EU Public Procurement Regulation and Core Labour Standards

A Report for DFID

May 2007

Public World

29 Moresby Road
London E5 9LE
United Kingdom

www.publicworld.org

Contents

Executive Summary

Aims and Purposes of the Report

This report sets out the findings of a study of public procurement practice in certain member states of the European Union (EU) and the European Commission. The study, conducted principally via desk research, had two aims. The first was to identify and analyse procurement policy, regulation and published tendering documents in order to establish the nature and extent of any action taken to ensure that minimum labour standards are taken into account in purchasing decisions. In particular, we were interested in the extent to which the ILO's eight fundamental conventions and the Ethical Trading Initiative's Base Code are used as reference points for defining social best practice. The second aim was to comment on the degree to which the policy, regulation and purchasing practice identified was compliant with EU procurement regulation.

The EU Procurement Regulation

The EU procurement regulation is contained in two Directives that came into force in 2004. While these directives were due to have been incorporated into national law by the beginning of 2006, this process is not yet complete in all member states. The Directives were intended, among other purposes, to clarify the situation with respect to the inclusion of 'social clauses' in public procurement contracts. The EU regulations permit linking public procurement with social goals such as labour standards as long as the clauses in question are compliant also with other requirements, such as transparency and non-discrimination.

The Legal Form of Social Clauses

In principle there are four points in the procurement process at which social goals can be included. The first is in the eligibility criteria for participating in a tendering process. Contracting authorities can refuse to consider bids from a tenderer which fails to satisfy certain minimum standards of financial, technical/professional or 'social' capacity, for example compliance with basic labour standards. The second possibility is to build social or ethical criteria into the subject and/or the technical specifications of a contract. Thus, for example, a contracting authority might specify that it requires a 'fair trade' product. The third possibility is to include social factors in contract award criteria, to specify that contracts will be awarded not just on the basis of price, but taking into account other defined and weighted elements. The fourth possibility is to include social factors in contract performance conditions, making compliance with defined standards a contractual obligation for suppliers.

Policy Divergence

The study found that purchasing authorities in the EU member states differ in both the extent to which social clauses are used and the legal form that they take. It revealed that certain member states (Belgium, France, the Netherlands and Sweden) have adopted high-profile national policies aimed at encouraging purchasing that is linked to the pursuit of a range of environmental and social goals. Others have so far left such activities to sub-national levels of government (Germany), take the path of facilitation rather than positive encouragement (Italy), or tend to express commitment to labour standards in terms of compliance with prevailing standards where the work is to be carried out. In the case of the European Commission's own procurement, the study found no evidence of inclusion of minimum labour standards.

Strategic Approaches

Amid the significant variations between member states that were found in looking at procurement contracting practice, some patterns nonetheless emerge.

Eligibility Criteria. Eligibility criteria are not widely used as a means of excluding from the tendering process suppliers with unacceptable records with regard to minimum labour standards, although the Directives appear to provide the possibility of doing so on grounds of "grave professional misconduct". However, a requirement that tenderers sign a binding commitment to conform with certain standards in carrying out the contract, should they be awarded it, is more widely used to achieve the same objective. This practice is routinely used by some of the largest contracting authorities, and in Belgium is even a legal requirement for all Federal Government contracts. It can be seen as a 'weaker' practice than the use of eligibility criteria per se because once potential contractors have made such a commitment, it is not possible for a contracting authority to exclude them from a tendering process on the grounds that it believes they cannot or do not intend to fulfil it. This choice of strategy may be explained by the difficulty of demonstrating that a potential contractor is guilty of past practice of non-compliance with minimum labour standards in the absence of an actual conviction.

Subject/Technical Specifications. The evidence suggests that there are two principal routes to the inclusion of social clauses in the subject and/or the technical specifications of contracts. First, there is the demand for 'social labels', formal certifications that a product or service conforms to certain social criteria. While the study was able to identify only contracts that specified the 'fair trade' label, there seems to be no reason in principle why the ILO core conventions or the ETI's Base Code should not also be used to label products and services for the purposes of specifying the requirements of a contract. The second route is the provision by public authorities of a catalogue of 'socially-validated' products and/or detailed product specifications which purchasing authorities can choose to include in their contracts. This approach is used in Belgium, France and the Netherlands. Its aim is to encourage the use of social criteria by putting a national government 'stamp of approval' on certain products or types of product.

Contract Award Criteria. The use of social criteria in contract award decisions is not commonly used as part of a national strategy, possibly because of lack of clarity about how direct the relationship between award criteria and the subject of the contract must be. The most liberal view would be that contracting authorities have the right to decide what award criteria are relevant to the subject of the contract. Conservative legal opinion would suggest that the connection has to be rather more overt. The study did, however, find examples of the use of award criteria to enforce social standards in France, Netherlands, Germany and Italy.

Contract Performance Conditions. The inclusion of social elements in contract performance conditions is the most frequently occurring strategy found by the study. Most of the countries that appear to have set out systematically to include core labour standards in public procurement have chosen to do so mainly through including them in contract conditions. The widespread adoption of this strategy may be explained by the fact that there is no requirement that contract conditions be related to the subject of the contract, and by the explicit mentioning of the ILO core conventions in the preamble ('recitals') of the public services directive. The requirement that contract conditions be non-discriminatory in effect still stands, but the absence of any need to demonstrate relevance to the subject of the contract would appear to remove a significant area of legal doubt. The risk that remains relates to the possibility that suppliers in certain countries will find it easier to comply with the conditions than those in others.

Conclusion

Overall, the research found that the countries studied vary in the extent to which they have developed public procurement strategies to enforce minimum labour standards among their suppliers. It found examples of social standards in procurement documentation in all the

countries studied (but not in that of the European Commission itself), and no evidence that any of these cases had given rise to legal challenge. However, such clauses appear in only a minority of the documents studied, and it might be that the legal uncertainty with regard to the practice is acting as a deterrent, and that if the practice were to become more widespread legal challenges would become more likely. Among those countries with the most systematic national approaches, the use of contract conditions is the most common strategic approach, and it might be that this is because it is least susceptible to legal challenge.

1 Introduction

In March 2007, the United Kingdom Department for International Development (DFID) commissioned Public World to undertake a research consultancy to "provide DFID with a clear view of how individual EU member states (excluding the UK) and the European Commission apply and interpret the EU public procurement rules, with respect to core labour standards". The report was to be "based on informed analysis of, and comparison between, the published bidding/tendering documents of each individual EU member state and the European Commission (EC)".

The Public World team assembled for the study comprised:

- Conor Cradden, Public World's senior industrial relations specialist, and the principal researcher for the study.
- Richard Macfarlane, Public World's associate specialist on public procurement, who contributed to the research design and provided guidance on interpretation of the results.
- Brendan Martin, Public World director, and project manager for the study.
- Christof Schiller, Public World's German associate, who provided background research and analysis for the case of Germany.

The Terms of Reference expressed the background to the study as follows: "There have been some concerns raised that the UK may have interpreted and applied EU public procurement rules more narrowly than other countries, with respect to core labour standards. The essence of the concerns is that minimum labour standards may not always have been protected as strongly as possible within the procurement rules." The purpose of the review (to be conducted mainly through desk research) was to "identify and analyse rules and published bidding/tendering documents and notices in selected EU member states and the European Commission to establish:

- "the extent to which the rules and bidding/tendering documents and notices set out a clear eligibility criteria for prospective suppliers to include the requirement to meet the minimum labour standards"; and
- "the extent to which the bidding/tendering documents carried reference to minimum labour standards within the product/service specifications".

On the basis of the information compiled from the research, the consultants were to produce a report that would include:

- A review of the buying practices of selected EU member states (excluding the UK) and the European Commission, concentrating on action taken to ensure that labour standards are taken into account in purchasing decisions.
- A commentary on whether the procurement practices found are compliant with EU purchasing practice.
- A comparison of the practices found with the basic codes as set out by the Ethical Trading Initiative (which goes beyond the ILO core standards).

In discussion between DFID and Public World at the outset, it was agreed that the report would focus on five EU member states: France, Germany, Ireland, the Netherlands and

Sweden. In the course of the research, in the light of the discovery of particularly significant evidence from Belgium and Italy, it was agreed that relevant information from those countries would also be included. It also became apparent (for reasons explained in the following section) that, in addition to tender eligibility criteria and technical specifications, it would be informative to include an analysis of the extent to which conformity with minimum labour standards is included within contract award criteria and as contract performance conditions.

Following this introductory section, the report is structured as follows:

Section 2 begins with some general background on the use of public procurement as a means to pursue social ends, and an outline of the European Union legal context. It describes the ILO's core labour standards and the Ethical Trading Initiative 'Base Code'. With reference to these factors, the research and evaluation methodology used in the study is then explained. (A more detailed account of the research methodology is given in Appendix 1.) Section 3 sets out and discusses the research findings in respect of the European Commission and the seven countries whose tender documents were investigated. Section 4 is a commentary, based on those findings and on background research, on the extent to which the procurement practice identified in the study complies with the EU Directives, the ILO core conventions and the ETI Base Code. The tensions between these different regulatory frameworks are discussed.

2 Background and Evaluation Methodology

The approach we have adopted to evaluating the data collected in the study needs to be understood within the evolving policy and legal context of the use of public procurement to achieve social outcomes. As McCrudden (2004) points out, this has a long history.

2.1 Public Procurement and Social Goals: From Labour Protection to Sustainable Procurement

As we will see in a moment, contemporary approaches to the pursuit of social goals via public procurement involve a wide range of labour and product market issues. These approaches often also include environmental goals. However, the narrower field of labour protection – our principal concern in this report – has historically been the most frequently-targeted area. For example, as early as 1840, some US Federal Government contracts included the requirement for a 10 hour limit on the working day. In the UK, the Fair Wages Resolution of 1891 specified that workers employed on public contracts should benefit from a level of pay and terms and conditions no less favourable than the established rates in the industry in question. By the 1960s, the concepts of contract compliance and workforce monitoring had emerged, and in the 1970s and 1980s public authorities were routinely enforcing anti-discrimination policies through public contracts.

More recently, attempts have been made to use public procurement to boost training opportunities and workforce insertion of young people and the long-term unemployed. Contracting authorities have also begun to use procurements to pursue what McCrudden has called 'outward-directed' social and environmental goals, that is, policies aimed at communities beyond their immediate jurisdiction. Perhaps the most familiar of these is the policy of buying 'fair trade' products (see below, section 2.4). At the same time as this widening of the scope of public procurement's labour-related goals we have also seen the emergence of environmental objectives in procurement. This movement towards 'green procurement' has merged with the existing focus on social issues to produce what is now known as 'sustainable public procurement' or SPP. SPP is itself one aspect of the wider policy agenda known as 'sustainable development'. Sustainable development is a significant preoccupation both within the EU institutions and in individual member states. The EU, for example, recently agreed the following definition of sustainable development (SD):

> Sustainable development means that the needs of the present generation should be met without compromising the ability of future generations to meet their own needs... It is about safeguarding the earth's capacity to support life in all its diversity and is based on the principles of democracy, gender equality, solidarity, the rule of law and respect for fundamental rights, including freedom and equal opportunities for all (EU 2006, p2).

