities demand standards within a bidder declaration that go beyond the ILO core labour standards?

It is still debatable whether procurers can demand standards which are further reaching than the ILO core labour standards (see section I. Introduction). Mosters states that this should be possible under the condition that these further reaching demands meet the following requirements: Either they are universally accepted by the vast majority of states as inalienable fundamental rights or they are regarded in the home state of the tenderer as an indispensable part of the moral standards so that the breach, which is connected with the good to be procured, cannot be accepted. To give an example: In most states the Rights of the Child as set out in the respective UN Convention are recognized as fundamental rights and could therefore be rightfully demanded in calls for tenderers according to Mosters. However, whether the same applies to the rights contained in the UN Convention on Economic, Social and Cultural Rights is still debatable (Mosters 2012: 19).

Is it possible to formulate targeted measures in the bidder declaration?

Targeted measures, i.e. activities undertaken by the contractor to improve living and working conditions along the supply chain related to the products, services or works provided within a defined time plan and monitored towards success, can be required in bidder declarations at the stage of contract performance clauses, but they must be drafted carefully. The measures should meet the targeted criteria which mean that in this case it is important to evaluate the individual problems in the production processes. Mosters argues that the targeted measure has to have a real and measurable impact on the production process of the specific goods or services to be delivered to the contracting authority. The contractor should be able to enforce the criteria during the production of the product delivered to the contracting authority. It is also necessary to adjust the requirements mentioned in the model bidder declaration in Annex 1 to small tenderers or short-term delivery of goods in order to maintain proportionality. Furthermore, Mosters recommends to go even more in detail regarding the formulation of targeted measures than it is the case in the model bidder declaration (Mosters 2012).
Is it legally permissible to use a graduated bidder declaration?

One potential legal issue arises regarding the choice between independent evidence of implementation of the stated labour standards versus targeted measures. If both options are allowed within a single tender procedure, it is possible that a tenderer who gave independent evidence of implementation could argue that those who only provide evidence of targeted measures had an unfair advantage, e.g. due to the higher costs associated with third-party certification or participation in multi-stakeholder initiatives. However, the principle of equal treatment also requires that different situations not be treated in the same way, unless such treatment is objectively justified – so it might be considered a violation to apply the same treatment to contractors who were in different positions with respect to their supply chains.

In any event, the use of bidder declarations as a contract clause would seem to avoid this problem, because only the successful bidder will have to demonstrate compliance or adopt the targeted measures. It would however pose a problem if the bidder declaration were used at other stages of the procurement process.

How to address unreliable or incomplete information provided alongside the bidder declaration?

As noted, for procedures above the EU-threshold the declaration must be included in the terms of reference (tender documents). This means that the contracting authority must decide how to deal with tenderers who do not submit the declarations, submit incomplete declarations, or make declarations where the information is found to be unreliable (e.g. the procurer has independent knowledge of breaches within the supply chain). Based on the principle of equal treatment, contracting authorities are generally obliged to exclude operators where certain documents which are stipulated as a mandatory part of the tender are omitted or incomplete. The principle of equal treatment means that the same approach should be applied to all candidates or tenderers in a procedure.

The situation is somewhat more complex where a contracting authority has reason to doubt the authenticity or completeness of a declaration made by an operator. In this case the contracting authority would normally in the first instance seek clarification or confirmation from the operator, before determining whether the information can be relied upon. Again the principle of equal treatment means the same approach should be applied to all operators who are in a similar situation.

Is it possible to use the bidder declaration and another verification scheme?

Bidder declarations may be combined with other verification schemes (e.g. disclosure of information or a follow-up questionnaire).
Should key product groups be identified for a bidder declaration?

Bidder declarations may – like every other contract clause – be adapted to the characteristics of the tender. To meet the requirement of proportionality it makes sense to tailor the bidder declaration to the specific product group being purchased. In some product groups the supply chain is more complex than in others, meaning that in some cases it would not be proportional to require that the bidder proves compliance with the ILO core labour standards for the whole supply chain. Furthermore the problems in the production processes differ a lot.

1.3.3 STAGE OF THE PROCUREMENT PROCESS

If social criteria are included in contract performance clauses via a bidder declaration it is not legally permissible to use this bidder declaration as an award criterion (i.e. giving marks based on the tenderer’s response. It is also not allowed to use it as a selection criterion). Bidder declarations also should not be used as disguised technical specifications. However, it is possible that the basic concept of the bidder declaration could be adapted for use in one or more of these stages in the procurement process (e.g. selection criteria and contract performance clauses).

1.3.4 LEGAL CONCLUSIONS

The use of bidder declarations to integrate social standards in public procurement at the stage of contract performance clauses has a strong legal basis. Because of this strong legal basis bidder declarations give us the possibility to formulate extensive requirements for the contractor, which have a high potential to improve living and working conditions in the global south. Nevertheless the bidder declaration – especially if the contracting authority uses targeted measures – has to be carefully drafted to be compatible with Community law, the GPA and national contract law.

Recommendations for public procurers

Firstly, it is important that if there are product groups with certificates or labels demanding high standards and criteria (i.e. fair trade or FSC) these standards and criteria should be required by the contracting authority. From a development point of view it makes no sense to use a graduated bidder declaration if plenty of independent labels and certificates exist for one product group. In this case it is sufficient to refer to applicable criteria underlying these labels in the call for tender and subsequently ask the tenderer for the referred or comparable proof.

Secondly, it is important that the presented proof is independent and credible.16 It also must be required in the bidder declaration.

Thirdly, if in one product group there are not enough credible and independent labels or certificates to be required we recommend using a bidder declaration

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16 For the definition of an independent and credible proof see CorA/CIR 2009: 15.
with targeted measures, which are helpful in improving working conditions. If the contracting authority must use graduated bidder declarations because there are not enough alternatives it is furthermore absolutely important to verify the information made by the bidder. To achieve better working conditions we do not recommend availing of the possibility to tick the option “self declaration” in the bidder declaration.

1.4 PRACTICAL CONCLUSIONS FOR PROCURERS (SWOT ANALYSIS)

<table>
<thead>
<tr>
<th>STRENGTHS</th>
<th>WEAKNESSES</th>
</tr>
</thead>
</table>
| • Bidder declarations are not a new instrument of public procurement. Purchasers have already been able to gain experience with it in other areas.  
• Bidder declarations can be used in both above and below-threshold tender procedures.  
• Through the presentation of evidence of plausibility, later sanctions or costly contract dissolution can be prevented. | • In Germany, until now, there are no political answers to questions concerning the obligation to produce proof and to control. This is asking too much of many municipalities and requires that the purchaser knows about problems that might occur in the production process of the good to be purchased or has done the necessary research beforehand. |

<table>
<thead>
<tr>
<th>OPPORTUNITIES</th>
<th>THREATS</th>
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<tbody>
<tr>
<td>• With this instrument, public authorities can actively support the market for socially and responsibly produced goods.</td>
<td></td>
</tr>
</tbody>
</table>

1.5 SUCCESS FACTORS

In order to make the proposed verification scheme successful it is necessary that the contracting authority verifies the information of the company, especially when they submit targeted measures.
2. FOLLOW-UP QUESTIONNAIRE (SWEDEN)

2.1 DESCRIPTION OF THE VERIFICATION SCHEME

Among the EU Member States Sweden distinguishes itself by its very strong political commitment\(^{17}\) to, and practical implementation of, socially responsible public procurement. The Swedish Environmental Management Council (SEMCo)\(^{18}\) – as a central competence centre for the implementation of SRPP – develops product-specific criteria for sustainable procurement, provides background information, guidance and training, a helpdesk, and support to public procurers at national, county and local level.

During the process of elaboration of the social criteria it was recognised that to be able to ensure compliance with international social standards and thus to purchase products that are produced in ways that respect decent work and the ILO core conventions, follow-up with suppliers is a crucial step in the tender process. As a result a follow-up questionnaire has been developed by SwedWatch (Sweden)\(^{19}\) as a control instrument of the social criteria. The Swedish approach is based on the perception that compliance requires control.

The follow-up questionnaire is based on the belief that often a few targeted questions to suppliers are effective to verify their given declarations and contribute to the proof of compliance with social criteria along the supply chain. It is one way to find out to what extent the required criteria has been respected in the execution of the contract. The social requirements the Swedish public authorities set are formulated as contract performance clauses.

The questionnaire

The follow-up questionnaire (see Annex 5) contains fifteen questions that refer to the inner structure of the contractor, the arrangements between the contractor and his suppliers, knowledge of the contractor about the processes of his suppliers as well as measures that the contractor has taken to ensure compliance with social and ethical requirements throughout its supply chain and the foreseen instruments to address problems in this field.\(^{20}\) To show its efforts and the efforts its subcontractors have gone to in ensuring the required social conditions in the production stage are met, the contractor is required to provide supporting documents. The questions relate to the manufacturing

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\(^{17}\) With the addition to the procurement law of regulation Article 9 a in 2010 contracting authorities should take environmental and social considerations into account in connection with public procurements, if the nature of the procurement motivates this.” See Swedish Public Procurement Act 2010: 571.

\(^{18}\) For more information visit [www.msr.se](http://www.msr.se) Last visited: 20 February 2012

\(^{19}\) SwedWatch is a Swedish NGO with long-standing and comprehensive expertise in the field of global supply chains. See [http://www.swedwatch.org/en](http://www.swedwatch.org/en) Last visited: 20 February 2012

\(^{20}\) The supplier must answer where the production takes place: land and city/region. But they must also reveal location of fabrics if the contracting authority whishes to make an audit. Materials, technologies etc. are not covered in the questionnaire.
of the goods supplied in the specific contract that is being followed-up. The questions must be answered by the operator who is party to the contract.

**Assessment guideline for public authorities**

In addition to the questionnaire a guideline for a quality assessment and comparison of the responses to the questionnaires for public authorities\(^{21}\) and guidance for operators\(^{22}\) has been developed by SwedWatch. The assessment guideline for public authorities aims to help public procurers to interpret each answer correctly.

The answers are compiled and assessed based on the colour code green, yellow and red. Full compliance with the requirement claimed by the question leads to a green mark, partial compliance to a yellow mark and no compliance to a red mark. The operators / bidders can then be compared with each other within each industry segment or with other suppliers to a specific municipality. The bidders with the highest percentage of red responses should be subject to a deeper examination and a direct dialogue. Bidders that answer no to questions 2-5 (regarding whether they have a person responsible for social and ethical requirements, knowledge of location of production, whether risks have been assessed and requirements for suppliers introduced) are always a high risk and should be subject to deeper examination and direct dialogue.

**Scope of application**

The filling in of the questionnaire happens during the contract performance phase, i.e. after the awarding of the contract. It is a post-award controlling tool which a contractor (not the bidder) should answer within the scope of contract execution. It is expected from the suppliers that they have procedures which ensure that the production is compliant with required working conditions. These procedures are being followed up with the questionnaire. The follow-up questionnaire should serve the public procurer as a tool of control to find out to what extent the required criteria has been respected in the execution of the contract. If the answers in the questionnaire show that it is likely that the supplier does not follow the social criteria, the contracting authority should also have the possibility to make an audit in the production. Furthermore if the supplier does not answer the questions in a satisfying way, the contracting authority can sanction this (provided that there is a corresponding regulation in the contract).\(^{23}\)

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\(^{21}\) Due to space shortage in this legal guide it was not possible to attach the comprehensive assessment guideline for public authorities. Public authorities interested to learn more about the assessment guideline or receive a copy please contact the LANDMARK consortium at http://www.landmark-project.eu.

\(^{22}\) The Guidance for enterprises “Explanations and comments on the follow-up form” is available in English on the Website of SEMCo: http://offentlig.csr-kompassen.se/doc/msr csr_exempel_forklaringstexter_EN.pdf Last visited: 20 February 2012

\(^{23}\) Telephone interview with SEMCo by WEED e.V., March 2012
2.2 EXAMPLE OF APPLICATION

According to the project coordinators from SEMCo some procurers have set social criteria in their procurements but have yet to complete the follow ups. SEMCo recommends doing the follow up six months after the start of the contract. The questionnaire was published on the CSR Compass at the end of March 2011, so practical experience does not yet exist. First follow ups using the questionnaire are expected to be made during 2012. Therefore reference data with regard to the use of the questionnaire, as well as related case-law does not exist.

