

Public procurement of wood and wood-based products

Report to the Standing Forestry Committee

by the Standing Forestry Committee Ad Hoc Working Group IV on Public Procurement of Wood and Wood-based Products

November 2010

Standing Forestry Committee Ad Hoc Working Group IV
on Public Procurement of Wood and Wood-based Products

**Final Report
November 2010**

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Executive summary

The Standing Forestry Working Group on public procurement of wood and wood-based products has been launched in March 2009 with the aim to exchange experience between the Member States, Commission services and stakeholders to achieve better compatibility between different approaches applied in the Member States, and also support the EU FLEGT Action Plan¹. As the EU does not have a uniform policy for public procurement of wood and wood based products and existing Member States approaches still vary, the need for better harmonisation is increasing as more and more countries implement their own mechanisms.

Work was also intended to develop a better understanding of technical aspects of public procurement schemes for wood and wood-based products in the EU Member States and to provide input for the preparation of more detailed guidance for the application of the principles of green public procurement to wood and wood-based products.

The efforts of the working group contribute to the implementation of Key Action 17 of the group representatives, Commission services' staff as well as invited external experts. Thus, this document reflects the opinion of its members, based on their policies, experience and the study of legal analysis.

Eight EU Member States (Austria, Belgium, Denmark, Finland, France, Germany, the Netherlands, UK) presently have operational central government public sector procurement policies for wood and wood-based products (WWBP) in place, some of which are under revision and which show similarities but also differences in their development and criteria used. Luxembourg, Italy, Portugal, Spain and Sweden are considering or developing such policies, partly to be addressed in broader green procurement policies.

Driving forces for a public procurement policy on wood are grounded in a public consensus for necessary governmental action to combat deforestation and forest degradation, notably in tropical countries e.g. by reducing illegal and unsustainable production of wood and related trade, while contributing to sustainable forest management by using market rules. Also these policies are tools to allow meeting the goals of international commitments and agreements, like the Convention on Biological Diversity (CBD) and the UN Declaration on the Rights of Indigenous People, and in fighting illegal logging directly.

Public procurement policies on legal and sustainable wood are dynamic. Strong debate is taking place to explore the possibilities to make sustainable procurement as effective as possible by including social, environmental and economic criteria and improving efficiency.

Given that about 85 % of wood and wood-based products consumed in the EU originate domestically, to promote the better functioning and transparency of the Internal Market for wood, as well as to facilitate and render transparent the participation of imported wood and wood-based products in that market, the closer approximation and comparability of such MS schemes is seen as desirable and necessary.

In the continued absence of EU-level material-specific sustainability criteria for wood, some EU MS, especially significant importers of wood and wood-based products, have developed public procurement schemes for wood, and in some cases for wood-based products, which seek to favour that wood which has its origin in sustainable forest management and/or legal harvesting and trade. In almost all cases, certain social criteria are also included. These focus

¹ Forest Law Enforcement Governance & Trade, see document COM 2003/251 of 21/05/2003.

mainly on the origin and production of the wood rather than being concerned with its overall life-cycle performance.

The harmonisation of criteria and requirements has made progress (mainly in Denmark, the Netherlands and the UK) and there is a common view that public procurement should be ambitious and therefore aim where appropriate for sustainability. It is widely understood and has been repeatedly affirmed by the EU that sustainable development entails social and environmental as well as economic considerations. Accordingly, public procurement in pursuit of sustainable development goals should address social and environmental as well as economic considerations. These three components of sustainability - social, environmental and economic - have to be understood as inherently integrated and all three components incorporated into public procurement policies.

However, problems stem from a lack of clarity regarding the requirements of EU law governing public procurement that could not be resolved to the full extent necessary, still causing uncertainty regarding which criteria are permissible, particularly with regard to criteria relating to the social aspects of sustainable forest management and the maintenance and enhancement of biodiversity. This issue needs to be addressed further on by an open debate with the European Commission. The Working Group is of the opinion that “sustainably produced timber” can qualify as subject matter and that criteria of all three pillars of sustainable production, including criteria regarding use and tenure rights of the forest, are appropriate in the technical specifications and/or the award stage of wood and wood products. Such criteria are widely accepted as indissolubly part of the sustainability concept of forest management, the production process of wood.