The *Renewed EU Sustainable Development Strategy*, from which the definition above is taken, makes it clear that SD is now the central guiding principle of the EU's social and economic policy. It also states quite explicitly that SD includes not just environmental issues but also questions of social equity and cohesion. Promoting fundamental rights, working towards poverty reduction, and enhancing social dialogue all figure among the policy objectives derived from the SD strategy.

SPP has recently been defined by the UK Sustainable Procurement Task Force as "a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves "value for money on a whole life basis" in terms of generating benefits not only to the organisation, but also to society and the economy, whilst minimising damage to the environment" (Sustainable Procurement Task Force, 2006, p10).

2.2 Potential Conflict between SPP and Competition Policy

Despite the longstanding policy focus on labour issues in public contracts and the more recent emphasis on procurement as an important element in sustainable development strategies, there have also been countervailing policy pressures. As Bovis (2006) suggests, the neo-classical economic approach that has had a significant influence on public policy since the beginning of the 1980s sees the inclusion of social issues in public procurement as potentially damaging to the market and to competitiveness: "Public procurement has been identified as a serious non-tariff barrier and a hindering factor for the functioning of a genuinely competitive common market" (Bovis 2006, p74). In the context of the European Union's development of a single market, and continuing debates about the balance to be struck between economic liberalization and social protection in the EU, public procurement regulation has been guided mainly by the goals of opening markets, improving value for money and, not least, combating corruption through transparency and accountability. These concerns may have contributed to a tendency to emphasise narrowly-defined commercial criteria for awarding public contracts.

In the public procurement context, therefore, policy priorities are potentially in conflict. On the one hand, it is clear that the purchasing power of public authorities, which has been estimated at around 16% of GDP in the EU as a whole, represents an immensely powerful lever that in principle can be set to the social and environmental ends of sustainable development. On the other, there are concerns that public procurement should be not used in a way that is effectively protectionist, that procurement procedures should be sufficiently open and transparent, and that public bodies and their staff should be accountable for their actions.

2.3 The 2004 EU Directives

The EU Directives issued in 2004 represent a significant systematization and clarification of the law on public procurement, previously codified in six different Directives. Part of this clarification is precisely an attempt to specify how contracting authorities can avoid the potential conflict we have just identified. Directive 2004/18/EC (the 'public services Directive') applies to central and local government and other public services and agencies, while Directive 2004/17/EC (the 'utilities Directive') applies to public, semi-public or privatised utilities operating in the water, energy, postal and transport sectors.

The EU Directives apply only to contracts whose estimated value is above a certain threshold. (This does not mean that their requirements do not apply to contracts below those thresholds. The terms of the EU Treaties imply that they should do so, but the Directives prescribe a method contracts above the threshold that is not provided for lower value procurements.) These thresholds depend both on the nature of the contracting authority and the nature of the contact, but for central government supplies contracts, the current threshold is €137,000 and for other public sector authorities €211,000. Where the value of a contract is above the relevant threshold, the Directives specify a series of procedural requirements with which contracting authorities have to comply if the award of the contract is to be lawful. Arrowsmith (2006) has provided a useful summary of these requirements, which we have adapted below:

1. Contracts must be publicly advertised in the Official Journal of the European Union.
2. Contracting authorities must award contracts using certain specified competitive award procedures.
3. Contracting authorities must select (or exclude) bidders on the basis of certain objective criteria which must be disclosed in advance. The Directives propose a non-exhaustive list of acceptable criteria, which include most notably financial and

technical capacity, but also the potential bidders' compliance with taxation and social security legislation, and its standards of professional conduct.

4. Contracts must be awarded either on the basis of lowest price, or on the basis of which tender is 'most economically advantageous' to the contracting authority and the public it represents. The type of award procedure must be specified in advance. Where the contract is to be awarded to the most economically advantageous tender (MEAT), this is to be determined on the basis of criteria linked to the subject matter of the contract, which criteria and the quantitative weight they carry in the decision-making procedure must also be disclosed in advance.
5. Each phase of the process is subject to minimum time limits.
6. Contract specifications must include reference *either* to performance or functional requirements, *or* to certain designated standards (most importantly national standards implementing EU standards, or international standards).
7. Contracting authorities are required to provide certain types of information, for example to give reasons for decisions.

Beyond these procedural requirements, the Directive also lays down certain broad substantive requirements for a lawful public contracting process, and specifies certain measures that contracting authorities are permitted to take should they wish to do so.

In the public services Directive, the substantive requirements are specified in article 2, which states quite simply that "contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way". These substantive objectives clearly give rise to the procedural measures outlined above, but the principles of non-discrimination (or equal treatment) and transparency are also those used by the European Court of Justice "to interpret the law and to imply additional obligations where no explicit rules exist" (Arrowsmith 2006, p354).

For our current purposes, the most relevant of the permissive elements of the Directives is the permission granted to contracting authorities to add 'contract performance conditions', which are requirements that the successful tenderer conform to certain conditions in carrying out the contract. Crucially, in article 26 of the services Directive, it is specified that "the conditions governing the performance of a contract may, in particular, concern social and environmental considerations". In the explanatory sections that precede the text of the Directive itself (the 'recitals') it is suggested that one possible such social consideration is a requirement to comply with the terms of the ILO's core conventions (Recital 33).

Despite the clarifications introduced in the 2004 EU Directives, however, the legality of social clauses remains a defiantly grey area. There are several reasons why this is the case, but two may be particularly significant. The first, suggested by Arrowsmith (2006), is that "the rules have been created by judicial development. One consequence of this... is the considerable uncertainty over the content of the legal obligations"(p382). The second point, made by Arrowsmith and Maund (2006), is that the existing guidance on the law "focuses on the kinds of social and environmental issues that are of concern for the traditional public sector, and has little to say, for example, on issues relating to labour conditions in developing countries" (p9). In fact, as we will see in more detail later, the question of the inclusion of clauses relating to labour standards in the global supply chain for manufactured goods or commodities is perhaps the greyest area of all, there being no clear reference to such provisions in the Directives, and no European case law that has any direct bearing on the issue.[1]

[1] Consultation of the European Court of Justice case-law database also suggests that there are no cases pending that might be of relevance to the social clauses issue.

The policy tensions explored earlier, between economic liberalization and social protection aspects of European Union policy, remain, therefore, and as the French government advisory body the Economic and Social Council has put it: "The possibility of including social clauses in public procurement contracts... remains highly regulated, and is perhaps even hindered, by EU law founded on free market principles." (ESC 2006, p29; author's translation). This might not be so problematic for public authorities wishing to leverage their spending in pursuit of social objectives if the limits set by that regulation were clearer.

2.4 The ILO's Core Labour Standards, the Ethical Trading Initiative and Other 'Social Labelling' Codes

The Governing Body of the International Labour Organization has designated 8 of its 187 conventions as 'fundamental'. These 8 conventions, identified in the 1998 Declaration on Fundamental Principles and Rights at Work and commonly known as the ILO 'core conventions' or 'core labour standards', cover four areas: freedom of association and the right to collective bargaining; the elimination of forced and compulsory labour; the abolition of child labour; and the elimination of discrimination in the workplace. The fundamental conventions are as follows:

- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
- Forced Labour Convention, 1930 (No. 29)
- Abolition of Forced Labour Convention, 1957 (No. 105)
- Minimum Age Convention, 1973 (No. 138)
- Worst Forms of Child Labour Convention, 1999 (No. 182)
- Equal Remuneration Convention, 1951 (No. 100)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

While the core conventions have become the effectively uncontested global minimum standard for working conditions, there are several other 'social labelling' organisations that have established codes or sets of criteria that are more stringent than the fundamental rights specified by the ILO.[2] The Ethical Trading Initiative (ETI) is one such body. In its own words, the ETI "is an alliance of companies, non-governmental organisations (NGOs) and trade union organisations. We exist to promote and improve the implementation of corporate codes of practice which cover supply chain working conditions. Our ultimate goal is to ensure that the working conditions of workers producing for the UK market meet or exceed international labour standards" (ETI website). The ETI has developed what it calls a 'Base Code', which it defines as a minimum requirement for any corporate code of labour practice. The ETI Base Code covers the same four areas specified in the ILO core labour standards, but also adds the following conditions:

- Working conditions are safe and hygienic;
- Living wages are paid;
- Working hours are not excessive;
- Regular employment is provided;

[2] It should be borne in mind, however, that the ILO's non-core conventions and recommendations establish an international labour code that is unsurpassed in its coverage and stringency.

- No harsh or inhumane treatment is allowed.[3]

Arguably, what the ETI adds to the ILO core conventions is a broader concern for the quality of life of those involved in production. While the ILO core conventions are concerned only with the bare legal form of the relationship between employer and employee, the ETI Base Code adds elements that are to do with the working experience of employees and the degree to which their work enables them to maintain a decent standard of life outside the workplace.

This concern with the substantive experience and outcome of work is what links the ETI code to the various fair trade standards that exist. Both the Fairtrade Labelling Organization (FLO), which is concerned with products, and the International Fair Trade Federation, which is concerned with organizations, make specific reference to ILO conventions in their standards. Indeed, the FLO, which is responsible for the most commonly used fair trade mark, makes reference not just to the core conventions, but to a number of others. However, these organisations also look beyond the ILO conventions, taking a wider view which, like that of the ETI, includes a concern with the experience of working life. Unlike the ETI, they are also concerned with supporting sustainable economic development in the communities and regions along the whole chain of production and distribution.

2.5 Research and Evaluation Methodology

The starting point for the collection of tender documentation was the EU's central tenders database, Tenders Electronic Daily (TED). TED is the online version of the supplement to the Official Journal of the European Union in which contracting authorities are obliged to publish information relating to tenders that fall under the terms of the 2004 EU Directives. As well as open tenders, TED includes a tender archive dating back to the beginning of 2002 in which are indexed more than 1.25 million tender documents relating to around 740,000 calls for tender.

Our research and evaluation methodology was designed in the first instance to identify any public contracting processes in which it is specified that contractors or potential contractors must demonstrate that they already comply with, or must accept that in carrying out the contract they will be required to comply with, some social standard that has a component relating to the labour conditions of workers. Thus we searched TED for contracts making reference to the ILO core conventions or their content, to the ETI or ethical trade, or to fair trade (for more details see Appendix 1).