2.3 LEGAL ANALYSIS

2.3.1 SWOT ANALYSIS FROM A LEGAL PERSPECTIVE

<table>
<thead>
<tr>
<th>STRENGTH</th>
<th>WEAKNESSES</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The questionnaire can be applied as a control instrument after awarding the contract without any procurement law concerns. (Mosters 2012: 13)</td>
<td>• The questionnaire cannot be used as a precondition of the contract in the context of social criteria being used as technical specifications or as contract award criteria. (Buchmüller/Falke 2012a: 7)</td>
</tr>
<tr>
<td>• The use of the questionnaire is compatible with Community law and with the GPA. (Buchmüller/Falke 2012a: 7)</td>
<td>• The contracting authority cannot require bidders to submit the completed questionnaire together with their offer. (Mosters 2012: 13)</td>
</tr>
<tr>
<td>• Due to the clear structure of the questionnaire and the detailed guidance in the assessment guide, it is a user-friendly instrument that saves time and money. From a legal point of view, this helps to comply with the principles of transparency and proportionality. (Zieres 2012: 11)</td>
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24 The follow up questionnaire is available in English on the CSR Compass Website http://offentlig.csr-kompassen.se/doc/msr_csr_exempel_frageformular_EN.pdf Last visited: 21 February 2012

25 The Swedish County Councils have used similar questionnaires in their follow ups.

26 CSR Compass Information platform for procurers from the public and private sector. At the moment available in Swedish, supposed to be translated into English soon: http://www.csr-kompassen.se/ Last visited: 05 March 2012

27 Telephone interview with SEMCo by WEED e.V., March 2012
2.3.2 COMPLIANCE WITH RELEVANT LAW

The follow-up questionnaire may be applied to ensure compliance with social criteria included in the contract performance clauses without any procurement law concerns if bidders are not excluded on the basis of the way they answered the questionnaire. (Mosters 2012: 34)

Is the contractor obliged to answer the questionnaire?

The contractor\(^\text{28}\) is obliged to answer the questions of the contracting authority only if the follow-up questionnaire is part of the contract conditions and has been accepted by the contractor (Buchmüller/Falke 2012a: 7). Therefore, in order to comply with transparency requirements, this would mean that the questionnaire must already be communicated along with the tender documents. (Mosters 2012: 35, Zieres 2012: 13)

Do insufficient answers lead to breaches?

Although the questionnaire enables the contracting authority to identify possible breaches of contract after awarding the contract, insufficient answers to the questionnaire are not adequate evidence of an actual breach of contract (Buchmüller/Falke 2012a: 7). Thus the contracting authority may not seek damages or terminate the contract based only on the answers of the contractor. (Mosters 2012: 36) This would require evidence of an actual breach of one or more of the special contract conditions regarding social criteria. (Buchmüller/Falke 2012a: 8)

\(^{28}\) Please notice: The contract conditions may contain an obligation only for the contractor to respond to the questionnaire. No other economic operator in the supply chain (e.g. of “the level of production that is closest”) shall be obligated to respond to the questionnaire. Buchmüller/Falke 2012a: 7
On the other hand if the contractor does not respond to the questions of the contracting authority, this may constitute a separate breach of the contract. (Buchmüller/Falke 2012a: 7) Furthermore, if the questionnaire is successfully included into the contract performance clauses to be accepted by the successful bidder, bidders could be excluded from the tender procedure if they refuse to accept such contractual terms.29 (Zieres 2012: 13)

**Does the contractor disclose confidential information when answering the questionnaire?**

Mosters refers to the legal opinion of Krajewski/Krämer (2010) and points out that the disclosure of the supply chain could be considered as revealing manufacture and business secrets of the contractor.30 Therefore according to Mosters (2012) it is necessary that entitled economic interest must exist in secrecy. Beside competitive-juridical aspects, aspects worthy of protection should also be taken into consideration e.g. procedures, technologies, materials, formula etc. (Goede/Herrmann 2012: § 4 VOL/B Rn. 55). In this context it is uncertain whether the questions contained in the follow-up questionnaire – which are directed at the disclosure of the supply chain and the terms of employment ruling – concern business secrets. (Mosters 2012: 37)

**Proportionality and effort needed**

Analysing the questionnaire might be to some extent a significant effort for the tenderer. In this regard there might be concerns related to the efforts needed, e.g. if the contract has a relatively low value or if there are no indications of a violation of working or social standards with regard to the concerned products (Zieres 2012: 12). Therefore it is recommendable to apply the questionnaire in contracts with higher value and risk product groups, where there are indications of a potential violation of working or social standards.

**2.3.3 STAGE OF THE PROCUREMENT PROCESS**

The questionnaire should be applied as a control instrument of compliance with the social conditions in contract performance clauses. This application is without any procurement law concerns. (Mosters 2012: 13)

Whether the questionnaire could be applied as a precondition of contract award and bidders obliged to respond to it as part of their tenders is more debatable. In this case non-compliance or non-completion would entail exclusion from the procedure. Mosters (2012) raises legal concerns arguing that there are serious doubts about requesting the completion of the questionnaire as part of the tender even if the answers to the questionnaire would neither be considered as technical specifications or as contract award criteria. These doubts have been raised because, at this point in time, the purchaser may not have a legitimate interest to require information on the

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29 Bids from tenderers who have not accepted any such conditions would not comply with the contract documents and could not therefore be accepted (cf. European Commission 2010: 43).
conditions in the establishments and supply chain of companies he will not contract with. (Moters 2012: 41, Zieres 2012: 12).

Buchmüller/Falke (2012a) see the possibility of using the questionnaire to assess the technical and/or professional ability of the tenderer regarding social criteria. However, in the present legal situation it is controversial whether and/or to what extent contracting authorities may consider social criteria in order to determine the technical and/or professional ability of a tenderer. Within the next months the legal situation will likely become clearer.31 While the questionnaire may be used to determine the technical and/or professional ability of a tenderer, it cannot be used as a technical specification or as contract award criterion.32 This is due to the principle of equal treatment (Article 2 of Directive 2004/18) (Buchmüller/Falke 2012a: 8). Buchmüller/Falke (2012a) further states that “if the contracting authority defines “social technical specifications” or “social contract award criteria”, it has to be clear which bid complies with the criteria. The questionnaire is not able to answer this question since it only indicates probabilities”.

2.3.4 LEGAL CONCLUSIONS

The use of the questionnaire is compatible with Community Law and with the Government Procurement Agreement (GPA), provided that:

- the contracting authority defines contract conditions regarding social criteria that have to be accepted by the tenderers.
- according to the contract conditions the contractor is – apart from the social criteria – obligated to respond to the questionnaire.
- it is clear that the answers of the contractor may not be adequate evidence of an actual breach of the contract.
- the contracting authority does not disclose any information which has been designated as confidential by the contractor. This condition is fulfilled by the Swedish questionnaire.

31 The ECJ will decide in a case regarding government procurement and ecological and social criteria. (Case C-368/10) The Advocate-General argues in her opinion from 15 December 2011 that social criteria may be used to find out about the technical ability of a tenderer. The Advocate-General bases her argument on Article 48 para. 2 c) of Directive 2004/18 for the social requirements. (For further information see the opinion of the Advocate-General see para. 133)

32 Please note that due to the present legal situation it is controversial whether and/or to what extent contracting authorities may consider social criteria as “social technical specifications” or “social contract award criteria”.
2.4 PRACTICAL CONCLUSIONS FOR PROCURERS (SWOT ANALYSIS)

<table>
<thead>
<tr>
<th>STRENGTH</th>
<th>WEAKNESSES</th>
</tr>
</thead>
<tbody>
<tr>
<td>• It is a very user-friendly, time and money saving instrument due to the clear structure of the questionnaire and the detailed guidance in the assessment guide.</td>
<td>• In practice it is not always easy to interpret each answer to the questionnaire. The assessment guideline should help public procurers to interpret correctly, but this cannot cover every possible response.</td>
</tr>
<tr>
<td>• By evaluating the questionnaire, the purchaser obtains a wide range of information that gives an indication of whether the supplier has an overview of his supply and production chain or not.</td>
<td>• Analysing the questionnaire might be a significant effort for the purchaser.</td>
</tr>
<tr>
<td>• Contractors are asked to submit documents that prove their commitment to different aspects of sustainable production.</td>
<td>• Despite this effort, the analysis often does not provide enough information to verify compliance with contract performance clauses.</td>
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<table>
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<tr>
<th>OPPORTUNITIES</th>
<th>THREATS</th>
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<tbody>
<tr>
<td>• The questionnaire helps to intensively sensitize suppliers for questions of compliance with working standards in their supply chain.</td>
<td>• Public authorities need to be trained in using the assessment tool of the questionnaire correctly.</td>
</tr>
<tr>
<td>• The questionnaire already suggests concrete measures that the supplier can use as an example for his future behaviour.</td>
<td>• The obligation to answer the questionnaire could discourage operators from participating in the tender.</td>
</tr>
</tbody>
</table>

2.5 SUCCESS FACTORS

Once there is more practical experience with the application of the questionnaire, public authorities might overcome their reticence towards the questionnaire and would have examples of how to apply the assessment guide of the questionnaire correctly. The experience of the application of the questionnaire could lead, in the medium-term, to an enhancement and improvement of the tool regarding the correct interpretation of the answers. Furthermore, public authorities need to be trained in using the assessment tool of the questionnaire correctly.
3. ENABLING CONTROL THROUGH TRANSPARENCY AND DISCLOSURE OF THE SUPPLIER AND SUB-CONTRACTORS (THE NETHERLANDS)

3.1 DESCRIPTION AND EXAMPLES OF APPLICATION

In 2007, the Dutch government clearly expressed in the Dutch National Action Plan (DNAP) its intent to re-orient 75% of procurement by the national administration toward social and ecological criteria by 2010. The target for local administration was defined at 50%. Implementation was commissioned at the time to the public agency Agentschap NL (formerly SenterNovem) working closely with PIANOo33, whose main activity so far had been to define encompassing environmental criteria for several different product groups.

Concerning social criteria, first pilot projects on the implementation of ethical standards, such as fair trade, ILO core conventions and human rights were set up in 2011 (see the government policy on social public procurement). According to an official policy by the Ministries for Environment, Social Affairs, and Development Coordination, based on the EU directive on procurement procedures, social criteria could only be implemented within the contract performance clauses. The social criteria described in the tender and the information provided by the successful bidder as means of proof of compliance are intended to be disclosed to allow for external control. In the Netherlands controls by Government are currently not planned, in reference to social criteria and verification schemes that focus on the supply chain. Instead, the strategy is to rely on the public disclosure of supplier information as an essential instrument of control throughout the management of the contract. Civil society organisations have the possibility to publicly or anonymously denounce breaches after the tendering process has been completed and the suppliers’ names have been announced. However, it is at the companies’ and contracting authorities’ discretion how to deal with these ‘warning signals’ sent by civil society. Procurement agencies may then decide on the next steps including several means to check and possibly sanction. At the moment no case is known to the authors where disclosure of the supply chain was applied as a controlling instrument.

33 PIANOo, the Dutch Public Procurement Expertise Centre, was set up to professionalise procurement and tendering in all government departments, with a view to improving efficiency and compliance with the rules. It offers a hotline, a helpdesk and trainings for public procurers also regarding ecological and social criteria. For more information about PIANOo visit www.piano0.nl Last visited: 05 March 2012.
3.2 LEGAL ANALYSIS

3.2.1 SWOT ANALYSIS FROM A LEGAL PERSPECTIVE

<table>
<thead>
<tr>
<th>STRENGTH</th>
<th>WEAKNESSES</th>
</tr>
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<tbody>
<tr>
<td>• Disclosure of information on the supply chain of the products, services or works related to the contract and necessary for this verification and control scheme to work in practice is compatible with Community law and the GPA under certain circumstances. (Buchmüller/Falke 2012a: 10)</td>
<td>• It will most likely be considered impermissible, for example, to install special contractual terms which obligate the bidder to agree to the publication of the structure of their supply chain when presenting a tender. (Zieres 2012: 14)</td>
</tr>
<tr>
<td>• There are no legal concerns if companies choose to publish such information voluntarily. (Zieres 2012: 14)</td>
<td></td>
</tr>
<tr>
<td>• The disclosed information could be verified by NGOs and/or competitors. False or misleading data could then, for example, trigger legal steps by competitors under competition law. (Zieres 2012: 14)</td>
<td></td>
</tr>
<tr>
<td>OPPORTUNITIES</td>
<td>THREATS</td>
</tr>
<tr>
<td>• In the notice of the results of the award procedure the contracting authority may also publish additional information (e.g. on production sites or countries of origin), as long as the information does not constitute confidential information. (Buchmüller/Falke 2012a: 10)</td>
<td>• As contracting authorities are not engaging in verification themselves, there is a risk of an inconsistent approach between different contracts and suppliers, as NGOs or other elements of civil society may have incomplete information or only focus their efforts on certain areas.</td>
</tr>
<tr>
<td>• Disclosure may be combined with other verification measures, e.g. a bidder declaration or a questionnaire. (Buchmüller/Falke 2012a: 10) although the administrative efforts must be clearly weighted against the benefits gained (see below).</td>
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3.2.2 COMPLIANCE WITH RELEVANT LAW

The legally most secure way to disclose the name of the successful economic operator is by publishing the notice of the results of the award procedure.34 Civil society organisations can check the notices and publicly or anonymously denounce contradictions or breaches with the social criteria required (such as ILO core conventions) (Buchmüller/Falke 2012a: 10f).