Nevertheless, not each and every criterion of a wood procurement policy may comply with the principles of non-discrimination, transparency and objectivity or will be considered as an indispensable requirement for sustainable forest management. For these cases a fuller explanation of how these principles are to be applied in the context of wood procurement criteria, consistent with the manner in which these principles have been generally applied by the European Court of Justice in the public procurement context.

Implementing public procurement remains challenging. There is a need for increased promotion, uptake and reporting across all levels of the public sector. At the same time, it has to be ensured that timber procurement policy does not become a barrier to the use of sustainably produced wood or the sustainable management of woodlands, but as long as unsustainable practices exist, consumers want to have guarantees of sustainable wood. It is important to retain the primacy of international forestry processes and commitments in relation to sustainable forestry, such as the Forest Europe (MCPFE) criteria and indicators, which form the basis for the definition of sustainable forestry in many MS, as well as for certification schemes.

Solutions in sustainable procurement have to be found that are proportionate to risk. Risk-based approaches are considered as a very pragmatic and sensible way forward. It is also important to retain market access, especially for wood from non-certified small woodlands in the EU, which is a particular issue in many MS.

Whilst FLEGT works at a different level from that of certification schemes which relate to the forest management level, its content is in support of the same objectives, the sustainable management of forests. In the view of the Working Group, FLEGT licences are stand-alone schemes that, even if they include sustainability aspects, have to be differentiated from those

means directly addressing sustainability such as certification. Even if FLEGT licences may be treated equally, e.g. for a limited time frame, they are not the same and cannot yet be proof of sustainability. The acknowledgement of the efforts countries undertake when entering a VPA could be made through accepting also FLEGT wood in procurement e.g. through the option to require legal, FLEGT and/or sustainable wood in procurement.

In implementation, regulatory burdens have to be minimised and woodland management should not be discouraged through additional costs. Therefore, it is important to maintain market access through a workable alternative form of evidence to certification.

Besides sustainability criteria, the provision of help, training and advice for wood producers and procurers is definitely necessary for their successful participation in a procurement policy. Assessments of procurement policies have been punctually carried out but lack reliable and comparable data. More information on the impacts of policies including on markets and the competitiveness of wood is needed.

On the basis of these conclusions, the Working Group proposes to consider the activities listed below for follow up:

In the field of further policy development and guidance the Working Group recommends to the **European Commission**

- 1) to provide a further analysis of the possible legal framework and guidance on how to incorporate the principles of sustainable development into clear public procurement policies and guidelines for wood and wood-based products from sustainably managed forests. This could build on MS experiences through their active participation and consultation. The analysis could contribute to the evaluation of the current EU procurement legislation and policy, which is ongoing;
- 2) to clarify its concerns about so-called social criteria in wood-procurement policies, with an appropriate legal analysis pertaining to sustainability criteria, including criteria relating to social aspects of sustainable forest management;
- 3) to elaborate, in close co-operation with the Member States, further guidance on the various means of proof which may be used for the criteria concerning the legal and sustainable production of wood and wood products, with a preference for generic specifications for certification schemes as well as for alternative means of proof. Practical examples should be indicated where possible. While FLEGT licences will be accepted as proof of legality, a common assessment of Voluntary Partnership Agreements (VPAs), with the aim to develop a common approach on whether and how VPAs could be included in wood procurement as delivering means of proof going beyond the verification of legality, should be undertaken;
- 4) to strive for consistency in the use of definitions and criteria and indicators in the various policies in support of sustainable forest management, including public procurement, in combating illegal logging and attempts towards good governance. In this context, further clarify the usage of FLEGT licences in relation to criteria for sustainably produced and legal wood.

Encourages **Member States and the European Commission:**

- 5) to work towards the use of the same sustainability criteria regardless of the end-use of wood, including as biomass for energy. This means that all forest-related policies in the EU - such as Green Public Procurement (GPP), Renewable Energy (RES), FLEGT - should base their sustainability on a commonly accepted definition of and criteria for sustainable forest management and also legality requirements. Criteria and indicators for SFM as developed by the Forest Europe (MCPFE) process, the International Tropical Timber Organisation (ITTO) and work done by CBD could form the basis.