With respect to the evaluative component of the project, it became apparent during the course of the data-gathering exercise that variations in national approach reflected not just differences in the interpretation of the EU legal context, but also the degree of political and policy support for using public procurement to promote labour standards and other social goals. For this reason, we also undertook a basic comparative analysis of national public procurement regulation schemes and policy guidance, to the extent that this was possible within the time and resources available

2.6 The Structure of the Analysis

The EU regulations are written in such a way that there are four possibilties for linking procurement contracts with social goals or social labelling.

[3] Each of these conditions are defined in some detail in the ETI document *Purpose, Principles, Programme And Membership Information*, referenced below.

The first possibility is the inclusion of 'social performance' in the eligibility criteria for tenderers. These can justify a contracting authority's refusal to consider any tenderer who fails to satisfy certain minimum standards of financial and technical/professional capacity, and specifically any who is "guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate" (article 45.2(d), Directive 2004/18/EC). This could be applied to serious breaches of labour standards.

The second is to build social or ethical criteria into the subject and/or the technical specifications of a contract. Thus, for example, a contracting authority might specify that it required a 'fair trade' product, along with an appropriate definition of what this means and how tenderers might go about demonstrating that the product they propose meets this criterion.

The third is to include social factors in the award criteria where contracts are to be awarded on an MEAT basis.

The final possibility is to include social factors in contract performance conditions.

The description and analysis that follows in section 3 is structured in accordance with those four points. However, in those cases where there is no evidence to report under a particular heading, we have omitted that heading rather than including it merely to report that there is nothing to report.

3 Country Reports

In what follows, we provide an overview of public procurement policy in each country under analysis, together with the details of any relevant tender documents.

3.1 The European Commission

Although the Commission has a Green Public Procurement strategy, and a sustainable development strategy, it has not taken the step of combining these approaches into a sustainable public procurement strategy that systematically includes labour standards or other social criteria. A wide range of EC and European Parliament tenders were examined, and no evidence of the inclusion of social criteria at any stage of the procurement process was found. However, sources within the Commission suggest that this should not be taken to mean that the EC is opposed in principle to the use of social clauses in procurement.

3.2 Belgium

Our analysis suggests that the SPP strategy of the Belgian Federal authorities is the most rigorous of any of the member states examined in this study. This strategy involves the inclusion of social clauses both in the technical specifications of contracts and in contract conditions.

3.2.1 Subject of the Contract/Technical Specifications

Since 2005, all federal government departments and agencies are obliged to apply a certain set of environmental and social/ethical criteria in their purchasing unless there are fundamental obstacles that prevent them from doing so. In order to facilitate the application of these criteria in procurement contracts, 'sustainable' technical specifications for a wide range of products have been drawn up. In effect, these specifications carry a government guarantee of legality, and procurement officers can be confident that by including them in contracts they are not exposing the contracting authority to any legal risk – or, at least, that any legal risk is sanctioned by the government. These specifications are available on a dedicated sustainable procurement website.[4]

The emphasis in these product specifications is firmly on environmental criteria, but it appears that social criteria may also be included. That this is the case is suggested by the reference to the Belgian Social Label (BSL) and to fair trade labeling schemes. The BSL is an officially-sanctioned scheme that involves independent certification that the ILO's core conventions are respected at every stage of a given product or service supply chain. The label is awarded to individual products or services rather than to enterprises. On the Belgian sustainable procurement website, the possession of the BSL is the baseline "social criterion" for each product. Thus it appears to be the case that contracting authorities could specify BSL products as the subject of the contract, which in turn enables them to make the possession of the BSL a part of the contract's technical specifications. This is coherent with the advice elsewhere on the Belgian SPP website that a recognised fair trade label such as Max Havelaar can be specified for particular products, notably coffee.

This having been said, there is little evidence available via TED that these social labels are mentioned in the subject of contracts or included in technical specifications in Belgium. In fact, no tenders could be identified mentioning the BSL – although this may be to do with the fact that up to now only five products have been awarded it[5] – and neither are there are any

[4] http://www.guidedesachatsdurables.be.

[5] These products are: a type of domestic electrical switch, a home insurance policy, an employment agency service and two types of architectural stone.

tenders that mention a requirement for fair trade produce. On the other hand, it may well be that the value of tenders for fair trade products is very much lower than the threshold above which publication on TED is required. The French evidence (see below) certainly suggests that this is likely to be the case.

3.2.2 Contract Conditions

The situation with respect to contract conditions is very clear. A Belgian federal government order published in 2005 (Circulaire P&O/DD/1) states that:

> In signing their bids, potential contractors commit themselves to respect the ILO's core conventions, unless their products have obtained the Belgian Social Label or its equivalent. The absence of such a commitment, or the failure to respect it in the course of carrying out the contract, constitutes a cause for the cancellation of that contract (p3690; author's translation).

In order to make this requirement more concrete, the Belgian government has made available a model declaration that contractors can be asked to sign. The text of this declaration (see box 1) makes it clear that respecting the ILO conventions also means ensuring that they are respected in the supply chain.

Box 1: Belgian Model Declaration on Respect for ILO Core Conventions

I, the undersigned, Mr/Ms X, representing enterprise Y, solemnly declare that to the best of my knowledge the product Z has been produced by companies that respect, and that require their subsidiaries, suppliers and subcontractors to respect, the following criteria:

- Freedom of association, ILO Convention no. 87
- The right to collective bargaining, ILO Convention no.98
- The ban on forced labour, ILO Conventions nos. 29 and 105
- Equal treatment and non-discrimination, ILO Conventions nos. 100 and 111
- The progressive elimination of child labour, ILO Convention no. 138
- The ban on the worst forms of child labour, ILO Convention no. 182

If I should learn that these conventions are not being respected, I will endeavour to take the measures necessary to change this situation or to find an alternative supplier.

I agree that the procurement officer or his/her representative may inspect any records detailing those of my suppliers, subsidiaries and sub-contractors that are involved in the delivery of the contract.

Source: http://www.guidedesachatsdurables.be

The sole example of the use of this model text in actual contract documents that could be found on TED involved a 2006 tender for office supplies put out by the Belgian Federal Public Justice Service. The social clause is included under the heading "Conditions for participation", and uses almost exactly the text of the government order cited above. The only significant difference is the omission of any mention of the BSL.

3.3 France

France has developed and promoted a sustainable development strategy, which has in turn been applied to public procurement. The law relating to procurement (*Code des Marchés Publics)* was updated in August 2006, both to take account of the 2004 EU Directives and to increase and clarify the scope for SPP. Then, in March 2007, the French government

published its National Action Plan for Sustainable Public Procurement. This plan set the objective of placing France among the most committed EU member states in the field of SPP by 2009.

The steps that will be taken to achieve this end are similar to, but seem likely to go beyond the Belgian model. The proposed approach is based on the same belief that certain types of social clause pose no risk of legal challenge – there is no suggestion that any further change in French law is required – but that it is necessary to provide the appropriate information and support to staff involved in public procurement in order to ensure that they feel sufficiently confident in the legality of their SPP practices. It is also recognised in the plan that there is a greater need for research and information resources on social than environmental clauses. In order to redress this imbalance, the plan proposes, for example, the development of a website dedicated to socially responsible public procurement on the model of an existing site dedicated to environmental responsibility in purchasing. A legally validated practical guide to the use of social clauses in public procurement is also currently in preparation.

3.3.1 Eligibility Criteria

Perhaps surprisingly, the French public procurement regulations omit the possibility, specified in article 45 of the public services Directive, of excluding potential contractors from the bidding process for "grave professional misconduct proven by any means which the contracting authorities can demonstrate". It remains possible to exclude candidates for recorded breaches of specific national legislation, many of which are in the field of labour protection.

However, our research uncovered a possible alternative means of pursuing essentially the same goal. Our interrogation of TED identified two calls for tender – admittedly both put out by the same contracting authority, a public research institution – in which social considerations are included as elements in the technical capacity of tenderers. In one case, both "fair trade buying" and "corporate citizenship" ("*politique et bilans sociaux*") are listed as elements in technical capacity. In the other, tenderers are asked to provide evidence of their quality policy, which includes "certifications, fair trade and health and safety policy".

3.3.2 Subject of the Contract/Technical Specifications

With respect to the technical specifications of contracts, the French regulation simply reproduces the text of the public services Directive. However, there is a provision on the determination of the 'user requirement' of procurement – there is no similar provision in the Directives – specifying that this shall be defined "taking into account the objectives of sustainable development" (*Code des Marchés Publics*, article 5; author's translation). The term 'user requirement' simply means the reason why the procurement is taking place, that is, the need the contracting authority aims to satisfy in purchasing products or services. Since the user requirement will clearly be the strongest influence on the determination of the subject of the contract, and hence its technical specifications, it could thus be argued that the French regulation provides a greater degree of encouragement to include social and environmental considerations in these specifications than do the Directives.

However, the evidence from the documentation available via TED suggests that up to now, the French experience in this area is limited and tentative. There were 17 French tenders retrieved from TED in which social considerations – or rather, one particular social consideration, fair trade – formed part of the technical specifications of the contract. In 11 of these cases, the supply of a fair trade product was compulsory, while in the remaining 6 it was optional. In three of these, fair trade produce was as an either/or choice along with organic products. Of the 11 cases in which the supply of a fair trade product was an integral part of the subject of the contract, only one was exclusively for fair trade produce. In all other cases, fair trade products were one "lot" within a contract specifying predominantly

conventional products. In no case was the maximum estimated value of the fair trade element close to the threshold level for the application of the EU regulations.

3.3.3 Contract Award Criteria

Article 53 of the public services Directive provides a (non-exhaustive) list of criteria that contracting authorities may use in determining the "most economically advantageous tender". While none of these criteria bear any relation to social objectives, the otherwise identical French text adds "performance with respect to the employment of persons in difficulty". So, although the past social performance of potential contractors cannot be used as a criterion for *exclusion* from the bidding process, the French view would seem to be that it is an acceptable factor in deciding whether or not to award a contract.

We identified four cases in which a social consideration – once again, fair trade – was included in contract award criteria. In the first of these, "development of fair trade" is one of eight unweighted headings in an assessment category called "overall value of the proposal", which is worth a maximum of 10 points out of an available total of 100. In the second case, 15 points out of 100 can be given for the tenderer's offer in terms of "environmental protection and/or the development of fair trade". In the third case, one of an unweighted series of criteria is "environmental performance", defined as including the extent of the use of organic and/or fair trade products. In the final case, up to 10 points out of a total of 100 can be given for "performance with respect to environmental and fair trade factors". In none of these cases is there an obvious link with the subject matter of the contract.