Some legal experts are of the opinion that according to Community law the contracting authority itself is obligated to control effectively whether the

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34 According to the Directive 2004/18 contracting authorities which have awarded a public contract shall send a notice of the results of the award procedure after the award of the contract (Article 35, No. 4 and Annex VII), which must include the name and the address of the successful economic operator (Annex VII).
contractor meets his contractual obligations. Buchmüller/Falke (2012a) disagree, stating that in their legal opinion this is not the case. Nevertheless the legally most secure way for the contracting authority is to explicitly reserve its right to control whether the contractor fulfills his contractual obligations. The contracting authority should not communicate that it does not plan government controls. (Buchmüller/Falke 2012a: 10f)

In cases where companies choose to publish such information voluntarily (e.g. as a consequence of growing public expectations) there are no legal concerns. The respective publications could then be verified by NGOs and/or competitors. For instance, false or misleading data could then trigger legal steps by competitors under competition law. (Zieres 2012: 14)

The legally most secure way for the contracting authority to—if so wished—publish information on sub-contractors and of additional information on the supply chain, as well as on production sites or countries of origin is to ask the contractor for his permission regarding the publication of certain information. The permission of the contractor must not be applied as a precondition of the contract. Contracting authorities should ask for permission after awarding the contract. The successful economic operator may deny his approval without any consequences for the contract. In case the contracting authority publishes confidential information without the prior consent of the contractor, it may face claims for damages (Buchmüller/Falke 2012a: 11).

Confidential information

The disclosure of sub-contractors and of the supply chain as well as of production sites or countries of origin is only compatible with Community law, the GPA and usually national law, as long as the information is not confidential or containing trade secrets (Buchmüller/Falke 2012a: 11). Zieres (2012) also raises legal concerns, referring to both the EU procurement directives and GPA that emphasize in multiple instances the importance of the protection of confidential data received by the contracting authorities during a tender procedure. The procurement directives and the GPA do not authorise the publication of the names of subcontractors or other supply chain details by the contracting authority. (Zieres 2012: 14)

It has to be determined on a case-by-case basis whether the disclosure of sub-contractors of the supply chain and other additional information may legally be published. Considering that some companies voluntarily disclose their

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37 Without the will of the contracting authority to use the required information (e.g. about the chain of supply) itself, it might be disproportionate to ask for this information. Krajewski/Krämer (2010: 12).
38 Otherwise the contracting authorities would circumvent Article 6 of Directive 2004/18.
39 Information inter alia on production sites or at least the country of origin is in practice regularly published in the context of tenders regarding electricity from renewable sources.
40 According to Article 6 of Directive 2004/18, such information includes, in particular, technical or trade secrets and the confidential aspects of tenders.
41 Article 35 (4), 41 and 42 (5) of the Directive 2004/18/EC and Article XIX (4) GPA
chains of supply, this information does not always have to be confidential.\textsuperscript{42} (Buchmüller/Falke 2012a: 11). Furthermore, according to Buchmüller/Falke (2012) “whether information on sub-contractors, on the supply chain and other additional information is confidential can only be determined on a case-by-case basis. In case of doubt information should be treated as confidential.” Zieres (2012) states that “One cannot say in general that information on subcontractors, of the supply chain and other additional information is not considered to be confidential. It cannot be ruled out in advance that confidential information could be affected by a publication, since contracting authorities cannot foresee in advance what companies will participate in a tender procedure or what their respective supply chains will be structured like. However, it could be ruled out in individual cases after the award of the contract that confidential information could be affected, e.g. if the companies would voluntarily disclose the information and give the permission to publish the information.”

\subsection*{3.2.3 STAGE OF THE PROCUREMENT PROCESS}

Disclosure and transparency cannot be used in a legally permissible way as a precondition of the contract to install special contractual terms which obligate the bidder to agree to the publication of the structure of its supply chain when presenting a tender (Buchmüller/Falke 2012a: 11, Zieres 2012: 16). Given the current legal situation, Zieres (2012) does not recommend including a general obligation to publish or an obligation to accept publication of information on the supply chain into the tender documents. (Zieres 2012: 16f)

\subsection*{3.2.4 LEGAL CONCLUSIONS}

The legally most secure way to disclose information of the successful economic operator is

\begin{itemize}
  \item after awarding the contract
  \item by publishing only the name of the contractor in the notice of the results of the award procedure
  \item by publishing additional information (e.g. on production sites or countries of origin) in the notice of the results of the award procedure as long as the information does not constitute confidential information
  \item by asking the contractor (after awarding the contract) for his permission regarding the publication of sub-contractors, of the supply chain as well as of production sites or countries of origin (Buchmüller/Falke 2012a: 10)
\end{itemize}

Contracting authorities should explicitly reserve the right to control whether the contractor fulfils its contractual obligations. Even if the contracting authority did not foresee comprehensive controls (it might decide to do on the spot checks, see section 4) it should not communicate that it does not plan such controls.

\textsuperscript{42} Krajewski/Krämer (2010: 21)


**Recommendations for public procurers**

In order to achieve high transparency about the supply chains, sub-contractors and country of production of the contractor, we recommend that the contracting authority enters into personal dialogue with the contractor after awarding the contract and ask them to provide this additional information. Alternatively, the authority could send a letter of enquiry, where they ask for the supply chains, sub-contractors and country of production of the products and the permission of the contractor to use this information for control (e.g. through on the spot-checks) and to publish this information. If the contractor raises concerns about publishing the additional information the public procurer might ask for permission to pass this information for research purposes to non-governmental organizations exclusively as the contractor might not like to disclose information to its competitors. To ensure maximum secrecy the term non-governmental organisations must be defined. The contracting authority must obligate non-governmental organisations not to disclose confidential information.

### 3.3 PRACTICAL CONCLUSIONS FOR PROCURERS (SWOT ANALYSIS)

<table>
<thead>
<tr>
<th>STRENGTH</th>
<th>WEAKNESSES</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The disclosure of the supplier may be an instrument to enable control by civil society, especially by means of the notice of the results of the award procedure. (Buchmüller/Falke 2012a: 10)</td>
<td>• In the model example of the Netherlands it is at the companies’ discretion how to deal with the ‘warning signals’ of the NGOs.</td>
</tr>
<tr>
<td>• Contracting authorities save money, time and capacity and use the expertise of NGOs to control compliance with the required standards.</td>
<td>• In the model example of the Netherlands procurement agencies do not engage in any controls that might lead to sanctions.</td>
</tr>
<tr>
<td>• NGOs gain insight into the suppliers and sub-contractors of the bidder and can apply their informal information channels to check the fairness and the ethical behaviour of the bidder; a wide range of NGOs have the possibility to engage in the control mechanism of compliance with the required standards.</td>
<td>• NGOs don’t always have the capacity to check in detail each of the bidder’s proof of compliance with the necessary social criteria.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>OPPORTUNITIES</th>
<th>THREATS</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Cooperation between contracting authorities, civil society and NGOs could increase compliance with the required standards and savings could be achieved. (Zieres 2012: 14)</td>
<td>• The willingness of the administration to cooperate with civil society groups may be low or variable.</td>
</tr>
</tbody>
</table>
3.4 SUCCESS FACTORS

- The public authority is willing to cooperate with Civil Society Organisations.
- The public authorities should develop a sanction strategy for bidders if critical information is found by the Civil Society Organisations.
- There are enough Civil Society Organisations in the country that continuously work on sustainable public procurement and have the capacity to check the bidders.
- A complementary verification scheme should be developed to overcome the prescribed difficulties and to ensure the continuous control of the bidder’s compliance with the required social standards.
4. EXTERNAL AUDITS (SWITZERLAND)

4.1 DESCRIPTION OF THE VERIFICATION SCHEME

Since July 2010, the Swiss Government has recommended sustainable public procurement at national level. Social standards should be included as mandatory conditions of participation as described in the “Law and Act on public procurement” (Gesetz und Verordnung über das öffentliche Beschaffungswesen BöB/VöB)43.

The Swiss Government differentiates between goods produced in Switzerland and abroad. The underlying minimum social standards that aim for decent working conditions depend on the place of performance of the contract. In the first case (production and delivery of goods and services takes place in Switzerland) companies have to respect Swiss law, in other cases they have to comply with the ILO core conventions. If goods are produced abroad (for instance textiles produced in Thailand, shipped to Switzerland) the place of performance is the country of production (Thailand) and the contractor or his subcontractors have to respect the ILO core conventions.

Procedural aspects

Necessary steps and actions for purchasers, bidders and their main sub-contractors include:

1. The bidders are asked to send certificates and other documents to show their compliance with the core ILO core convention labour standards (including information on important sub-contractors – so called key third parties).

2. The purchaser checks the offer in order to determine the technical and/or professional ability for the economically most advantageous bid according to technical specifications and award criteria. If the best ranked bidder can provide a positive audit or a SA 8000 certificate or any other appropriate means of proof, or if it is not likely that a breach of ILO core conventions is common in the branch the bidder is accepted and the contract can be awarded.

3. If it is a risk branch/product and there is no prior certification an external audit is conducted. If the audit shows no major violations of core labour standards the bidder is accepted and the contract can be awarded.

4. If the audit shows major violations of core labour standards the bidder can be excluded and the process starts again with the second best ranked bidder.

The General Terms and Conditions of the contract reiterate the bidders’ obligation to comply with minimum social standards. That includes a

specification of the contractual transfer of these obligations to third parties. Both obligations are protected by a penalty clause in case of non-performance. Furthermore, the right of the contracting authority to carry out additional social audits and on-the-spot checks is mentioned again in the contract. The Swiss Government provides a draft text for those terms and conditions in the document “Recommendations for sustainable procurement”.

**Substantive scope of coverage**

Notably, this approach also has an influence on the bidders’ subcontractors. In principle, the bidder is liable for all third parties. Due to administrative processes the Swiss Government only recommends including the key third parties in the external audit. Key third parties are defined as those that fulfil a substantial part of the contract, i.e. those that deliver an important component, furnish an important partial service or is a party that operate in a particularly high-risk area in reference to criteria from the ILO core conventions (e.g. the garment industry).

**Inter-organisation working group**

From 2007 until 2010 an interdisciplinary working group devised a concept of a Code of Conduct (CoC) for the Swiss Government’s sustainable procurement activities. It consists of the procurement committees’ secretariat (BKB, Sekretariat Beschaffungskommission), the Federal Agency for Construction and Logistics (BBL, Bundesamt für Bauten und Logistik), armasuisse (Swiss Armed Forces), Office for the Environment (BAFU, Bundesamt für Umwelt), Swiss State Secretariat for Economic Affairs (seco, Staatssekretariat für Wirtschaft), the Swiss Competition Commission (WEKO, Wettbewerbskommission), the Swiss Postal Service (Die Post) and the Federal Swiss Railways (SBB). One main discussion point was to set the scope for the external audits and to clarify who would pay for them.

**Conducting the audits**

The audits are generally conducted by external service providers and, according to previous experience, would take about three to four weeks’ time. As outlined above, audits can be carried out before awarding the contract and during the contract. The Swiss Government recommends that the costs for the audit before the award decision should be borne by the contracting authority. Experience shows that the costs per company can be estimated between 3,000 and 4,000 CHF, depending on the size and location of the company to be audited (as of 2010).

Costs for audits necessary during the performance of the contract can be borne by the contractor, but the Swiss Government recommends that the procuring entity should conduct the audit at its own expense. In case of joint procurement between different contracting authorities or in case of

---

framework contracts managed by a central purchasing body, these costs could be more easily taken into account already within the cost breakdown for the procurement management activities.

### 4.2 EXAMPLE OF APPLICATION

The Swiss Armed Forces (armasuisse) piloted the external auditing approach in a tender for functional water-proof work wear worth 2.5 Million CHF. The external audits have been carried out by the Company SGS.

Experience showed that the additional requirements were perceived very positively by the supply chain, i.e. suppliers. Rather than being seen as a burden, the audits were perceived as supporting suppliers’ activities to show, within their Corporate Social Responsibility activities, that they can offer products that have been produced in conformity with the ILO core conventions. The fact that armasuisse agreed to non-disclosure agreements for part of the audits increased acceptance from the bidders.

The results of the audits showed some non-performance of sub-contractors in relation to the health and work safety, but those were solved by straightforward means of improvement. The strength and weaknesses outlined by armasuisse are as follows.

<table>
<thead>
<tr>
<th>STRENGTH</th>
<th>WEAKNESSES</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Highly increased reliability and reduced reputational risks for the contracting authority.</td>
<td>• Additional time resources needed (about three – four weeks), but the process can be improved and streamlined if applied regularly.</td>
</tr>
<tr>
<td>• Increase of awareness from the supply side towards the importance of ILO core conventions.</td>
<td>• Costs for the audits need to be budgeted into the procurement management activities.</td>
</tr>
<tr>
<td>• “Signatures do have consequences” – contract clauses do not appear to be “toothless tigers”.</td>
<td></td>
</tr>
</tbody>
</table>

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4.3  LEGAL ANALYSIS

4.3.1  SWOT ANALYSIS FROM A LEGAL PERSPECTIVE

<table>
<thead>
<tr>
<th>STRENGTH</th>
<th>WEAKNESSES</th>
</tr>
</thead>
<tbody>
<tr>
<td>• External audits and on-the-spot checks in order to determine the technical and/or professional ability of the tenderer regarding social criteria are compatible with Community law and the GPA (ref. Art. 45 (2) of Directive 2004/18/EC).</td>
<td>• A legally sound implementation of the entire Swiss control tool into procurement procedures outside of Switzerland with application of the EU Procurement Directives and, for example, German law, will most likely not be possible, at least with regard to the formal details and course of action specified for Switzerland.</td>
</tr>
<tr>
<td>• External audits and on-the-spot checks as a means of control during the performance of a contract are compatible with Community law and the GPA.</td>
<td>• The Swiss model includes an additional level of assessment that is not covered by EU procurement laws.</td>
</tr>
<tr>
<td>•</td>
<td>• If the verification of the tenders reveals statutory violations of several bidders, then this will dramatically increase time and cost expenditure for the procedure. In addition, such a development could result in unacceptable commitment periods (during which bidders are obliged to maintain their offer).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>OPPORTUNITIES</th>
<th>THREATS</th>
</tr>
</thead>
<tbody>
<tr>
<td>• It could be an alternative to adopt individual successful components of the Swiss model for individual cases, modified for EU procurement laws and national laws outside of Switzerland.</td>
<td>• External audits and on-the-spot checks may be combined with other verification measures, e.g. a questionnaire.</td>
</tr>
<tr>
<td>• According to Buchmüller/Falke (2012a:13):</td>
<td>•</td>
</tr>
</tbody>
</table>

4.3.2  COMPLIANCE WITH RELEVANT LAW

Zieres (2012:18) states that it would be important to ensure acceptable commitment periods during which bidders are obliged to maintain their offer. Therefore, in the EU, the selected external audits of all offers in question would need to be carried out simultaneously, resulting in further resources needed in case the contracting authority decides to pay for the audits.

To allow for transferability into the EU procurement procedures, there would be a need to define the term “key third parties”, specifying those with commonly accepted general definitions that are specific to the product or
service tendered. For example, in the case of work wear, the key production processes and sub-contractors of the bidder carrying out the work could be yarn and fabric production, sewing, and packaging. The information and selected key third parties should be proportionate to the tender and according to Buchmüller/Falke (2012a: 14) bound to the non-disclosure of information received. A ruling from the German Federal Court of Justice states that bidders should not be obliged to provide final and definite information on their subcontractors in advance when presenting a tender (Zieres 2012: 18) may have an influence on the scope of the information that can be asked for at the selection stage.

The share of the costs for the external audits must be proportionate. Buchmüller/Falke (2012a: 14) explore possibilities to ensure this as follows: “One important aspect is that the contracting authority should bear the costs for audits before the award of the contract. As regards audits during the performance of the contract, the contractor may be obligated to bear the costs according to contract conditions. In this case, according to the principle of proportionality the costs must not be disproportionate with respect to the value of the contract. It may be disproportionate to hold the contractor liable for the conduct of other economic operators who are part of the supply chain. A better way might be to oblige the contractor to require its contracting partners to respect the same social standards it has to respect”.

4.3.3 STAGE OF THE PROCUREMENT PROCESS

Under the EU procurement rules selection criteria, award criteria and contract performance clauses must be strictly separated during the tender procedures. Therefore it is recommended to apply the described verification scheme at one important and suitable stage: e.g. the selection criteria stage, actually before preparing the assessment for the award of the tender. Procurers could also consider applying the scheme as part of the contract performance clauses or in order to determine the technical and/or professional ability of the bidder. Audits may be relevant at other stages too, but it is important that compliance at one stage (e.g. with a selection criterion based on past performance) is not used to award marks or determine compliance at another stage.

4.3.4 LEGAL CONCLUSIONS

According to Buchmüller/Falke (2012a: 13) the described verification scheme “is compatible with Community law to determine the technical and/or professional ability of the tenderer also with a view to the conduct of other economic operators who are part of the supply chain.” Buchmüller/Falke (2012a: 13) further explain that “the main argument in favour of this is that the professional ability of a tenderer also depends on his conduct in relation to his suppliers. A tenderer, who cooperates with other economic operators that violate basic human rights, has to be regarded as “professionally unable” to perform a contract”.

46 German Federal Court of Justice (BGH), ruling of 10 June 2008 – X ZR 78/97
This leads to the conclusion that “external audits and on-the-spot checks lead to an effective control by the contracting authority before awarding the contract. Thus, an equal treatment of all tenderers according to Article 2 of Directive 2004/18 and to the jurisprudence of the ECJ is guaranteed.” (Buchmüller/Falke 2012a: 13).

In reference to Buchmüller/Falke (2012a: 14) “External audits and on-the-spot checks as a means of control during the performance of a contract are also compatible with Community law and the GPA”.

### 4.4 PRACTICAL CONCLUSIONS FOR PROCURERS (SWOT ANALYSIS)

<table>
<thead>
<tr>
<th>STRENGTH</th>
<th>WEAKNESSES</th>
</tr>
</thead>
<tbody>
<tr>
<td>- A verification scheme that influences the final award of the tender is important to have, especially for high-risk groups such as textiles, information and communication equipment.</td>
<td>- Cost- and time-intensive for the contracting authority.</td>
</tr>
<tr>
<td>- Higher security of verifying compliance to social criteria for the contracting authority.</td>
<td>- The procedure is only suitable for larger contracts as the amount of the order has an influence on how comprehensively the auditing process can be carried out – especially during contract management.</td>
</tr>
<tr>
<td>- Part of the audits can fall under non-disclosure agreements providing additional reputational safety for the bidders.</td>
<td>- The scheme is reliant on existing third-party schemes such as SA 8000 and other appropriate means of proof for the first assessment, whether an external audit is necessary or not.</td>
</tr>
<tr>
<td>- Transparency of communication towards the supply side and the consequences of non-fulfilment with the requirements.</td>
<td></td>
</tr>
<tr>
<td>- Allows for continuous contributions to monitoring systems regarding Corporate Social Responsibility (CSR) in place at the contracting authority.</td>
<td></td>
</tr>
</tbody>
</table>

**OPPORTUNITIES**

- Established as a regular procurement management activity, costs can be reduced significantly.
- Can be integrated in existing contract management systems.
- Needs further training of staff on how to apply the verification scheme, broken down to specific product and services groups.

**THREATS**

- The audits are not published due to effective non-disclosure agreement.
- The liability of the supplier towards its sub-contractors may be difficult to enforce.
4.5 SUCCESS FACTORS

In order to make the proposed verification scheme successful, it is recommended that the contracting authority includes the verification scheme in its strategies and policies for public procurement. The effectiveness of the scheme depends on the ability of the contracting authority to follow implementation during the contract management phase. Budgetary resources would also need to be available to cover the costs of the audits.

In order to effectively improve the living and working conditions of workers in developing countries this verification scheme needs to have a strong contract management component and procurers would need to maintain the dialogue with the successful bidder on a continuous basis.
5. CATALOGUE OF MEASURES (AUSTRIA)

5.1 DESCRIPTION OF THE VERIFICATION SCHEME

The idea of the catalogue of measures is to provide public procurers with a step-by-step approach for verifying compliance with social criteria along the supply chain. The catalogue can also be useful for companies and interest groups and includes ideas for concrete steps which could lead to improved working conditions in the supply chain of companies. The catalogue was developed within the scope of the SO:FAIR initiative (Austria).

The scope of coverage is related to the risks of workers’ rights violations in the different steps of the supply chain and to accessible means of verification. The means of verification should be easy to check for public purchasers and should not require too many financial and time resources. Another requirement was to avoid declarations where companies simply undersign a statement that all ILO core conventions are respected in their supply chain, which would leave the public buyer the obligation to verify and take actions for control.

The following catalogue of measures is designed by SO:FAIR as a model for two different product groups (work wear and computers) but can be adapted to other products. The catalogue should be included in the contract performance clauses together with additional comments as an explanation for bidders on how to implement the required measures.

<table>
<thead>
<tr>
<th>CATALOGUE OF MEASURES FOR A SUSTAINABLE PROCUREMENT OF COMPUTERS</th>
</tr>
</thead>
<tbody>
<tr>
<td>X MEASURES</td>
</tr>
<tr>
<td>---</td>
</tr>
<tr>
<td>• Member of Multistakeholder-Initiative (e.g. Ethical Trading Initiative) or in an independent monitoring organisation (e.g. Social Accountability International corporate program)</td>
</tr>
<tr>
<td>• Independent audit of the working conditions in the supply chain</td>
</tr>
<tr>
<td>• Internal audit of the working conditions in the supply chain</td>
</tr>
<tr>
<td>• Code of conduct including core labour standards in the supply chain</td>
</tr>
<tr>
<td>• Transparency of the supply chain (production)</td>
</tr>
<tr>
<td>• Strategy and activities for tracing metals to the original source</td>
</tr>
<tr>
<td>• Strategy to improve working conditions in the supply chain</td>
</tr>
</tbody>
</table>
- Binding objectives to improve working conditions in the supply chain
- Description of objectives, time schedule & bidders declaration

- Strategy to reduce the toxic substances in production
- Description of the strategy, time schedule & bidders declaration

- Recycling-Strategy to reduce e-waste
- Description of the strategy, time schedule & bidders declaration

## CATALOGUE OF MEASURES FOR A SUSTAINABLE PROCUREMENT OF WORK WEAR

<table>
<thead>
<tr>
<th>X</th>
<th>MEASURES</th>
<th>MEANS OF VERIFICATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Member of Multistakeholder-Initiative or in an independent monitoring organisation (e.g. Fair Wear Foundation, Ethical Trading Initiative)</td>
<td>Membership statement</td>
</tr>
<tr>
<td>2</td>
<td>Independent audit of the working conditions in the supply chain</td>
<td>Audit report</td>
</tr>
<tr>
<td>3</td>
<td>Internal audit of the working conditions in the supply chain</td>
<td>Description of the internal audit system, Audit report</td>
</tr>
<tr>
<td>4</td>
<td>Code of conduct including core labour standards in the supply chain</td>
<td>Code of conduct &amp; bidders declaration</td>
</tr>
<tr>
<td>5</td>
<td>Transparency of the supply chain (production)</td>
<td>Description of supply chain</td>
</tr>
<tr>
<td>6</td>
<td>Strategy (binding) to improve working conditions in the supply chain</td>
<td>Description of the strategy, time schedule &amp; bidders declaration</td>
</tr>
<tr>
<td>7</td>
<td>Binding objectives to improve working conditions in the supply chain</td>
<td>Description of objectives, time schedule &amp; bidders declaration</td>
</tr>
<tr>
<td>8</td>
<td>Certification of products (e.g. FAIRTRADE, GOTS)</td>
<td>Certificate, licence partnership statement</td>
</tr>
</tbody>
</table>

**Additional information**

The bidder has to take into account socially responsible aspects while performing the contract. The bid should include a choice of (a number of) measures which will be part of the offer. The bidder is obliged to realize a certain amount of measures which he should select and realize during the performance of the contract (see section 1: targeted measures of a bidder declaration). Means of verification should be provided at mid-term of the contract. An improper realisation or insufficient verification (as outlined in the contract) can be handled as an insufficient or non-performance of the contract. This could lead to annulations of the contract.
5.2 LEGAL ANALYSIS

5.2.1 SWOT ANALYSIS FROM A LEGAL PERSPECTIVE

<table>
<thead>
<tr>
<th>STRENGTH</th>
<th>WEAKNESSES</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The use of the catalogue of measures to integrate social standards into additional contract terms is compatible with Community law and with the GPA. (Buchmüller/Falke 2012a: 16)</td>
<td>• The link to the subject matter must be respected and depends on the specific circumstances of each case. (Zieres 2012: 19)</td>
</tr>
<tr>
<td>• Low cost approach is beneficial to complying with the principle of proportionality. (Zieres 2012: 20)</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>OPPORTUNITIES</th>
<th>THREATS</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The catalogue of measures may be combined with other verification measures, e.g. transparency and disclosure. (Buchmüller/Falke 2012a: 16)</td>
<td>• The costs for the measures must not be disproportionate with respect to the volume of the contract. (Buchmüller/Falke 2012a: 16)</td>
</tr>
</tbody>
</table>

5.2.2 COMPLIANCE WITH RELEVANT LAW

In order to comply with the principle of transparency the contracting authority is obligated to clearly define the measures that have to be taken by the successful economic operator. (Buchmüller/Falke 2012a: 16)

Regarding transparency of the supply chain, the disclosure of sub-contractors and of the supply chain and other additional information (e.g. on production sites) is only compatible with Community law, the GPA and usually national law, as long as the information is not considered to be confidential. (Buchmüller/Falke 2012a: 16) For the publishing of sub-contractors and of the supply chain please see section 3.2.2 on confidential information.