3.3.4 Contract Conditions

The article in the French law that reprises most of the Directives' text on contract performance conditions is entitled "Social and Environmental Clauses" rather than "Conditions for Performance of Contracts". Rather than simply reproducing the Directive's formulation – "The conditions governing the performance of a contract may, in particular, concern social and environmental considerations" (article 26, public services Directive) – it states: "The conditions governing the performance of a contract... may include elements of a social or environmental character that take into account the objectives of sustainable development by reconciling economic development, environmental protection and promotion, and social progress." (*Code des Marchés Publics*, article 14 ; author's translation). This strongly suggests that for the French government, the preferred location of social clauses is in contract performance conditions.

The five examples of social clauses in the form of contract conditions that we were able to find via TED are all very similar to the Belgian contract conditions model. Tenderers are asked to provide a solemn declaration that both they and their suppliers and subcontractors respect certain labour standards. The ILO core conventions are mentioned in three cases, and the worst forms of child labour in one case, while in the remaining case tenderers are required to provide a declaration "relative to the struggle against child labour". The three cases in which the ILO core conventions are mentioned (the contracting authorities are the SNCF and two local councils) all use the same form of words: "The candidate commits him/herself to respect, and to ensure that those organisations working on his/her account respect, the 1998 ILO Declaration on Fundamental Rights and Principles at Work" (author's translation). While it is not stated explicitly that the non-respect of this condition will lead to the cancellation of a contract, we understand that the SNCF has already taken such a step on at least one occasion.

3.4 Germany

The German case poses some problems for a comparative study of the current kind as the structure of public contracting is rather difference from elsewhere in Europe both in the

average value of public contracts and the governmental level at which contracting takes place. According to the OECD (2004), “Germany has the lowest level of openly advertised calls for public procurement in the Official Journal of the EU. Public procurement published at the European level accounted for little less than 1 per cent of GDP in 2001 in Germany, whereas the total value for public procurement contracts was estimated at 17.1% of GDP” (p16). By contrast, in the same year both the French and Irish tenders advertised on TED amounted to more than 2.5% of their respective GDP, and Swedish tenders to more than 4.5%. This variation is partly a consequence of differing national practice with respect to the grouping or splitting-up of tenders – and thus their value – and partly to do with variation in national policies on the advertising of below-threshold tenders. In Germany, we know that 60% by value of all public procurement activity goes on below national level, and that 95% of these non-federal contracts have a value which is less than the EU regulation threshold level. (Dusch Silva 2006).

The legal situation with respect to the inclusion of social clauses in procurement contracts is complex, governed as it is both by Federal and state law. While state (*Land*) law varies in the degree to which it permits the use of social clauses, it seems that in all cases, such clauses can be included at three of the standard points. With respect to the technical specifications of contracts, contracting authorities are able to specify places of origin, the source of supply and the manufacturing process to be used. Disqualification of tenderers is also possible on the grounds of poor social performance, but as in practice this can be difficult to demonstrate, potential contractors can be required to sign declarations of their conformity with social requirements as a condition for participation. Contract performance conditions can also be imposed (Maibaum 2006).

Above the threshold for the application of the EU Directives, however, the situation is rather less clear. Maibaum (2006) argues that, whether with respect to technical specifications, selection criteria or contract performance conditions, it cannot be stated with any certainty that the use of social clauses is lawful. This may explain why even the German Development Agency, GTZ, has so far only implemented green procurement practices and does not include social clauses of any kind in its contracts.

This caution at national level persists despite changes to Federal law introduced with a view to bringing German law into line with the 2004 directives. Indeed, Maibaum concludes that the 2004 directives have not been completely ratified in Germany, particularly article 26 of the public services directive, the article concerned with contract performance conditions. However, efforts are apparently underway at present to correct this situation and new legislation is expected within a few months of the time of writing.

What we can certainly say is that in Germany, metropolitan and other local authorities are the main actors in sustainable public procurement. At present, around 65 municipalities are known to include core labour standards in their procurement contracts.

3.4.1 Eligibility Criteria

A case study published by Cities as Responsible Purchasers in Europe (CARPE), a network of municipal and metropolitan authorities, outlines the practice of Bonn City Council (CARPE 2007). In order to be permitted to tender for supplies contracts, potential contractors are required to provide a declaration on the country of origin of the products in question.

3.4.2 Contract Award Criteria

An unusual example of a German social clause in the form of a contract award criterion came to light via TED. A city council call for tender for the supply of stone for use in road building listed three unweighted criteria for the award of the contract: no child labour, quality and delivery time (in that order).

3.7.3 Contract Conditions

TED also provided the details of a call for tender for office furniture put out by a large healthcare organisation in which, unusually, abiding by the terms of the UN Convention on the Rights of the Child is a contract condition. Tenderers are required to provide a declaration that the products supplied are not produced using child labour and that the terms of the UN convention will be respected in the execution of the contract.

We also know from the case study cited above that Bonn City Council includes a social clause in its contract performance conditions as well as in its tenderer selection criteria. This clause is unusual in that it applies only to products that come from the southern hemisphere (defined in terms of development status, rather than geographically, and therefore including Asia, Africa and South America). In these cases, contractors are required to provide "an independent certificate or binding self-commitment... that demonstrates that the products supplied have not been manufactured or treated by means of exploitative child labour (including all suppliers and subcontractors)." In addition, "the company/suppliers/subcontractors must provide a binding commitment that they are introducing effective measures against child labour". The reference standard for "exploitative child labour" is ILO Convention No.182.

Similar practice exists in Munich, where since 2002 contractors are required to identify the country of origin of manufactured products and, where this is a developing country, to provide either a recognised fair trade certification or a binding declaration that no child labour has been used in production. In Düsseldorf, the fire service specifies adherence to all of the ILO's core conventions in the performance conditions attached to contracts for the supply of uniforms.

3.5 Ireland

Sustainable public procurement practice in Ireland is considerably less developed than in the other national cases examined here, particularly with respect to social clauses. There are no government objectives or targets that relate to sustainable procurement. Policy guidance on environmental considerations in procurement was issued in 2004, but the tone of this guidance is very cautious. For example, the guidance states: "Contracting authorities should not seek to use their purchasing power to pursue wider environmental ends. Factors which go beyond the scope of the contract, or do not relate to the contract requirement, such as a contractor's general environment policy, should not be taken into account." (GCC 2004, para 8.2).

Although we are not generally concerned in this report with aspects of public contracts that seek commitments or information with respect to tenderer conformity with existing national regulation, it is worth mentioning that the sole area in which Ireland seems to take a firm line is in ensuring that public contracts do not undermine prevailing industrial relations standards. This is achieved both at the stage of selecting or excluding tenderers and in contract conditions that include "fair wages clauses".

3.5.1 Eligibility Criteria

The Irish procurement regulations adopt a slightly stronger wording than the Directives, explicitly specifying that tenders will be disregarded if tenderers fail to state that "in preparing their tenders for the contract, they have taken account of the obligations relating to employment protection and working conditions that are in force where the works are to be carried out or the service is to be supplied" (article 27, European Communities (Award of Public Authorities' Contracts) Regulations 2006). It should be noted that the reference to "obligations" is not restricted to statutory obligations, and in the Irish context will certainly be interpreted as including obligations arising from collective agreements.

3.5.2 Subject of the Contract/Technical Specifications

We were able to identify only one example of an Irish call for tender that included social considerations as part of its technical specifications. The contract was for the operation of a coffee bar on a university campus, and it was specified quite simply that "fair trade tea/coffee products are required". It is possible, however, that the EU regulations would not apply to this contract, because direct sales to staff apparently fall outside the scope of the Directives (OGC 2006 p37.), and it may be the same exemption applies to sales to students.

3.5.3 Contract Conditions

There is a long-established practice in Ireland of including 'fair wages clauses' in government contracts. These clauses generally follow the pattern set by ILO Convention 94, the Labour Clauses (Public Contracts) Convention. This convention provides that "workers employed under contracts issued by a central public authority [are] to be protected. States party to the Convention [are] required to include clauses in their public contracts ensuring that wages (including allowances), hours of work, and other conditions of labour [are] not less favourable than those established for work of the same character in the trade or industry in the district where the work is carried out" (McCrudden 2004, p265). The following clause, for example, is included in contracts concluded by the Government Supplies Agency on behalf of central government clients:

> The Contractor shall pay rates of wages and observe hours of labour not less favourable than those commonly recognised by employers and trade societies or, in the absence of such recognised wages and hours, those which in practice prevail amongst good employers in the trade in the district where the work is carried out. Where there are no such wages and hours recognised or prevailing in the district, those recognised or prevailing in the nearest district in which the general industrial circumstances are similar shall be adopted.
>
> Further, the conditions of employment generally accepted in the district in the trade concerned shall be taken into account in considering how far the terms of the Fair Wages Clauses are being observed, and for this purpose also regard shall be had to the conditions of employment generally in the Contractor...

The same contract specifies both that contractors are responsible for the observance of the fair wages clause by subcontractors, and that in the case of infringement of any of these conditions, the contracting authority can terminate the contract without payment. What is not clear is whether these conditions would also apply to subcontractors or suppliers outside Ireland.

A shorter version of this legal text is included in a contract for electrical contractors' services issued by a tertiary education institution.

A slightly different approach is used by the Irish Health Service Executive, whose standard contract conditions include the following clause:

> The Supplier shall set up and maintain policies and procedures governing all relevant personnel matters (including, without limitation, discipline, grievances, equality and health and safety) and shall ensure that such policies are also set up and maintained for its subcontractors (where appropriate). The Supplier shall ensure that the terms and the implementation of such policies and procedures comply with law and any legal requirement and good industry practice.

Again, however, it is not clear whether these conditions could be applied to subcontractors and suppliers based overseas.

3.6 Italy

The new Italian Public Procurement Code (*Codice dei Contratti Pubblici*) came into force in July 2006. While, as with the other members states we have looked at, the Directives have been enacted into Italian law with changes that are in most cases of no substantive significance, there are are two areas in particular in which the Italian regulation is tighter or more specific than the Directives demand. We will outline these differences in the relevant sections below.

One peculiarity of the Italian regulation that does not belong to any particular part of the contracting process is is the existence of the *Autorità per la vigilanza sui contratti pubblici di lavori*, *servizi e forniture*, or the Supervisory Authority for Public Works, Services and Supplies Contracts. This seven-member body, whose existence is established in the public procurement code and whose members are appointed by parliament, has a wide remit involving not just the provision of general advice and information gathering, but also the inspection and oversight of public contracting processes. Most notably, it also has a duty to provide contracting authorities with an opinion on the legality of any contract conditions in proposed contracts *in advance* of the publication of calls for tender. The Authority is obliged to give its opinion – which is non-binding but obviously authoritative – within 30 days.