As regards the (mandatory) certification of products please see section 6.3.

5.2.3 STAGE OF THE PROCUREMENT PROCESS

According to Buchmüller/Falke (2012a) it is legally permissible to include social criteria in tenders in the contract performing clauses, but the catalogue of measures may also be applied to determine the technical and/or professional ability of the tenderer regarding social criteria. (Buchmüller/Falke 2012a: 16)

However, there is considerable disagreement on this point (see chapter 2.3.3).

Zieres has no legal concerns if the catalogue of measures is embedded in the contract performing clauses and the verification is scheduled to take place after the contract has been awarded, as proposed. (Zieres 2012: 19)

5.2.4 LEGAL CONCLUSIONS

If put in the contract performing clauses, properly communicated and respecting the basic principle of procurement procedures the catalogue of
measures is a relatively legally permissible way to include social criteria in public tenders.

**Recommendations for public procurers**

The minimum required measures of the catalogue must be selected by the contracting authority according to the product and the different verification schemes available for the product-group. Expert organisations can provide information on different labels, initiatives or main problems in the supply chain of different products. The catalogue of measures is, when implemented as proposed in the contract performing clauses a relatively legally permissible instrument, but the demands for companies are – depending on the selected measure – often not very high. The measures which are not very demanding are not as effective at improving working conditions in the supply chain as more demanding ones. The instrument is meant to be a step by step approach. Bidders have the opportunity to start their activities towards compliance with basic workers rights in their supply chain on a very low level, but it is necessary to require increasingly demanding measures in the course of time to create a continuous process towards the respect of basic human and workers rights in the supply chain.
5.3 PRACTICAL CONCLUSIONS FOR PROCURERS
(SWOT ANALYSIS)

<table>
<thead>
<tr>
<th>STRENGTH</th>
<th>WEAKNESSES</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The use of the catalogue of measures as part of the contract performance clauses creates a contractual obligation to take concrete action. (Buchmüller/Falke 2012a: 16)</td>
<td>• By including social criteria in contract performing clauses there is no possibility to select socially responsible goods in the tender process. Since the contracting authority is forced to exclude the tenderer/bid who does not accept a contract clause, including social criteria in contract performing clauses at least indirectly leads to a possibility to select socially responsible goods in the procurement process. (Buchmüller/Falke 2012a: 17)</td>
</tr>
<tr>
<td>• Low cost approach because of the step by step approach and the basic demands.</td>
<td></td>
</tr>
<tr>
<td>• The demands for purchasers are not very high, mainly screening provided documents.</td>
<td></td>
</tr>
<tr>
<td>• It creates a contractual obligation to take concrete action. (Buchmüller/Falke 2012a: 16)</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>OPPORTUNITIES</th>
<th>THREATS</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The possibility of demanding more and more measures in each tender could lead to a gradual improvement of social responsibility of bidders.</td>
<td>• If the possibility of demanding more and more measures in each tender is not taken, there will be no pressure to improve working conditions in the supply chain at all.</td>
</tr>
<tr>
<td>• The catalogue could be expanded, e.g. by adding further compulsory measures, subject to the specific criteria of the tender procedure. (Zieres 2012: 21)</td>
<td></td>
</tr>
<tr>
<td>• The catalogue of measures may also be applied to determine the technical and/or professional ability of the tenderer regarding social criteria. (Buchmüller/Falke 2012a: 16)</td>
<td></td>
</tr>
</tbody>
</table>

5.4 SUCCESS FACTORS

As with other verification schemes, in order to make the proposed verification scheme successful, it is recommended that the contracting authority includes the verification scheme in its strategies and policies for public procurement. The effectiveness of the scheme depends on the ability of the contracting authority to follow implementation during the contract management phase and to increase the number of measures to be taken in the following contracts.
6. LABELS, MULTI-STAKEHOLDER INITIATIVES AND CODES OF CONDUCT

6.1 DESCRIPTION OF THE VERIFICATION SCHEMES

Labels, multi-stakeholder initiatives (MSIs) and Codes of Conduct (CoC) can assist contracting authorities to verify compliance with social criteria, as they provide both criteria and evidence. To be a valid means of verification labels, MSI and CoC must fit the criteria outlined in the tender (which should sufficiently define them). Labels are usually regarded as the strongest proof of evidence, due to participatory multi-stakeholder involvement and third-party auditing, whereas CoC are seen as the weakest link in the verification chain. As such they can be used in a decreasing order in graduated bidder declarations or selectively, depending on, for instance, the scarcity of labels for a given product which would require the use of MSI. The tender stage these means of verification are used for depends on which stage the compliance of social criteria needs to be proven. Labels are widely used, though the availability of so called social labels is still limited. An increasing number of public authorities use MSI to prove compliance with social criteria, particularly in the textile (work uniform) sector.

Labels and certifications can represent strong and credible proof of compliance with social criteria such as decent working conditions along the supply chain. They relate either to specific products or to the management of the company as a whole. Labels are often multi-stakeholder initiatives but MSI are not necessarily labels. Examples of relevant labels for construction materials: Forest Stewardship Council (FSC)47, Natureplus48 and Xertifix49; for the textile and clothing sector (work wear) the Global Organic Textile Standard (GOTS)50 and Fair Trade (besides food, also cotton)51; and in the ICT sector: TCO Certified52, the Nordic Ecolabel or Nordic “Swan”53.

Multi-stakeholder initiatives are usually partnerships between private and public actors and NGOs, i.e. so-called public-private initiatives or partnerships. The boards of such MSI bring together representatives of different interest groups – usually comprising businesses, trade unions, and civil society – to set standards and define procedures for verification. MSI are seen as a ‘third way’ between government regulation and corporate self-regulation. The boards also have to insist on the establishment of a credible monitoring (including regular reporting) or complaints procedure to enforce the standards. It is their task to make sure that the group respects general interests and to seek ways of convincing the participating companies that commercial interests

47 http://www.fsc.org/ Last visited 05 March 2012
48 http://www.natureplus.org/ Last visited 05 March 2012
49 http://www.xertifix.de Last visited 05 March 2012
51 http://www.fairtrade.net Last visited 05 March 2012
52 http://www.tcodevelopment.com Last visited 05 March 2012
53 http://www.nordic-ecolabel.org Last visited 05 March 2012
run in parallel to public interests. Relevant MSIs are for instance the Fear Wear Foundation (FWF)\(^\text{54}\) and the Better Cotton Initiative (BCI)\(^\text{55}\) in the field of textiles and clothing; the 4C Association\(^\text{56}\) and Ethical Tea Partnership (ETP)\(^\text{57}\) in the field of food\(^\text{58}\); or more generically the Ethical Trading Initiative (ETI)\(^\text{59}\) and the Fair Labor Association (FLA)\(^\text{60}\) both dedicated to improving the labour standards at supply companies. Another process-type standard example is the generic SA8000 standard.\(^\text{61}\)

CoC are public commitments to Corporate Social Responsibility (CSR), announcing the principles of social and environmental responsibility that a company commits to adhere to. Compared to labels or MSI they are the weakest link in the chain and sometimes lack effective implementation and control. CoC can be either developed by the industry (individual company or by sectoral actors) or externally (by a civil society organisation or a multi-stakeholder initiative), which makes them more credible. The Business Social Compliance Initiative (BSCI)\(^\text{62}\) for instance is a leading business-driven initiative of 700+ companies committed to improving working conditions in the global supply chain. Among industry an example of CoC developed by sectoral actors is the EICC – Electronic Industry Code of Conduct.\(^\text{63}\) An example of a CoC developed by an individual company is the Nespresso AAA Sustainable Quality\(^\text{™}\) Program.\(^\text{64}\)

### 6.2 EXAMPLES OF APPLICATION

#### 6.2.1 GOOD PRACTICE EXAMPLES FOR WORK WEAR:

**Hannover, Germany**

Work wear (e.g. for fire workers) is accepted only if produced in compliance with ILO Conventions. Suppliers and sub-contractors must demonstrate that they have a social code in terms of the ILO Conventions, which is actively implemented and monitored by external auditors or must sign the CoC of the Clean Clothes Campaign (CCC) and have it controlled by independent auditors. Note: This is taken from an official concept developed by the Local Agenda 21 Group. To date no tender with these criteria has been issued.

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\(^{54}\) See online at: [http://www.fairwear.org](http://www.fairwear.org) Last visited 05 March 2012

\(^{55}\) Better Cotton Initiative, see online at: [http://www.bettercotton.org](http://www.bettercotton.org) Last visited 05 March 2012

\(^{56}\) See online at: [http://www.4c-coffeesassociation.org/](http://www.4c-coffeesassociation.org/) Last visited 05 March 2012

\(^{57}\) See online at: Ethical Tea Partnership (ETP)

\(^{58}\) For other MSI see list online at: [http://www.verite.org/node/713/lightbox2](http://www.verite.org/node/713/lightbox2) Last visited 05 March 2012

\(^{59}\) See online at: [http://www.ethicaltrade.org/](http://www.ethicaltrade.org/) Last visited 05 March 2012

\(^{60}\) See online at: [http://www.fairlabor.org](http://www.fairlabor.org) and the World Fair Trade Organization (WFTO) at: [http://www.wfto.com](http://www.wfto.com) Last visited 05 March 2012

\(^{61}\) See online at: [http://www.saasaccreditation.org/certSA8000.htm](http://www.saasaccreditation.org/certSA8000.htm) Last visited 05 March 2012

\(^{62}\) See online at: [http://www.bsci-intl.org](http://www.bsci-intl.org) Last visited 05 March 2012

\(^{63}\) See online at: [http://www.eicc.info](http://www.eicc.info) Last visited 05 March 2012

\(^{64}\) See online at: [http://www.nespresso.com/communication/?q=node/18](http://www.nespresso.com/communication/?q=node/18) Last visited 05 March 2012
Ministry of Defence, France

When tendering for sustainable uniforms, the French Navy required in the contract performance conditions of the contract:

_The contractor and its subcontractors must comply with the eight core conventions of the International Labour Organisation. Within four months of award of contract, and on each renewal, the contractor must provide a report detailing how 11 criteria based on social requirements of the SA 8000 standard are being met. A checklist of these requirements is included in an annex to the contract. Noncompliance with these provisions will result in penalties and/or termination of the contract._

Note: Tender successfully conducted.

Dortmund, Germany

In 2007 Dortmund declared it would no longer procure products produced by exploitative child labour (ILO n° 182). With the support of CCC the city engaged in a pilot project on the procurement of fairly traded work wear for a canteen restaurant. Two of the reasons for choosing the successful bidder was that the company was a member of the Fair Wear Foundation, which was proof of socially responsible production, and demonstrated that the cotton was Fairtrade-certified. Compliance with the criteria was guaranteed along the entire production chain from the fibre to the final product.

Note: Tender successfully conducted.

Barcelona, Spain

Ethical procurement of work wear for 700 gardeners.

Objective: providers have to be able to guarantee that the textiles used directly or indirectly in production have respected the workers’ basic rights (ILO conventions), with a policy that is committed to environmental management and labour risks prevention.

Selection criteria: the chapter related to capacity conditions and technical solvency of bidders mentions that the ILO conventions should be respected. Documents to be provided in order to show the ethical commitment of the company include:

1. Declaration stating the data of the final product manufacturing companies
2. Supporting documents (any of the following can be supplied):
   - Certificate of ethical behaviour (SA8000/Fair Wear Foundation)
   - Audit Certificate made by external company

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67 Txiema, Castiella, Sustainable Procurement in Barcelona (PPT) Barcelona City Council ICLEI World Congress 2006
If the audit is internal: documents of the company indicating and informing about the standards and procedures used. Companies should also provide information about the employees at risk of exclusion. Note: Tender successfully executed.

Sweden’s procurement criteria for textiles and leather\textsuperscript{68}

Award criteria for environmentally appropriate textile fibres – Advanced criteria:

Has the cotton been produced in accordance with the criteria in BCI Production Principles & Criteria 2.0 or Fairtrade International Generic Fairtrade Standards for Small Producers’ Organizations or a similar initiative aimed at reducing chemical use and water consumption during cotton cultivation?

Proposal for verification: Supplier declaration or similar documentation demonstrating that the cotton was produced in accordance with the BCI criteria. If the cotton meets another similar initiative, documentation demonstrating this must be available.

Supplier declaration or documentation demonstrating that the products were produced in accordance with the criteria in the Swan Nordic Environmental Label, EU Ecolabel, Bra Miljöval “Bra fibrer”\textsuperscript{69} or GOTS.

6.2.2 EXAMPLE FOOD

Italy’s National Action Plan on Green Public Procurement related to Food

The ‘minimum environmental criteria’ related to ‘Catering Service and Food Provision’ of Italy’s National Action Plan on Green Public Procurement contain social aspects with regards to seasonal food (support for regional producers), fair trade products and allocation of perfectly edible leftover food to charitable organisation (in line with national legislation). With regards to ‘exotic products (pineapple, bananas, cacao, chocolate, sugar and coffee)’ award criteria are foreseen for suppliers who provide such products from fair trade sources. A legal representative of the bidder must declare that the products are either distributed through bodies accredited at national or international level such as WFTO or certified by recognised international organisations such as FLO as outlined by the European Parliament Resolution n° A6-0207/2006. Note: over one hundred local authorities in Italy have already incorporated similar criteria in their tenders.

\textsuperscript{68} Procurement criteria for Textiles and Leather, see online at: http://www.msr.se/en/green Procurement/criteria/Furnishing-and-textiles/Textiles-and-leather/ Last visited 06 March 2012

\textsuperscript{69} Bra Miljöval, see online at: http://www.naturskyddsforeningen.se/bra-miljoval/ Last visited 06 March 2012
6.3 LEGAL ANALYSIS

6.3.1 SWOT ANALYSIS FROM A LEGAL PERSPECTIVE

<table>
<thead>
<tr>
<th>STRENGTH</th>
<th>WEAKNESSES</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Labels, MSI and CoC are appropriate and</td>
<td>• Legal requirements for the implementation, like proportionality and</td>
</tr>
<tr>
<td>generally permissible tools to include</td>
<td>equal treatment and link to the subject-</td>
</tr>
<tr>
<td>social considerations into procurement</td>
<td>matter of the contract, depend on the specific circumstances of each</td>
</tr>
<tr>
<td>procedures.</td>
<td>case, as well as on possible constraints under national law.</td>
</tr>
<tr>
<td>• They can make life of procurers easier</td>
<td>• Labels in particular should meet the following requirements: specifications</td>
</tr>
<tr>
<td>as they can trust bidders that supply</td>
<td>appropriate to define the characteristics of the supplies or services of</td>
</tr>
<tr>
<td>products with such certifications or are</td>
<td>the contract; label requirements based on scientific information,</td>
</tr>
<tr>
<td>affiliated to such initiatives.</td>
<td>participatory procedure involving stakeholders such as government</td>
</tr>
<tr>
<td>• Under certain conditions, contracting</td>
<td>bodies, consumers, manufacturers, distributors and environmental</td>
</tr>
<tr>
<td>authorities seeking better quality may</td>
<td>organisations, and equal accessibility.</td>
</tr>
<tr>
<td>give more points to bidders that provide</td>
<td></td>
</tr>
<tr>
<td>labels that offer better quality instead of</td>
<td></td>
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<tr>
<td>simple self-declarations.</td>
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</tbody>
</table>

| OPPORTUNITIES                                 | THREATS                                                                    |
|-----------------------------------------------|                                                                          |
| • Given the current draft version of the      | • It is difficult for contracting authorities but important for compliance |
|   new European directives for public          |   with the principles of transparency and non-discrimination to keep      |
|   procurement, these instruments are          |   track of and have a clear overview regarding MSI and CoC.              |
|   expected to gain additional importance in   |                                                                           |
|   the future.                                 |                                                                           |

6.3.2 STAGE OF THE PROCUREMENT PROCESS

What can be done in the pre-procurement stage?
At this stage, once the product scope is identified, a starting point can be to look for unilateral or multilateral (MSI, labels) CoC developed for a specific sector and to consider a market dialogue with affiliated members (suppliers, manufacturers). From a legal point of view, it is recommended to invite relevant associations rather than single companies to avoid any kind of discrimination.

Can the public procurer prefer one label over another?
There is no possibility under the current rules to insist upon a label as the only means of proof, neither in the technical specifications nor in the award phase. Equivalent means of verifying compliance with the social requirements (such as a technical dossier, test result or a declaration of the manufacturer or a test report from a recognised body) must be explicitly accepted.

When using the criteria underlying a label, products which carry that label can be deemed to comply. This does not mean that they must be accepted if they do not adequately demonstrate compliance with the stated specifications.
To secure the required link to the subject matter of the contract, if e.g. a label does not directly refer to the production of a certain product but rather to internal company standards, the bidder must be obliged to declare that criteria e.g. ILO core labour standards will be respected in the production and delivery of the product (Zieres 2012: 22 quoted after Ziekow 2011: 47). Not only the label itself but also the relevant criteria should be explicitly mentioned (Zieres 2012: 22).

**Can the public procurer award more points for ‘better’ labels?**

While verification for technical specifications is in principle a pass or fail option, this is slightly different for award criteria, where bidders have already passed the pass or fail stage. Like for all tendering stages, in the award stage all bidders must be treated in the same way and have the chance to obtain the maximum amount of points. However, when applying MEAT and one or more qualitative criteria or sub-criteria have been included, the contracting authority must assess how well each bid performs against each of those criteria. Hence, it is about awarding the better quality and not the better verification of that quality (Buchmüller/Falke 2012b: 2). In this context it is legally debatable whether more points may be awarded for better internal control instruments established by the tenderer. On the one hand one could argue that the “social quality” of a tender depends at least indirectly also on the measures taken by the tenderer to ensure compliance with social standards (Buchmüller/Falke 2012b: 2). On the other hand the quality of a tender results from the effective compliance with social criteria. If one follows the latter view, the consideration of internal control instruments established by the tenderer as award criteria would not be compatible with Community law (Buchmüller/Falke 2012b: 2). For example, when tendering for sustainable timber (see below timber chapter within ‘Sector-specific schemes’ at 7.1.1), an award criterion could be, although legally debatable, considered: “The quality of system in place for ensuring that sustainable forest management principles x, y & z are complied with throughout the supply chain of the product” – this is not a pass/fail criterion. So a procurer may argue that having FSC (or Programme for the Endorsement of Forest Certification Schemes, PEFC) certified wood indicates a very high quality system as it is third-party verified, so will award them top marks. A bidder which instead lists a series of self-supervised actions might receive fewer marks if the quality of the system is not as high.

**What are the conditions for accepting labels and MSI?**

Eco-labels clearly outnumber social labels which explain the importance of affiliations to relevant MSI as alternative means of evidence for social requirements. On the other hand, several eco-labels such as FSC, PEFC, and GOTS do also contain social criteria.

Labels are highly credible verification schemes due to independent auditing and wide accessibility. However, contracting authorities cannot give preference to one verification scheme over another if an equivalent means of proof is provided. In order to use accredited labels or MSI as a means of evidence for social criteria, certain conditions should be met:
- They must be able to prove compliance with the specific social requirements defined in the tender document such as, for instance, compliance with the ILO core conventions in the case of decent working conditions.
- The requirements for the label must be based on scientific information.
- The requirements must have been adopted using a participatory approach, and be accessible to all interested parties.
- There must be an independent monitoring of compliance with the minimum standards.
- They should have a mechanism of regular publishing of progress reports.
- They should have a Management System Audit (MSA) in place.

### 6.3.3 LEGAL CONCLUSIONS

Labels, MSIs and CoC are appropriate and legally permissible and can make the life of procurers easier as they can trust them if they fulfil certain requirements and are able to meet all the criteria set out in a tender. Consequently, contracting authorities do not have to invest considerable expertise into analysing other means of proof, such as long, technical dossiers.

### 6.4 PRACTICAL CONCLUSION FOR PROCURERS (SWOT ANALYSIS)

<table>
<thead>
<tr>
<th>STRENGTH</th>
<th>WEAKNESSES</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Labels, MSIs and CoC are useful during the preparatory stage to identify which social considerations are relevant and appropriate to be taken into account.</td>
<td>• Where independent monitoring is limited due to e.g. lack of labels or credible MSI, contracting authorities will have practical and financial difficulties to obtain certainty about the fulfilment of the social criteria required for a specific product.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>OPPORTUNITIES</th>
<th>THREATS</th>
</tr>
</thead>
</table>
| • Unilateral or multi-lateral CoC might represent weaker and less viable verification options but represent first steps towards a stronger social policy by suppliers.  
• Eco-labels increasingly include also social criteria and can thus be evidence for social requirements.  
• Over the past years labels – social and eco – have strengthened their social side, meaning for instance that more ILO conventions are covered and control and monitoring goes further back through the supply chain. | • Unlike the large number of environmental labels, relatively few social labels exist.  
• Due to the financial crises and lack of market access for small producers, the latter have increased difficulties paying for social certifications. |
6.5 SUCCESS FACTORS

When a contracting authority intends to successfully engage in a socially responsible procurement some preliminary research along with market dialogue in the pre-procurement phase is recommended. Apart from having a list of valid, relevant labels as proof of evidence for the specific requirements, procurers are also advised to find out about relevant MSI in the field. Collaborating with relevant local NGOs – such as Barcelona and others (above) did with the Clean Clothes Campaign when ethically procuring work wear – proved to be a success factor for the tender process. A growing number of labels and MSI is increasingly strengthening social commitments and credibly monitoring these commitments along the supply chain. These developments will help public procurers to make a real difference in a globalized world when bidders offer products with such labels, or are affiliated to such MSI.
7. SECTOR-SPECIFIC SCHEMES

7.1 DESCRIPTION OF THE SCHEMES

7.1.1 TIMBER

Several EU Member States have sustainable timber policies in place, or address it within their national action plans on green public procurement of typical wood-based products, such as furniture, construction materials, flooring and paper. When it comes to timber procurement, sustainable procurers usually require legal and sustainable timber. In accordance with the EU Timber Regulation all timber sold in Europe has to be legally sourced by 2013 at the latest. Legality can be proven through mandatory verification schemes (FLEGT, Due Diligence or equivalent.) With regards to sustainable timber, proof of compliance is generally the FSC, the PEFC or equivalent certification schemes or licensing schemes such as FLEGT.70

Given the broad consensus that sustainable timber management includes social aspects, EU Member States such as Belgium, Denmark, the Netherlands, Sweden and the UK have included social criteria in their timber procurement policies, although these policies differ in the extent to which they have included social criteria. Proof of evidence of such criteria can be affiliation to one or more MSI if appropriate, or a bidder’s declaration that the requirements are fulfilled or measures actively undertaken.

With the exception of the UK, where FLEGT-licensed timber is accepted as evidence both of legality and sustainability, most EU Member States refer to forest management certification schemes such as FSC or PEFC as means of verification that forest products are sourced from sustainably managed forests. Certification schemes include mechanisms for tracing products from the forest of origin through the supply chain, to the end consumer. The certification of the supply chain is called “Chain of Custody” (ChoC). Acceptable forest certification schemes thus provide evidence of legal and sustainable timber through a Sustainable Forest Management (SFM) and/or ChoC certificate.

Examples of possible alternative means of proof (the list is not exhaustive):

- Supplier documentation submitted to independent third-party assessment;
- Documents attesting to a forestry management plan and its implementation, as approved by a relevant authority. (All requested criteria for SFM should be covered by the plan);
- Evidence of a company’s internal procedures that shows traceability

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70 It is important to note that FLEGT licences are only available in respect of timber sourced from countries where a Voluntary Partnership Agreement (VPA) is in place with the EU. As of 1.03.2012, VPAs are in place with Ghana, Cameroon, the Republic of Congo and the Central African Republic.
through the supply chain (as an alternative means to proving traceability back to SFM, but not as proof of sustainable forest management per se);  

- Technical dossiers from wood producers or reports from competent bodies giving the same level of information as the certification process;  

- Self-declaration of compliance with the sustainability criteria applying at the source of supply, together with evidence to verify this information. (To be provided upon request).