3.6.1 Eligibility Criteria

Article 38 of the Italian code specifies the conditions for participation in a tendering process. As well as the usual exclusions for breaches of the criminal law, failure to pay required social security contributions etc., the Italian code states that those candidates will be excluded who "can properly be shown to be guilty of serious infractions of regulations with respect to safety and any other obligation arising from the employment relationship" (article 38(e)). It also expands on the Directive's clause on professional misconduct, stating that any candidate will be excluded if "in the reasoned judgement of the contracting authority, it has been guilty of grave negligence or bad faith in carrying out services on behalf of the contracting authority or has been guilty of grave professional misconduct…" (article 38(f); author's translation).

Italy also provides some exceptional examples of strict conditions for access to tender processes. Eight separate cases were identified via TED in which the SA 8000 certification is required as a condition for participation. In six of these cases, this certification requirement is listed as an element in the tenderer's technical capacity or professional situation. In a seventh case, the requirement is referred to under the heading 'other information'. In the final case, tenderers can be excluded from participation if they have in the past obstructed or refused the contracting authority's efforts to verify their compliance with the SA 8000 standard. Tenderers do not appear to be given the opportunity to provide alternative types of certification or evidence that they meet the terms of SA 8000. A final point worth noting is that the contracts in question are all substantial, amounting in some cases to several million euros.

As well as those making reference to the SA 8000 standard, we were able to identify two other major contracting authorities who make reference to core labour standards in their contracts. One is the electicity supply company ENEL, and the other the Rome metropolitan transport authority Trambus. Both of these organisations follow the pattern of SNCF, FMV and the Belgian Government, which is to say including labour standards as contract conditions, and making participation in the tender process conditional on a 'pre-acceptance' of these conditions. ENEL, for example, states that participants will be excluded if "they are unwilling to assume certain ethical/social obligations (for example, measures that guarantee that workers' basic rights will be respected, the principles of equal treatment and non-discrimination, measures against child labour etc.) and to accept the inspection of their production plants and operating premises with a view to verifiying that these requirements are being satisfied."

3.6.2 Subject of the Contract/Technical Specifications

Although there are around 70 local authorities in Italy reported to purchase fair trade products for school canteens on a regular basis, we were able to identify procurement contract details for only four cases. One of these represents the only Italian example of the inclusion of social considerations in technical specifications. This was in a contract that specified the supply of fair trade bananas to school canteens on one day every week.

3.6.3 Contract Award Criteria

The other three cases of calls for tender for fair trade produce involved contract award criteria rather than technical specifications. Three such cases were identified. In the first, the "willingness of the contractor to supply" fair trade produce could amount to up to six points out of a total maximum of 100. In the second, tenderers could be awarded up to two points (out of a maximum of 100) for their *use* of fair trade products. In the third, tenderers could be awarded up to 10 points (again, out of a maximum of 100) for their *supply* of fair trade products. These differences in wording are unlikely to be significant.

We were also able to identify 10 cases in which possession of the SA 8000 certification was specified as a contract award criterion. In one of these cases it was the fifth criterion of eight, listed in order of importance but otherwise unweighted. In five cases, possession of SA 8000 certification was worth five points out of a possible maximum of 100, in a sixth case four points, and in a seventh one point. In two cases SA 8000 certification was listed along with other quality certifications, the possession of one or more of which would bring a maximum of five points out of a possible total of 10

3.6.4 Contract conditions

The Italian regulation includes a 'fair wages' clause similar to that used by certain authorities in Ireland. Article 118(6) of the code states the "the contract holder is required to observe the economic and other conditions established in national and regional collective bargaining that apply in the region in which the contract is carried out; it is also responsible for the observation of these conditions by any subcontractors with respect to their employees" (author's translation).

3.7 The Netherlands

In 2005, the Dutch parliament agreed a motion requiring that by 2010, sustainability become a prerequisite for 100% of the central government's procurement and investment contracts. As in Belgium, the intention is to make SPP the default approach, with contracting authorities obliged to provide good reasons for any failure to purchase sustainably. The 2005 Parliamentary motion has been described as a watershed for Dutch policy on SPP as it changed the policy approach from one of "gentle persuasion" to one of the facilitation of an obligatory target (SenterNovem 2007). Dutch policy also follows the Belgian approach in its emphasis on positive measures to facilitate SPP rather than close regulatory specification. Indeed, there is no specific Dutch legislation on public procurement, simply a framework law that enacts the EU Directives directly into Dutch law.

The principal route by which SPP is to be made a reality is the development of sustainability criteria for each of about 120 different product groups – an approach which is, again, strikingly similar to that taken in Belgium – together with a monitoring process in which contracting authorities are given positive or negative assessments of their progress towards SPP. The development of the product criteria is the responsibilty of SenterNovem, an agency of the Dutch Ministry of Economic Affairs that deals with sustainable development. By February 2007, such criteria had been defined for 32 product groups. These criteria "are based as much as possible on existing national and international agreements (such as the

fundamental ILO conventions) and labelling systems" (SenterNovem 2007, p7). Contracting authorities are explicitly assured that the criteria are "in accordance with the basic principles of the [EU procurement] directive" (SenterNovem 2006a, p4). According to another SenterNovem document, a working group on social norms is in the process of producing general guidelines applying to all procurements that will specify minimum social requirements based on the ILO core conventions (SenterNovem 2006b, p4).

The Dutch approach to SPP includes the specification both of required minimum standards, which apply in all cases, and additional, more exacting standards whose application is encouraged as part of a strategy of thinking of SPP as a process of continuous improvement. In formulating an SPP strategy, contracting authorities can choose from three different 'ambition levels' (active, advanced and innovative) that introduce progressively higher standards. Indeed, the sustainability criteria inherently involve a "growth model: the bar can – and will – be raised gradually in the course of the process" (SenterNovem 2006a, p5).

Finally, however, we need to note that while the Dutch authorities clearly see no fundamental problem with the inclusion of social clauses in procurement contracts, it is still the case that "questions regarding the legal status of the [sustainability] criteria and liability aspects are yet to be answered" (SenterNovem 2007, p8).

3.7.1 Eligibility Criteria

In one case identified via TED, a call for tender includes under the heading "Conditions for participation" the requirement that tenderers "state their policy" on social issues, including child labour. While it is not altogether clear what would be the effect of not doing so, or of stating a policy that was not acceptable to the contracting authority, the inclusion of this requirement would make little sense were the intention not to include some reference to social capacity in the selection of tenderers.

3.7.2 Subject of the Contract/Technical Specifications

A case frequently mentioned in the policy literature as an example of best practice is that of a joint procurement involving the Dutch provinces of Utrecht and Zuid-Holland. The contract, in effect for the supply of a beverage vending system, combined both environmental and social considerations. The technical specifications stated that the coffee and tea supplied had either to be certified by both of two social (fair trade) labeling organisations, or to be demonstrably entitled to carry these labels. It was the responsibility of the putative supplier to demonstrate this to the satisfaction of the contracting authority (ICLEI 2006b).

3.7.3 Contract Award Criteria

The Utrecht/Zuid-Holland case also included social considerations in its award criteria: "sustainable procurement and labour conditions" was the fourth in a list of seven criteria listed in descending order of importance. Price was in fifth place. (Prior to the 2004 Directives, there was no requirement to quantify the weighting of each award criterion).

3.7.4 Contract Conditions

Our TED research identified four cases of calls for tender that included social clauses taking the form of contract conditions. In one case, it is specified that contractors must make no use of child labour, or of products that have been produced using child labour. In two other cases, contractors are required to declare that they will respect the ILO's core conventions. In neither of these cases is any indication given of what this means with respect to, for example, the practices of subcontractors. In a fourth case, the call for tender merely states that the ILO conventions on child labour "apply to this contract".

3.8 Sweden

Sweden is another EU member state that has been at the forefront of efforts to develop sustainable public procurement. During the review of the EU Procurement Directives that preceded the drafting of the 2004 regulations, the Swedish government was a vocal advocate for the expansion of the scope for making social and environmental demands in purchasing. Much like Belgium and the Netherlands, Sweden has set itself the objective of ensuring that social and environmental demands are systematically included in public procurement contracts wherever possible, and is committed to providing public purchasers with the "tools, training and other support that they need in order to make such demands" (Government of Sweden 2005, p68).

Unfortunately it is not possible to give any clear indication of the Swedish understanding of the legal position as the Swedish procurement regulations have yet to be updated to take account of the 2004 Directives. Updated legislation had been expected in 2006, but will apparently not now appear until mid-2007 (EKU Newsletter No.9, 2007).

In 2005 the government established an enquiry to carry out preliminary work for the drafting of the new regulations. This enquiry was charged to investigate all the possibilities for including social and environmental demands in procurement contracts, and in particular to assess whether ILO Convention 94 is compatible with the new Directives (Government of Sweden 2005, p68). Although further research would be required to confirm this, it may be that the delay in updating the Swedish regulations has been due precisely to difficulties of legal interpretation.

3.8.1 Contract Conditions

The two examples of Swedish tender documentation we have been able to obtain that make reference to social considerations both do so via contract conditions. The Swedish Defence Material Administration (FMV) has a policy on respect for ILO conventions which is unusual both in its clarity and severity. The relevant clauses of the standard contract are reproduced in Box 2.

While FMV does not insert this clause into all of its procurement contracts – the evidence from TED in fact suggests that it is limited to low-tech products that are likely to be manufactured overseas – its procurement practice is nonetheless highly significant as the value of the tenders in question is generally relatively high, and in all cases well over the threshold for the applicability of the EU regulations.

The other Swedish example is a tender for medical equipment put out by a regional government. It carries a clause stating that "vendors guarantee that child labour, as defined by international standards, does not occur at any stage of the supply chain". Breach of this condition would lead to the cancellation of the contract.

Finally, although the document in question is not technically a part of the organisation's tender documentation, it is worth noting that the Swedish International Development Agency's Procurement Guidelines include the following statement: "Sida requires Co-operation Partners and tenderers to respect and safeguard human rights as defined in the Conventions of International Labour Standards of ILO" (SIDA 2004, paragraph 2.9). However, exactly how this is supposed to work in practice remains unspecified.

Box 2: Extract from Swedish Defence Material Administration Contract

18.2.1 Fundamental Rights of Employees
The Contractor shall in performing work for delivery under this agreement comply with its national legislation concerning its employees' work and employment conditions. Such work and employment conditions shall, as a minimum, be compatible with the International Labour Organization's (ILO) conventions in the below stated respects.

[The ILO's 8 Core Conventions are cited here]

If the Contractor uses subcontractors for performance of work for delivery under this agreement, the Contractor shall be responsible to FMV for such subcontractors complying with the above conditions in accordance with their national legislation and the mentioned ILO Conventions.