It can be very complicated for public procurers to verify if sustainable management practices are applied at forest level, especially if the forest is in another country or geographical region. This verification requires evidence that can vary greatly and needs to be judged on a case-by-case basis. The framework provided by The Central Point of Expertise on Timber71 for the UK government presents an excellent set of tools that can provide support both to procurement staff and to suppliers tasked with the provision and assessment of this evidence.

### 7.1.2 CONSTRUCTION MATERIALS

For construction materials, the use of product declaration platforms is well established in many EU Member States. The platforms typically focus on the technical specifications and, increasingly the ecological or health properties of the materials. Some platforms also include reference to the social conditions of production for certain materials. For example, the DNGB Navigator72 (Germany), Baubook73 (Austria), GreenSpec74 (Britain) and Leitfaden75 (Luxembourg) provide information about timber which includes reference to certification under FSC, PEFC or other sustainable production standards. While such standards are not available or in wide use for the majority of construction materials, information about origin and supply chain for materials included on such platforms can play a role in the development, application and verification of social criteria in procurement.

The use of construction product declaration platforms to verify compliance with social criteria is likely to be indirect. The more comprehensive platforms (such as those cited above) include life-cycle assessment data about the materials and products listed. This allows procurers who wish to verify the sourcing, chemical composition, emissions or other impacts associated with a material throughout its production process to use the platforms as a source of information. So, for example, if a procurer identifies a particular substance or process used in the production of insulation material as posing a high risk to workers, the platforms could be used to check whether this substance or process is used for an individual material. This could be done both prior to developing specifications and at tender evaluation stage.

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73 [http://www.baubook.at/](http://www.baubook.at/) Last visited 06 March 2012  
74 [http://www.greenspec.co.uk/](http://www.greenspec.co.uk/) Last visited 06 March 2012  
If the contracting authority satisfies itself that the conditions for inclusion of a particular construction product declaration platform are suitable to meet its social criteria, it could request that the platform be used to source the materials to be used in construction. The use of such a platform should be clearly indicated in the contract notice and all interested suppliers given the opportunity to register and declare their products. In general, the requirement that producers pay a fee to have their products or materials included on such a platform will not preclude its use in the procurement process – however, under some national procurement regulations this may not be allowed.

### 7.1.3 TEXTILES

Procurers may use third-party certification schemes to verify the social sustainability of textiles. A number of sector-specific certification schemes exist and are in relatively broad usage, including GOTS (which also includes social criteria) and GoodWeave International. Each of the above-mentioned schemes involves auditing/inspection of individual production facilities. Further information on some of these schemes and examples of their application by procurers are given in Section 6.1 above.

### 7.2 EXAMPLES OF APPLICATION

**Timber – City of Cognac, France**

Sustainable timber criteria in technical specifications and verification used:

- *The wood shall originate from sustainably managed forests.*
- *Tropical wood must not appear on the list of endangered species as stated by international agreements.*
- *The forms of verification are a demonstration of having fulfilled the latest environmental criteria under PEFC, FSC, Keurhout, Canadian Standards Association (CSA), Sustainable Forestry Initiative (SFI) certification schemes, or equivalent.*

**Construction – Province of Vorarlberg, Austria**

Vorarlberg indicates the use of the Baubook platform for the verification of the sustainability characteristics of construction materials in renovation and new build projects which it funds.

The criteria for each product are listed on the platform. Other means of demonstrating that these criteria have been met, such as a test report from the manufacturer, are also accepted.

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Textiles – French Ministry of Defence

The French Ministry of Defence has included the following in its contract conditions for the supply of navy uniforms:

The contractor and its subcontractors must comply with the eight core conventions of the ILO. Within four months of award of contract, and on each renewal, the contractor must provide a report detailing how 11 criteria based on social requirements of the SA 8000 standard are being met. A checklist of these requirements is included in an annex to the contract. Non-compliance with these provisions will result in penalties and/or termination of the contract.

To verify compliance with the contract performance clauses, the Ministry relies upon the services of a firm specialising in social auditing.

7.3 LEGAL ANALYSIS

7.3.1 SWOT ANALYSIS FROM A LEGAL AND PROCESS-ORIENTED PERSPECTIVE

<table>
<thead>
<tr>
<th>STRENGTHS</th>
<th>WEAKNESSES</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Sector specific schemes are often the most appropriate way of addressing social concerns about the sourcing of a product or service, because they reflect its particular attributes.</td>
<td>• There is a risk of over-reliance on schemes or platforms, so that the ability to assess compliance with the underlying criteria is reduced.</td>
</tr>
<tr>
<td>• Schemes in some sectors, such as timber, enjoy widespread recognition both among suppliers and procurers.</td>
<td>• In some cases, registration with a sector-specific scheme or product declaration platform will imply considerable extra costs for operators.</td>
</tr>
</tbody>
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<table>
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<tr>
<th>OPPORTUNITIES</th>
<th>THREATS</th>
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<tbody>
<tr>
<td>• There is an ongoing development of schemes and criteria addressing social considerations in many sectors (see <a href="http://www.standardsmap.org">www.standardsmap.org</a>).</td>
<td>• The legality of awarding more marks to a supplier who is able to demonstrate third-party certification over one who merely declares their actions is in debate. The case European Dynamics v EEA (T-331/06) provides one indication that this approach complies with the principle of equal treatment, but it is not conclusive.</td>
</tr>
<tr>
<td>• Suppliers, procurers and other stakeholders can help shape the development of these schemes and criteria in many cases.</td>
<td></td>
</tr>
</tbody>
</table>

7.3.2 COMPLIANCE WITH RELEVANT LAW

The main role for sector-specific schemes is i) as a reference source for specifications ii) as a basis for developing award criteria and iii) as one possible form of verification that products meet the social criteria set down. Compliance with the EU procurement directives and GPA will depend upon the contracting authority applying one or more of these applications, instead of insisting on use of a particular specification scheme or product declaration platform.
As with all verification schemes, it is important for the contracting authority to look behind the certification to identify the criteria applied and determine whether the scheme is open to all interested suppliers. If criteria based on sector-specific schemes are included in the technical specifications and/or award criteria, they must be linked to the subject matter of the contract, e.g. they should not concern matters which are not related to the production or supply of the goods, services or works in question. This would be the case where, for example, the certification applies to the overall practices of an operator and not the supply-chain of a particular contract.

### 7.3.3 STAGE OF THE PROCUREMENT PROCESS

At tender evaluation stage it is important to ensure that the use of sector specific schemes such as third-party certification or product declaration platforms does not violate the principles of transparency or equal treatment, or create unjustified obstacles to competition.

Contracting authorities may also wish to include a requirement regarding third-party certification and auditing in contract performance clauses. In this case it is important that such requirements be pre-advertised in the notice or contract documents, and that they do not constitute a material amendment to the contract as tendered.

### 7.3.4 LEGAL CONCLUSIONS

Sector specific schemes which include social criteria have the potential to make a strong contribution to the improvement of living and working conditions in developing countries. It is important to recall the proper role of such schemes, in the context of the procurement stage at which they are implemented. Transparency and equal treatment considerations must always be kept in mind, as well as the potential additional costs of registering with these schemes. There is still some debate on whether third-party certification can be differentiated from a supplier’s own declaration when assessing award criteria based on social considerations.
7.4 PRACTICAL CONCLUSIONS FOR PROCURERS
(SWOT ANALYSIS)

<table>
<thead>
<tr>
<th>STRENGTHS</th>
<th>WEAKNESSES</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Widespread availability of products with certification under schemes such as FSC and PEFC.</td>
<td>• No universally agreed definition of sustainable timber and no clear line between legal and sustainable timber.</td>
</tr>
<tr>
<td>• Requirement under FLEGT and EU Timber Regulation for chain of custody information makes checking compliance easier.</td>
<td>• ‘Equivalent’ evidence may be difficult to assess.</td>
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<table>
<thead>
<tr>
<th>OPPORTUNITIES</th>
<th>THREATS</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Existing legislation and schemes give the potential to work further with suppliers and introduce progressively higher social standards linked to timber production and processing.</td>
<td>• Where contracting authorities divide sustainable timber criteria between different tender phases (e.g. technical specifications, contract performance conditions) it can become complex if different types of evidence for different types of criteria (environmental, social) are provided.</td>
</tr>
</tbody>
</table>

7.5 SUCCESS FACTORS (TIMBER)

An overarching SRPP strategy can contribute considerably to the success of sectoral policies. Eight EU Member States – Austria, Belgium, Denmark, Finland, France, Germany, the Netherlands, and the UK – have general public procurement policies for wood and wood based products, while others such as Luxembourg, Ireland, Italy, Portugal, Malta, Spain and Sweden have developed and/or adopted such policies within their national action plans on SPP. Many sustainable timber policies are mandatory at the central/governmental purchasing level and local authorities are encouraged to follow suit. This demonstrates how such schemes can achieve a ‘critical mass’, making their application easier for both suppliers and procurers.

In other sectors, particularly construction, the fragmented nature of the market and long supply chains make it more difficult to develop and apply third-party certification. The use of product declaration platforms can be a first step towards the development of such schemes as they allow for basic information about the environmental and social characteristics of products to be compiled and reviewed.
4 CONCLUSIONS

The LANDMARK guide on verification schemes used in socially responsible public procurement discusses recent approaches how to ensure proof of compliance with social criteria for instance in reference to the ILO core conventions. The guide shows that verification can be achieved to a high level of reliability and that SRPP can make the difference for the working conditions of workers along the supply chain of products, services and works.

At the same time the guide highlights the legal challenges how the verification schemes can be applied in practice, but also showing ways, both on a practical and on a legal level, how to make a challenge into an opportunity. The guide provides any public authority with detailed legal opinions and we, the LANDMARK consortium, look forward to any public authority testing the outlined approaches in their tenders and frameworks agreements. If you would like to share your experiences with this advanced sustainable public procurement activities, please send us a message to procurement@iclei.org.

5 REFERENCES


Mosters, Johannes (2012): Legal opinion issued in connection with the draft “Guide on verification schemes for socially responsible public procurement along the supply chain.” Unpublished.


Zieres, Matthias (2012): Legal opinion issued in connection with the draft “Guide on verification schemes for socially responsible public procurement along the supply chain.” Unpublished.
ANNEX

1. A PRACTICAL EXAMPLE: BIDDER DECLARATION IN BREMEN

A) ADDITIONAL CONTRACT TERMS “ILO CORE LABOUR STANDARDS“

1. While fulfilling the contract, contractor and sub-contractors are particularly obligated to comply with regulations with which the corresponding core labour standards of the International Labour Organisation are transferred into national law. The core labour standards are ILO conventions 29, 87, 98, 100, 105, 111, 138 and 182.

Hereby, the national regulations of the country where the contractor or his sub-contractors take action to fulfil the contract are decisive. Even if in this particular country one or more core labour standards are not ratified or transferred into national law, contractor and sub-contractors are still obligated to comply with the respective core labour standards.

This means that in the extraction or production process of the good to be supplied

- no forced labour including slave and prison labour according to convention 29 on forced labour from 28 June 1930 (BGBl. 1956 II S. 641) and convention 105 on abolition of forced labour from 25 June 1957 (BGBl. 1959 II S. 442) is used;

- all employers are guaranteed the right to form and join trade unions and to bargain collectively according to convention 87 on freedom of association and protection of the right to organize from 9 July 1948 (BGBl. 1956 II S. 2073) and convention 98 on the right to organise and collective bargaining from 1 July 1949 (BGBl. 1955 II S. 1123);

- distinction, exclusion or preference due to race, colour, sex, religion, political affiliation, nationality or social origin that suspends or impairs equality in opportunities or treatment in employment or occupation does not occur according to convention 111 on discrimination (employment and occupation) from 25 June 1958 (BGBl. 1961 II S. 98);

- male and female workers receive equal remuneration according to convention 100 on equal remuneration from 29 June 1951 (BGBl. 1956 II S. 24);

- no exploitative child labour is used according to convention 182 on the
prohibition and immediate action for the elimination of the worst forms of child labour from 17 Jun 1999 (BGBl. 2001 II S. 1291) and convention 138 on the minimum age for admission to employment from 19 June 1976.

Sub-contractors are all contractors that are involved in the production or extraction process of the object of the contract.

2.

The contractor is obligated to present the proof that has been assured in the self-declaration of the additional contract terms “ILO core labour standards” by no later than the delivery of the goods. In case of a partial delivery the proof has to be presented with every single delivery. The contractor guarantees the compliance with the obligation to provide proof also in case the delivery or the partial delivery is effected by a sub-contractor.

3.

The contractor is obligated to provide complete, up to date and auditable documents about the supplying countries of the goods that he delivers and to present these documents to the contracting authorities upon request. The contracting authorities have the right to request a German translation of the documents.

4.

In case the contractor

- delivers goods that have been extracted or produced in violation of the labour standards according to clause 1,
- does not provide evidence according to his self-declaration to the additional contract terms “ILO core labour standards” or
- does not present documents according to clause 3

the contracting parties agree on a contractual penalty of one percent of the contract value. The contractual penalty increases with every infringement according to clause 1 by an additional percent. Every partial delivery with a breach according to clause 1 will be counted as an individual infringement. If the contractual penalty is disproportionally high, the contracting authorities will reduce it to an appropriate amount. The sum of all contractual penalties is not allowed to exceed ten percent of the contract value in total.

5

In case of the events specified in clause 4, the contracting parties agree that the public purchaser has the right to withdraw from the contract pursuant to § 323 of the German Civil Code (BGB). In this case, the contractor has to compensate the contracting authorities for the damage caused. Further legal claims remain unaffected.
B) SELF-DECLARATION TO THE ADDITIONAL CONTRACT TERMS “ILO CORE LABOUR STANDARDS”

With the delivery of the goods, I will provide evidence to prove the compliance with the agreements specified in clause 1 of the additional contract terms “ILO core labour standards”

Comment: The declarations 1 to 3 are equivalent and do not influence the evaluation of the tender. However, the tender will be excluded from the tendering procedure if only declaration 3 will be submitted although seals, labels, certificates, membership in an initiative or other declarations by a third party customary in the market are available for the contractual good.

Please indicate which of the three declarations you want to submit.

DECLARATION 1

The proof will be provided through a seal, label, certificate or the attestation of membership in an initiative pursuant to letter ........ of the following list:

- for work wear and corporate fashion, fabrics and other textile goods
  - a) Fair Wear Foundation
  - b) Ethical Trading Initiative
  - c) Fair Labour Association
  - d) Social Accountability International Standard 8000

- for natural stone and natural stone products
  - e) Fair Stone
  - f) WGDN (Werkgroep Duurzame Natuursteen)
  - g) Xertifix

- for tea, coffee and cocoa products
  - h) Fairtrade
  - i) 4C Association

- for flowers
  - j) Fairtrade
  - k) Flower-Label-Program

- for toys and sporting balls
  - l) Fairtrade
  - m) Social Accountability International Standard 8000
  - n) a certificate in accordance with the ICTI-codex

Comment: Equivalent proof will be accepted provided that a corresponding explanation is given under point 2.
DECLARATION 2

The proof will be provided through another seal, label, certificate, membership in another initiative or other declaration of a third party, namely: ............................................................................................

issued by: ...........................................................................................

This proof is an equivalent to a seal, label or certificate from the list of declaration 1 as it includes the compliance with the agreements specified in clause 1 of the additional contract terms “ILO core labour standards” in the extraction and production process of the goods to be delivered. The issuer of this declaration is independent from my company, my suppliers and the producers of the good.

I am able to prove this upon request.

The webpages of the German Society for International Cooperation (GIZ) http://www.kompass-nachhaltigkeit.de or the Consumer Protection Initiative http://www.label-online.de can serve as further orientation concerning the equivalence of your proof.

DECLARATION 3

Seals, labels, certificates, membership in an initiative or other declarations by a third party customary in the market are not available for the contractual good since good comes from ..........................................................................................................................,

I declare that the goods have been extracted or produced in compliance with the agreements specified in clause 1 of the additional contract terms “ILO core labour standards”. I will present information on the extraction of the resources and the production of the goods as well as a list of the companies involved in the process immediately upon request. I inform myself regularly about the working conditions in the extraction and/or production process of the good. I will present further information about how the information is obtained immediately upon request.
2. MODEL OF GRADUATED BIDDER DECLARATIONS – EXAMPLE: CLOTHING

DECLARATION OF THE REQUIREMENTS OF THE TENDER

The following preliminary remark should be included in the terms of reference of the tender (Model suggestions are italicized):

The contracting authority emphasizes that the clothing to be delivered is produced in compliance with the eight ILO core conventions specified in annex 1 and the national labour laws in the country or countries of production.

Therefore, the contractor has to deliver products that have been manufactured in best possible compliance with these labour and social standards within the scope of the declaration enclosed to the tendering and contract documents. The declaration is part of the tender and will be a part of the contract in case of commission.

The contractor can prove compliance with the labour and social standards specified in annex 1 by either providing independent evidence or by enclosing a bidder declaration with targeted measures as proof with the tender, if the tenderer is presently not able to provide independent evidence.

TERMS OF CONTRACT

The following declaration which has to be signed by the tenderer could be taken into the terms of contract used by the contracting authority. For contracts above the threshold values, this declaration also needs to be included in the tender documents.

ARTICLE 1: STANDARDS

In the production process, the supplier is obligated to comply with the ILO core conventions specified in annex 1 and national labour laws in the country or countries of production.

Please specify which type of evidence you will provide:

a. presentation of independent evidence

I / We undertake to fulfil the contract exclusively with goods that have been verifiably manufactured in compliance with the labour and social standards specified in annex 1.
The proof of membership in an independent and recognized supervising organization (see Annex 2) or a certificate which testifies to the criteria postulated in the terms of references is enclosed.

b. implementation of targeted measures

Since I/we are not able to provide independent evidence of the compliance with the criteria specified in annex 1, I/we undertake to work towards the compliance with the criteria specified in annex 1 by implementing targeted measures within the supply chain.

ARTICLE 2: SUPPLY

In the production process of the product the contractor is required to

a. Obligate his own suppliers up to and including the process of manufacturing by contract to comply with the basic principles specified in article 1 of these terms of contract and the target-aimed measures specified in article 3. He stipulates that the suppliers for their part obligate themselves to pass these requirements on to their own suppliers up to and including the process of manufacturing.

b. The contractor has to communicate a list of his sub-suppliers to the purchaser upon request.

ARTICLE 3: IMPLEMENTATION OF TARGETED MEASURES AND REPORTS

Including:

a. The contractor initiates trainings for management, workers and employee representatives concerning freedom of association, the right for collective bargaining as well as health protection and occupational safety.77

b. Recruited workers of the suppliers, who are involved in the production process of the clothing to be delivered, will receive a copy of the national labour laws along with their employment contracts, unless this requirement creates a disproportionate burden on suppliers. In this case the workers will receive a copy of the ILO core labour standards (see Annex 1).

c. The tenderer stipulates the implementation of an independent complaints system at the supplier’s factory if no employee representation exists within the factory. If existing, local workers’

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77 The targeted measures presented shall be understood as a suggestion, a selection among them can be made. The measures presented have been chosen in consideration of their contribution to enforce the criteria specified in annex 1 as well as their proportionality. Proportionality is to be understood dynamically. Market developments have to be monitored and adaptations have to be made accordingly.
rights organizations and unions will be involved in the development process.

d. For contracts with a duration of one year or longer, every 12 months the contractor presents a Sustainable Procurement Report (SPR) that meets the standards of the Global Reporting Initiative (GRI). The report documents whether the company complies with the criteria specified in Annex 1 and states which violations in the supply chain have occurred and which corrective measures have been introduced, respectively. The report also documents the implementation of the target-aimed measures and corrective actions.

An infringement of the bidder declaration or knowingly made misstatements enables the contracting authority to deduct a financial penalty of 5% from the contractual remuneration. Furthermore, since this violation is a substantial breach of duty the contracting authority is able to withdraw from the contract and claim compensation. Further legal claims remain unaffected.\textsuperscript{78}

3. BIDDER DECLARATION – LABOUR STANDARDS TO BE COMPLIED WITH\textsuperscript{79}

1. VOLUNTARY EMPLOYMENT

No forced labour, including slave or prison labour (ILO conventions 29 and 105). Workers are not to be forced to hand over a deposit or their identification papers to their employer.

2. NO DISCRIMINATION OF EMPLOYEES

Equal opportunities and equal treatment shall be ensured regardless of race, colour, sex, religion, political affiliation, nationality, social origin or other distinctive features (ILO conventions 100 and 111).

3. NO CHILD LABOUR

There shall be no use of child labour. Employees shall only be hired if they are at least 15 years old or have reached the age where school attendance is no longer compulsory (ILO convention 138).

\textsuperscript{78} Corrective measures can be: If the contractor observes in his analysis required in paragraph a) that employees are working unpaid overtime, he will work with his supplier towards paying up those extra hours.

\textsuperscript{79} Arbeitsverhaltenskodex für die Bekleidungsindustrie einschließlich Sportbekleidung, basierend auf den Musterkodex des Internationalen Bundes freier Gewerkschaften (IBFG), Februar 1998.
4. RESPECT FOR FREEDOM OF ASSOCIATION AND THE RIGHT TO COLLECTIVE BARGAINING

All workers shall have the right to form and join trade unions and to bargain collectively (ILO conventions 87 and 98). Workers’ representatives shall not be the subject of discrimination and shall have access to all workplaces necessary to carry out their representation functions (ILO convention 135 and Recommendation 143). The employer shall take a positive attitude towards the work of trade unions and their activities to organize the workforce.

5. PAYMENT OF APPROPRIATE WAGES

Wages and benefits paid for a standard working week shall meet at least legal or industry minimum standards and always be sufficient to meet basic needs of workers and their families and to provide some discretionary income (ILO conventions 26 and 131). Deductions from wages for disciplinary measures shall not be permitted nor shall any deductions from wages not provided for by national law be permitted. Employees shall be clearly informed in written form about the specifications of their wages including wage rates and pay period.

6. NO EXTRA-LONG HOURS OF WORK

Hours of work shall comply with applicable laws and industry standards. In any event, workers shall not on a regular basis be required to work in excess of 48 hours per week and shall be provided with at least one day off for every seven-day period. Overtime shall be voluntary, shall not exceed 12 hours per week, shall not be demanded on a regular basis and shall always be compensated at a premium rate.

7. DECENT WORKING CONDITIONS

A safe and hygienic working environment shall be provided, and best occupational health and safety practice shall be promoted, bearing in mind the prevailing knowledge of the industry and of any specific hazards. Physical abuse, threats of physical abuse, unusual punishments or discipline, sexual and other harassment, and intimidation by the employer is strictly prohibited.

8. LEGALLY BINDING EMPLOYMENT RELATIONSHIP

Obligations to employees under labour or social security laws and regulations arising from the regular employment relationship shall not be avoided through the use of labour-only contracting arrangements, or through apprenticeship schemes where there is no real intent to impart skills or provide regular employment. Younger workers shall be given the opportunity to participate in education and training programmes.
4. BIDDER DECLARATION – REQUIREMENTS FOR INDEPENDENT EVIDENCE

All stakeholders are institutionalized and equitably involved in the decision-making processes.

The applicable standards for the particular product groups will be defined collectively and will be implemented consistently.

The compliance with these standards will be monitored and verified independently. Transparency and reporting are mandatory.

To prove effective compliance, adequate evidence has to be provided in the course of the execution of the contract. Such evidence can be the membership in a multi-stakeholder-initiative such as the Fair Wear Foundation.

5. FOLLOW-UP QUESTIONNAIRE FROM SWEDEN

The follow-up questionnaire described in the LANDMARK guidance is available for download at: http://offentlig.csr-kompassen.se/doc/msr_csr_exempel_frageformular_EN.pdf (Last visited: 02 April 2012).

80 CorA/CIR 2009, Aktionsplan für sozial-ökologische öffentliche Auftragsvergabe, Anhang 4: 32.
PROMOTING FAIR WORK CONDITIONS ALONG THE GLOBAL SUPPLY CHAIN

The LANDMARK project, running from April 2011 until March 2014, aims to enable European local authorities to act as key drivers for the promotion of fair working conditions in global supply chains for certain products purchased by the European public sector.

By changing the consumption patterns of public authorities, the living and working conditions of workers in Asia and parts of Sub-Saharan Africa, particularly those in the textiles, food, construction and electronics sectors will dramatically improve.

The LANDMARK project is an international project co-funded by the European Union (Programme Non-State Actors and Local Authorities, managed by EuropeAid) and is formed on the basis of a partnership between seven European organisations including cities, municipalities, national and international expert organisations.

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