18.2.1.1 Inspection and Monitoring
In order to monitor compliance with the conditions stipulated in this clause, the Contractor shall

1) as soon as possible upon FMV's request supply FMV with information concerning work and employment conditions of employees that perform work for delivery under this agreement,

2) permit inspection without any reservations, by FMV or an independent third party appointed by FMV, at the workplace where work is being performed for delivery under this agreement,

3) ensure that relevant information concerning work and employment conditions of employees that perform work for delivery under this agreement is available at the workplace for inspection by FMV or an independent third party appointed by FMV, and

4) not punish, dismiss or otherwise discriminate against employees who perform work for delivery under this agreement and who disclose information about compliance with the stipulations of clause “Fundamental Rights of Employees”.

Cancellation for Default
[...]
Concerning Fundamental Rights of Employees the following shall always be considered as a substantial breach of contract:

1) clear cases of breach of the conditions laid down in the ILO conventions, as referred to in clause 18.2.1,

2) breach of the contract terms laid down in clause 18.2.1 and 18.2.1.1, and where the Contractor does not, immediately and within ten days, at the latest, upon FMV delivering a written request for correction, take measures provable to FMV so as to make such corrections, and

3) breach of the contract terms laid down in clause 18.2.1 and 18.2.1.1, and where The Contractor will not, within 30 days upon FMV delivering a written request pursuant to 2) above, have made the corrections in a way provable to FMV.

Source: http://www.fmv.se

4 Commentary on Compliance with EU Regulation, ILO Core Labour Standards and the ETI Base Code

4.1 Introduction

The country data set out in the previous section suggest that there is a great degree of variation between EU countries with respect to the inclusion of social clauses in public procurement contracts. First of all, there appear to be significant differences between member states in the *extent* to which social clauses are used. Second, social clauses take a wide variety of legal *forms*, even within individual states. Third, there is also a wide range of different government *policies* and approaches to *policy implementation* in the area of sustainable public procurement.

It needs to be restated here that the legality of the use of public procurement to achieve social objectives is a fluid and very grey area, in which the role of case law is particularly significant. In this context, it is pertinent to point out that there were no lawyers on the study team. However, the practices identified in the country reports appear to be proceeding without legal challenge. That is not to say that no legal challenge would arise if such practices became more widespread or were applied to more tenders or to tenders of a larger scale.

If a substantive legal challenge were to arise – and by this we mean a challenge alleging a breach of the law that was more than merely procedural – it appears likely that it would be on the basis that a social clause in a procurement contract violated the underlying principles of equal treatment and transparency. McCrudden's view (2004, p6) is that there are five basic possibilities in this respect:

- First, SPP (sustainable public procurement) could increase the complexity of purchasing decisions, thereby reducing transparency and distorting free competition.
- Second, insofar as it has an impact on the technical specification of contracts, SPP might lead to the differential treatment of local and foreign suppliers.
- Third, production-related requirements in technical specifications can also have a discriminatory effect.
- Fourth, SPP can give rise to problems of compliance and verification that have a discriminatory effect.
- Finally, where procurement rules require that tenderers provide some kind of sustainable development credentials or certification as a condition for participating in government procurement bids, this might be also be considered to amount to differential treatment of like products if it could be shown that there was a variation in the capacity of domestic and foreign producers to acquire such a certification.

Bearing these possibilities in mind, in the remainder of this section we will consider the issues that arise with respect to national policy and practice in each of the four possible contractual locations, before moving on to consider some more general questions that arise. Before doing that, however, we need briefly to comment on our research findings with respect to the ETI.

4.2 The Ethical Trading Initiative

We were unable to find any direct reference to the ETI or its Base Code in any of the contract documents or policy materials considered in the study. The most obvious explanation for this is the UK focus of the ETI. While it has three global union federations as members, its corporate and NGO members are otherwise overwhelmingly UK-based. Hence, the lack of reference to the ETI Base Code in the member states studied seems likely to be due to a lack of awareness on the part of the public authorities. There is certainly no difficulty in principle with the Code. As we suggested above (section 2.4), the ETI Base Code represents a middle point between the basic, procedurally-oriented ILO core conventions and the more substantive fair trade criteria. Any product or organisation that qualified for a fair trade certification would therefore almost certainly have little difficulty in meeting the requirements of the ETI Base Code. On the other hand, while compliance with the ILO core conventions is a necessary condition for meeting the terms of the Base Code, it is some way from being sufficient in itself.

4.3 Eligibility Criteria

Putting aside the possibility of excluding candidates for clear recorded breaches of relevant national legislation, three strategies appear to be possible with respect to eligibility criteria. In all cases, of course, the reasoning and requirements of the contracting authority must be non-discriminatory in both intention and effect.

4.3.1 Grave Misconduct

Candidates can be excluded under the terms of the grave professional misconduct clause. In this case, their exclusion is on the grounds of their past behaviour, for example their record of environmental or social performance. The lawfulness of such an exclusion will depend on the reasonableness of the definition of grave misconduct. It is for the contracting authority to demonstrate that the candidate is guilty of grave misconduct.

The text of the public services Directive does not give any definition of grave misconduct, but states that it can be "proven by any means which the contracting authorities can demonstrate" (article 45.2(d)). In practice the existence of a criminal conviction would seem to be the only sure means for an authority to demonstrate 'gravity', but serious violations of one or more of the ILO core conventions might also qualify. The most conservative legal opinion suggests that only when ILO conventions have been incorporated into national law and candidates have been convicted of breaching this law is exclusion permitted. However, as Recital 33 of the public services Directive suggests that contract conditions may be used to enforce compliance with the core conventions where these have not been enacted into national law, it seems unlikely that a conviction for breach of a national law would be the minimum condition to prove grave misconduct.

There remains the issue of the burden of proof. Once again, conservative and liberal opinion exists. At the conservative end of the spectrum, the view would be that it is for the contracting authority to prove misconduct. At the liberal end, it would be held that candidates can be required either to declare or to produce independent certification that they and their suppliers conform with the core conventions.

4.3.2 Acceptance of Contract Conditions

It is frequently the case that candidates are asked to provide some kinds of declaration that they will abide by certain contract conditions. In the Belgian case, for example, this declaration is compulsory. Candidates can be excluded from a tendering process for their refusal to make such a declaration, that is, refusing to accept certain contract conditions.

It is important to bear in mind here that a contracting authority's belief that a candidate does not intend or will be unable to comply with a contract condition, regardless of how well-founded that belief might be, cannot be used as a reason to exclude them from participation. As Arrowsmith puts the point, “the procuring entity must allow the supplier to conclude the contract and then take action only of the supplier does not actually comply” (2006, p353).

4.3.3 Technical Capacity

Candidates can lawfully be excluded from a bidding process where they lack the technical capacity to fulfill the contract. In this case, capacity to fulfill the contract clearly depends directly on the technical specifications of the contract. Specifications of technical capacity must therefore be related to the subject of the contract if it is to be lawful to exclude candidates for failing to meet them. It is for the candidate to demonstrate that they possess the required technical capacity.[6]

The Italian cases cited in Section 3.8 are the most striking examples of this type of social clause, and it is significant that in none of the six cases is there any obvious *direct* link between the required SA 8000 certification and the subject of the contract. The contracts in question were simply for construction, cleaning services, car park management, or the supply of vehicle parts. There were no additional social criteria mentioned in the tender documentation that bore any relation to the SA 8000 certification criteria.

It may be the case, then, that the relationship between social clauses and the subject of a contract can in certain cases be indirect, for example if social considerations relate to the capacity of a contracting company to perform the contract on time and to required quality standards, or if they enable the contracting authority to deliver or improve its service to the public. This more liberal interpretation is supported, among others, by Anthony Collins Solicitors, one of the leading UK legal practices working in the area of procurement. They suggest that the precedents set in the ECJ case law mean that “it is for the purchaser to decide what is or is not relevant to the subject of the contract... based on the powers and policies of their organisation” (Anthony Collins Solicitors, 2006, p74)."

On this basis, if one of the Italian cases were to be challenged on the grounds that there was no link between the SA 8000 standard and the subject of the contract, the contracting authority would have two possible arguments. It could argue that possession of the SA 8000 certification is evidence of a high standard of general organisational capability and hence is relevant to the successful delivery of the contract. Alternatively, it could argue that insisting that contractors possess the SA 8000 standard enables it to pursue its duty to the public as it understands it. In this case, the contracting authority would be expected to have a clear policy of support for the SA 8000 standard as a means of improving labour standards in the community it serves.

4.4 Subject of the Contract/Technical Specifications

4.4.1 Products or Production Processes?

The principal difficulty inherent in the inclusion of social criteria in the subject or technical specifications of a contract is the possibility that this will have a discriminatory effect. One frequently cited argument is that since fair trade coffee and conventional coffee are indistinguishable as products, the specification of fair trade coffee in a supplies contract

[6] Most if not all of the arguments that apply in this area are also applicable in the area of contract award criteria. The difference is simply that in the latter case, the decision relates to whether the candidate meets a minimum standard of technical ability, and in the former, to the degree to which the tenderer's technical capacity affects the overall quality of the bid. In both cases, the definition of technical capacity is the same, and it is similarly dependent on the technical specifications of the contract.

violates the principle of equal treatment. Fair trade suppliers and conventional suppliers are treated differently for reasons – the living and working conditions of the coffee producers – that are not linked to the essential subject matter of the contract, i.e. the supply of coffee.

There are two potential solutions to this problem. The first is to argue that the method of production does in fact make a difference to the product. This is an argument proposed by a wide range of NGOs and labour organisations (see Eurocities et al 2004). Those who make this argument frequently make reference to the judgement in the EVN case (EVN C-448/01 [2003]). In this case, the ECJ acknowledged the legality of an environmental criterion relating to the production method used in the delivery of a service. The local government network ICLEI – Local Governments for Sustainability cites a European Commission handbook on green procurement that states that environmental requirements related to production processes rather than products are justified "when the nature and value of the end product has been modified by the process and production method used" (ICLEI 2006a, p5).

The second, rather simpler solution – recommended by McCrudden among others (McCrudden 2004, p32) – is to ensure that the subject of the contract also includes the pursuit of the social objectives that are achieved by the preferred production process. Where this is the case, and as long as it is within the powers and policy of the contracting authority to pursue those objectives, then the production process clearly falls into the category of facts that the authority is permitted to take into account in deciding whether to treat two suppliers in a materially different way, for example by excluding one from the bidding process and not the other. This approach also has the virtue of possessing a high level of transparency. Moreover, the established language of the ILO core conventions, and the specific reference to them in Recital 33 of the EU Directive, provides an unambiguous basis of definition and vocabulary.

In the tender documents we have examined, however, 'fair trade' is the only social criterion that appears to be used in the technical specifications of contracts. In all of the countries studied except Belgium, at least one example was identified where the supply of fair trade products were all or part of the subject of the contract. As we have already pointed out, however, in none of these cases was the value of the fair trade element of the contract above the threshold at which the EU regulations come into force. Nevertheless, given that compliance with the ILO core conventions is a minimum requirement for the award of the major fair trade labels, if it is acceptable to specify fair trade products in the subject matter or technical specifications of a contract then it would presumably also be acceptable to specify that products supplied must be produced under consitions in which the core conventions are respected.

4.4.2 Compliance with Social Requirements

Beyond the possibility that the inclusion of social criteria in the subject of a contract and in technical specifications might lead to unwarranted differences in the treatment of different suppliers of the same product, however, there is also a risk that suppliers may differ in their *capacity* to conform with the substance of certain social requirements because of the varying state of economic or juridical development across different states. For example, it might be easier for suppliers in countries whose national law is fully compatible with the ILO core conventions to comply with an ILO core convention requirement than it would for suppliers in countries in which some or all of the conventions have not been ratified.

Whether or not this is a significant risk with respect to labour standards is difficult to judge. However, we can at least cite the opinion of Arrowsmith and Maund (2006), who argue:

> The ECJ is perhaps most likely to accept requirements embodied in international instruments such as the ILO Conventions, and may possibly do so regardless of their trade impact – and thus even when they refer to supply contracts. At the very least, it may accept them when a Convention has been ratified by the country in which the work is done, even though the standards have not been implemented into national law; and conditions relating to 'core' ILO standards might even be accepted without ratification... The existence of such standards may serve both to indicate a significant 'independent' justification for the content of the... requirement, and to reduce the risk that it has been selected with a discriminatory intent, to favour national suppliers (p12).

This interpretation is reinforced by the 1998 ILO Declaration on Fundamental Principles and Rights at Work, about which the ILO states:

> In 1998 the ILO created a special promotional measure to strengthen the application of the four principles and associated rights that are considered fundamental for social justice. By adopting the Declaration on Fundamental Principles and Rights at Work and its Follow-up, ILO member states recognize that they have an obligation to work towards realizing certain basic values that are *inherent in ILO membership*, namely freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. *This obligation exists even if they have not yet been able to ratify the eight fundamental conventions which embody these principles*. At the same time the ILO itself has an obligation to provide assistance needed to achieve these objectives (ILO 2005; emphasis added).

4.4.3 Social Labels

Another possible source of discriminatory effects is the use of social labels such as the various fair trade labels, the Belgian Social Label or the SA 8000 certification. It has been argued that requiring a particular label can have a discriminatory effect in cases where the possibility of access to the label in question varies across producer countries. A straightforward solution to this difficulty is to ensure that the technical specifications of a contract do not include a requirement that the product or producer possesses a particular label or certification, but instead set out the conditions required to obtain that certification, or include the words 'or equivalent alternative.' Candidates would thus be permitted to provide any kind of evidence of conformity with those conditions – including, but not restricted to, the possession of the label or certification in question.

The case of the Belgian Social Label (BSL) and sustainable procurement catalogue is the best example of systematic practice in this regard. The baseline social element of the sustainable procurement criteria listed in the catalogue is the BSL, but where this is not available, contractors can fulfill the terms of the contract by signing the self-declaration of conformity with the ILO core conventions (see box 1).

Only in one of the fair trade cases examined, the Dutch beverage vending system contract, was there a clear reference to fair trade certification standards. This was also the only fair trade case in which it stated that tenderers were not required to possess a formal certification and could instead present any reasonable evidence that their product conformed to the required standard.

4.5 Contract Award Criteria

As we suggested above, the arguments that have a bearing on the legality of including social considerations in contract award criteria are more or less identical to those that could be made about including them in eligibility criteria relating to technical capacity.

In the tender documents we examined, the use or supply of fair trade products was a contract award criterion in five cases, and the 'development of fair trade' in two. Sustainable procurement and labour conditions figured once, the absence of child labour once, and the possession of the SA 8000 standard ten times. Of these cases, it is only in two that we found a direct connection between the technical specifications and the award criterion. There is also little evidence that contracting authorities have taken steps to define criteria such as 'fair trade' in great detail or, as in the SA 8000 cases, to provide candidates with alternative means of demonstrating their conformity with the certification standards.

4.6 Contract Conditions

Most of the countries in this study that appear to have set out systematically to include core labour standards in public procurement have chosen to do so mainly through including them in contract conditions, as the Belgian and Swedish cases in Section 3 show particularly clearly, and the French and Dutch cases to a lesser extent. The adoption of this strategy may be explained by the fact that there is no requirement that contract conditions be related to the subject of the contract and the possibility of requiring compliance with ILO core conventions is explicitly mentioned in Recital 33 of the public services directive. The requirement that contract conditions be non-discriminatory in effect still stands, but the absence of any need to demonstrate relevance to the contract would appear to remove a significant area of legal doubt. The risk that remains relates to the possibility that suppliers in certain countries will find it easier to comply with the conditions than those in others.

4.7 The Problem of the Supply Chain

A more general question that we have not yet considered concerns outward-directed procurement goals, that is, those intended to produce effects beyond the jurisdiction of the contracting authority. Given the global geography of manufacturing industry, SPP goals that apply over the whole length of the supply chain are very likely to be outward-directed. Where this is the case, there is some question about whether a contracting authority is entitled to pursue social objectives at all. As Anthony Collins Solicitors put it:

> The inclusion of some social or environmental considerations is felt by some to be difficult to justify within the legal and policy framework. For example, fair trade produce might be desirable to the public, but it is difficult to show a specific value to the community served by a local authority in terms of the promotion of well-being. Moreover, the very point of fair trade produce is arguably to enhance the well-being of an entirely different community (2006, p76).

The ECJ case law that exists on social clauses is exclusively concerned with 'inward-directed' procurement goals, that is, social goals that have an effect *within* the jurisdiction of the contracting authority. Typical examples would include measures to ensure that a certain number of long-term job-seekers are employed by a contractor, or that contractors provide particular kinds of on-the-job training. Recital 46 of the public services Directive states clearly that these kind of social clauses are permissible, but it also says that they can be used "in particular" in response to the needs of disadvantaged groups *within the community that directly benefits from the procurement* (emphasis added).

The latter point would appear to have particular relevance if the remit of the contracting authority is explicitly the pursuit of benefits to disadvantaged groups in countries external to the contracting authority country itself, which is obviously the case in relation to DFID. Moreover, the case law on the inclusion of environmental considerations in award criteria holds open the possibility of including considerations related to the standard of life and working conditions of groups outside the contracting authority's jurisdiction. As we saw above, in the EVN case, “the particular criterion used… requiring that the electricity supplied under the contract be produced from renewable energy sources, was acceptable as a matter of broad principle” (Anthony Collins Solicitors 2006, p105). The benefits of the green production method preferred by the contracting authority in the EVN case would certainly not have been felt principally within that authority's jurisdiction, but the community within that jurisdiction could be said to benefit in a general sense from the protection of the environment, regardless of where concrete steps to further this end are taken. By extension, one could argue that respecting the ILO's core conventions all along the supply chain has a universal benefit comparable to the benefit arising from the protection of the environment. In addition, if policies such as those expressed in the ETI base code are adopted and applied in the context of the universal sustainability benefits arising from equitable trading, it can be argued that communities within as well as outside the contracting authority are the beneficiaries.This benefit is enjoyed by the community represented by the contracting authority as much as by the individuals and communities directly involved in production.

However, as with so many of the questions that have arisen in our discussion, in the absence of some directly relevant case law, these arguments must remain highly speculative.

4.8 Verifiability and Proportionality

Finally in this section, we need briefly to comment on two potentially important legal issues that we have not yet encounteredencountered. First is the question of verification. In the EVN case, which we mentioned above, the ECJ ruled that while an award criterion relating to the production process of electicity was in principle acceptable, this criterion had also to be such as to permit the verification of the information provided the tenderer. By extension, any social criteria that are included in contracts at whatever point must be susceptible to verification.

Anthony Collins Solicitors (2006) have taken the view that not only do such requirements have to be verifiable, they have to be practicable, and the costs of implementation and verification must not be disproportionate, “as this can act as a deterrent for potential tenderers, including SMEs in particular. Where prospective tenderers are expected to (bear such) costs of social requirements as an overhead, a small firm may be at a disadvantage due to a reduced capacity to absorb costs” (p73). They also point out that the practicability and proportionateness of monitoring and verifying conformity of social requirements can be a particular problem in the case of contracts for the supply of manufactured goods.

Arrowsmith (2006) also discusses the principle of proportionality with respect to equal treatment of candidates, citing an ECJ judgement which ruled that a Belgian regulation that automatically excluded from tendering any person who had been involved in preparatory work on the contract was too strict. By contrast, the Court stated that It would have been acceptable to exclude only those who were unable to prove that their bid did not pose a risk to competition (pp355-6). Arrowsmith suggests that in future the principle of proportionality may become more important and may be applied in new circumstances.

Appendix 1: Research Methodology

The methodology for the data-gathering aspect of the report evolved as the work progressed and the limitations of the information sources that were initially targeted emerged. For the reasons set out below, it became apparent that the original project specification's more or less exclusive emphasis on the analysis of published tender documentation was inadequate and that our approach would have to be modified.

The TED database supports searching based on a wide variety of criteria. As well as straightforward matters such as the member states in which contracting authorities are located, the type of contracting authority (central government, local government, utilities etc.), and the type of contract (supplies, works or services), the system permits more complex interrogations combining category and free text searching using boolean operators (AND, OR and NOT).

In order to identify relevant tender documents held on the TED database, we adopted a strategy of free text searching using a range of ten words and phrases designed to find documents incorporating social clauses with some reference to labour standards. The search terms used were as follows:

- International Labour Organisation/ILO
- labour standards
- employment standards
- child labour
- forced labour
- anti-discrimination/non-discrimination
- freedom of association
- SA 8000
- fair trade
- ethical trade/trading
- corporate social responsibility

The first seven of these search terms were derived directly from the ILO core conventions. SA 8000 is the social accountability quality standard that makes reference to ILO core labour standards. In respect of “fair trade”, while it is not concerned exclusively with labour standards, the conditions of the workers involved in production are a crucial element of the ‘label’ (see above section 2.4). ‘Ethical trade/trading’ was included both because of its general meaning, and to ensure that any direct reference to the Ethical Trading Initiative could be identified. Finally, high standards of corporate social responsibility might be expected to include concern for labour standards.

(At this point, it is important to mention that the overwhelming majority of detailed tender documents are not available in any language other than that of the contracting authority. The amount of information about tenders available in non-national languages from national-level information sources is also extremely limited. We were able to enlist the assistance of Public World associates whose native languages are Swedish and German, and to commission the translation of a small amount of Dutch language materials. We have also made some limited use of translation software. This permits some basic interpretation of documentation, but is obviously too limited to form the basis of a reliable analysis on its own.)

Each of the search terms was translated into French, German, Swedish and Dutch using the EU's Interactive Terminology for Europe database, and the searches repeated for each language. Each entry on the TED database thus retrieved was examined for relevance in order to exclude, for example, contracts for conducting research, training or conferences on

particular labour standards. Repeated examples of the same social clause placed by the same contracting authority were also removed. (The overwhelming majority of the cases removed were from a single contracting authority, the French national railway company, the SNCF, which placed 436 of the tender documents retrieved, all of them including the same clause making reference to the ILO's core conventions.) Using this method, an apparently promising initial total of over 600 records was reduced to 38 distinct cases, of which 30 were from contracting authorities in France, five in the Netherlands, two in Germany, one in Sweden and none at all in Ireland. Neither did the search identify any European Commission procurement contracts that included social clauses.

The team's existing knowledge, supplemented by the results of background research, strongly suggested that this distribution of contracts was not representative of the current pattern of concern for labour issues in European public purchasing. Further research suggested two reasons for this divergence. The first was that the full tender documentation is not always available on the TED database. In many cases, reference is made either to full tender documentation available directly from the contracting authority or via a national tenders website, or to standard terms and conditions that apply to all contracts established by a particular authority. A significant number of cases were uncovered in which reference was made to labour standards only in documentation that was not available on TED.

The second reason is that the number and value of tenders whose details are published via TED varies considerably from member state to member state, as we saw above in our discussion of the German case.

In view of the impossibility within the budget and timetable for the study of examining all the documentation associated with all the public procurement tenders in the countries to be examined, we adopted three supplementary research strategies in an attempt to reduce the distortions introduced by data availability and to enable reasonable comparisons to be made. The first was to ensure that we obtained the full documentation relating to current or recent tenders for at least one of a range of contracting authorities (central government, local government, defence force, utility company, education establishment and healthcare establishment) for each member state under examination. The second was to consider the cases of Belgium and Italy, both of which had emerged from our background research as interesting cases for investigation. In the Belgian case, it was national policy on public procurement that attracted attention, while in the case of Italy, searching on TED identified 27 calls for tender that included social clauses of one kind or another. The third, and most significant, supplementary strategy involved a comparative analysis of national public procurement regulation schemes and policy guidance, because it was apparent that the variations in national approach reflected in part the degree of political and policy support for using public procurement to promote labour standards and other social goals.

References

Anthony Collins Solicitors (2006) *The Scope for Using Social Clauses in UK Public Procurement to Benefit the UK Manufacturing Sector: A Report for the Manufacturing Forum*, London: Government of the UK. [Accessed March 2007 at http://www.dti.gov.uk/files/file34323.pdf]

Arrowsmith, S. (2006) "The Past and Future Evolution of EC Procurement Law: from Framework to Common Code?" *Public Contracts Law Journal* 35, 337-384.

Arrowsmith, S. And Maund, C. (2006) "CSR in the utilities sector and the implications of EC procurement policy: a framework for debate". [Accessed March 2007 at http://www.nottingham.ac.uk/shared/shared_procurement/publications/CSR_Arrowsmith_and_Maund_version_Nov_20_for_web_site.doc]

Bovis, C. (2006) "The New Public Procurement Regime: A Different Perspective on the Integration of Public Markets of the European Union", *European Public Law* 12(1).

CARPE (2007) *Case Studies > Ethical Procurement*, Brussels. [Accessed March 2007 at http://www.carpe-net.org/site/article.php?id_article=43]

Dusch Silva, S. (2006) "Die Öffentliche Hand", *Presente* November 2006. [Accessed May 2007 at http://www.ci-romero.de/fileadmin/download/presente_artikel/2006_4/2006_4_presente_beschaffung.pdf]

Economic and Social Council (2006) *Enjeux Sociaux et Concurrence Internationale: Du Dumping Sociale au Mieux-Disant Social*, Avis et Rapports du Conseil Economique et Social No. 20 2006. [Accessed March 2007 at http://www.ces.fr/rapport/doclon/06110320.pdf]

EKU (2007) *EKU Newsletter* No. 9. [Accessed March 2007 at http://www.eku.nu/doc/news/EKU_newsletter9e.pdf]

Ethical Trading Initiative (undated) *Purpose, Principles, Programme And Membership Information*, London. [Accessed March 2007 at http://www.ethicaltrade.org/Z/lib/ppp/ppp_en.shtml]

Eurocities, CECOP, EDF, EEB, EPSU, ETUC, GMB & Social Platform (2004) *Making the Most of Public Money: A Practical Guide to Implementing and Contracting Under the Revised EU Public Procurement Directives*, Brussels: EPSU. [Accessed March 2007 at http://www.epsu.org/IMG/pdf/Practical_Guide_Public_Procurement_FINAL_NOVEMBER_2004.pdf]

European Union (2006) *Renewed EU Sustainable Development Strategy* (10117/06), Brussels. [Accessed March 2007 at http://register.consilium.europa.eu/pdf/en/06/st10/st10117.en06.pdf]

France, Government of (2007) *Plan national d'action pour les achats publics durables*, Paris. [Accessed April 2007 at http://www.ecologie.gouv.fr/pnaapd.html]

Government Contracts Committee (2004) *Environmental Considerations in Public Procurement*, Dublin: Government of Ireland. [Accessed march 2007 via http://www.etenders.gov.ie/guides/guides_list.aspx?Type=2]

ICLEI (2006a) *Buy Fair – A Guide to the Public Purchasing of Fair Trade Products*, Freiburg. [Accessed March 2007 at http://www.buyfair.org/fileadmin/template/projects/buyfair/files/buyfair_guide_final_www.pdf]

— (2006b) *Case study: Joint European procurement of hot beverages*, Freiburg. [Accessed March 2007 at http://www.buyfair.org/fileadmin/template/projects/buyfair/files/B.3_BuyFair_Netherlands.pdf.pdf]

International Labour Office (2005) *Rules of the Game: A Brief Introduction to Labour Standards*, Geneva. [Accessed march 2007 at

http://www.ilo.org/public/english/standards/norm/download/resources/rulesofthegame.pdf]
McCrudden, C. (2004) “Using Public Procurement to Achieve Social Outcomes”, *Natural Resources Forum* 28, 257-267.
— (2007) *Legal Aspects of Sustainable Public Procurement*, unpublished paper prepared for a meeting of the Marrakesh Process Taskforce on Sustainable Public Procurement, Turin, May 2007.
Maibaum, T. (2006) “Rechtliche Rahmenbedingungen für nachhaltige Beschaffung in Kommunen – taugt unser Vergaberecht zur Bekämpfung von Sklaverei und Kinderarbeit?” in Fonari A., Führ V. et al. (2006) *Kommunen und Eine Welt: Nachhaltigkeit in der öffentlichen Beschaffung*, Augsburg: Eine Welt Netzwerk Bayern. [Accessed May 2007 at http://www.eineweltnetzbayern.de/globalisierung/oeffentlichehand/061016/gesamtdokumentation_fachtagung_061016.pdf]
Office of Government Commerce (2006) *Social Issues in Purchasing*, London: Government of the United Kingdom. [Accessed March 2007 at http://www.ogc.gov.uk/documents/Social_Issues_in_Purchasing.pdf]
OECD (2004) *Enhancing Market Openness through Regulatory Reform: Regulatory Reform in Germany*, Paris. [Accessed March 2007 at http://www.oecd.org/dataoecd/46/22/32407585.pdf]
SenterNovem (2007) *Dutch National Action Plan for Sustainable Public Procurement*, The Hague. [Accessed March 2007 at http://www.senternovem.nl/mmfiles/NAPengels_tcm24-217304.doc]
— (2006a) *Protocol for Developing and Maintaining Sustainable Procurement: Criteria for Dutch Public Authorities*, The Hague. [Accessed May 2007 at http://www.senternovem.nl/mmfiles/PROTOCOL%20Criteriaontwikkeling%202006-12-07_tcm24-209588.pdf]
— (2006b) *Criteria for Sustainable Catering*, The Hague. [Accessed May 2007 at http://www.senternovem.nl/mmfiles/Criteria%20Duurzame%20Catering%20december%202006_tcm24-203850.pdf]
Sustainable Procurement Task Force (2006) *Procuring the Future*, London: Government of the UK. [Accessed March 2007 at http://www.sustainable-development.gov.uk/publications/procurement-action-plan/documents/full-document.pdf]
Sweden, Government of (2005) *Strategic Challenges: A Further Elaboration of the Swedish Strategy for Sustainable Development*, Government Communication 2005/06:126, Stockholm. [Accessed March 2007 at http://www.sweden.gov.se/content/1/c6/07/01/83/1a9ae133.pdf].
Swedish International Development Cooperation Agency (2004) *SIDA Procurement Guidelines*, Stockholm. [Accessed March 2007 at http://www.sida.se/shared/jsp/download.jsp?f=SIDA2450en_SPG+2004+web.pdf&a=943]

List of Legislation

Belgium

Circulaire P&O/DD/1 : Mise en oeuvre de la politique de développement durable lors des marchés publics de fournitures lancés par des pouvoirs adjudicateurs de l’autorité fédérale qui appartiennent aux secteurs classiques. Moniteur Belge 04/02/2005 p3689.

European Union

Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.
[http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_134/l_13420040430en00010113.pdf]

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.
[http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_134/l_13420040430en01140240.pdf]

France
Décret n° 2006-975 du 1er août 2006 portant code des marchés publics
[http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=ECOM0620003D]

Ireland
S.I. No. 329 of 2006 European Communities (Award of Public Authorities' Contracts) Regulations 2006
[http://www.fpp.ie/pdf/SI%20329%20of%202006%20-%20PS%20Regulations.pdf]

Italy
Decreto Legislativo 12 aprile 2006, n. 163 "Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE"
[http://www.camera.it/parlam/leggi/deleghe/testi/06163dl.htm]

Website Addresses

Belgian Sustainable Procurement Guide: http://www.guidedesachatsdurables.be

Ethical Trading Initiative (ETI): http://www.ethicaltrade.org/

Fairtrade Labelling Organizations International (FLO): http://www.fairtrade.net

Interactive Terminology for Europe Database: http://iate.europa.eu

International Fair Trade Association (IFAT): http://www.ifat.org

International Labour Organization (ILO): http://www.ilo.org