In the context of implementing, improving and extending wood-procurement policies the Working Group:

invites the **Standing Forestry Committee and the Member States**

- 6) to continue the exchange of experiences and frequently update between member states, including their designated centres of expertise in order to reach better comparability of wood procurement schemes and to give advice to MS e.g. through an SFC expert group. Further guidance e.g. input for developing procurement policies in other countries and procurement model texts could be elaborated through such a process.

Proposes to **Member States:**

7. to undertake promotional measures to encourage the up-take of legally and sustainable produced wood and the use of the identified good practices in its public (and hence private) procurement, including the provision of information, training and support material for procuring agents at regional and local levels.

Calls on Member States and the Commission:

8. to consider the support of extending sustainable public procurement to other raw materials and products other than wood and encourage contracting authorities to integrate life-cycle analysis in environmental impact assessments, while supporting the development of workable assessment standards. The inclusion of sustainability considerations related to processing, use and disposal of (wood-based) products in procurement policies should be further explored; studies on the application of the life-cycle approach could be initiated in order to develop harmonised criteria;
9. to work together with relevant stakeholders towards a common implementation horizon for the application of EU PPP policy (including: GPP, social, innovative, competitive and other criteria) for wood and wood-based products to correlate with this implementation horizon, since with the implementation of the Illegal Timber Regulation², due in early 2013, all wood and wood-based products traded on the EU market will be subject to its legality requirements. After its achievement, a common set of necessary, preferred and desirable procurement criteria for wood and wood-based products could be derived.

² NB this is the ad interim informal name of regulation 995/21010.

To foster monitoring and coherence in wood procurement, the Working Group

suggests to **Member States**:

10. in order to improve information on the achievements of procurement policies, to initiate research and evaluation work which considers economic, environmental and social impacts and includes market analysis. Options for the establishment of an integrated procurement assessment system may be discussed.

Recommends **the Standing Forestry Committee and the Member States**:

11. to launch a pilot project initiative which will provide an integrated and common approach on the implementation of different countries' wood procurement policies.

Finally, the Working Group invites **the Standing Forestry Committee** to adopt the content, including conclusions and recommendations, of this report and feed them into the ongoing process of evaluation of EU procurement legislation and policy as well as to consider relevant future steps to facilitate the procurement of sustainably produced wood and wood-based products.

The **European Commission** may consider this report in its future elaboration on sustainable (wood and wood-based product) procurement, e.g. to set the further development of GPP for different product groups in line with the findings.

1) Introduction

Each year the EU's public authorities spend the equivalent of some 17% of its Gross Domestic Product on the purchase of works and goods, such as office equipment, buildings, components and vehicles; as well as services, such as buildings maintenance, transport services, cleaning and catering. The potential of public procurement has been increasingly recognised as a tool for addressing growing concerns about the sustainability of consumer goods and the impact of unsustainable provision. Progressively, over recent years there has been growing political commitment at national, EU and international levels:

The European Union has set legal bases for public procurement within the Union, namely Directives 2004/17/EC and 2004/18/EC ("Procurement Directives") which establish conditions for economic operators to compete for public contracts. They also allow public authorities to get best value for money when procuring goods, works or services. Directive 2004/18/EC³ (hereafter the "**Procurement Directive**") also "clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development"⁴. The European Court of Justice has further clarified how sustainability considerations can be taken into account in designing public procurement criteria in accordance with the Procurement Directives.

The "*Handbook on Environmental Public Procurement (Buying Green)*"⁵ offers a few concrete examples of how the legal framework allows environmental considerations to be inserted in the different phases of a public procurement procedure.

On 16th July 2008, the Commission adopted the Communication on Public Procurement for a Better Environment⁶. The Communication provides for a process of co-operation with the Member States, aimed at setting common criteria for use in green public procurement (GPP) for a series of identified priority sectors. Out of these, four sectors (construction, paper, furniture and energy) are relevant for wood and wood-based products⁷.

The Europe 2020 strategy for smart, sustainable and inclusive growth⁸ considers public procurement as one of the market-based instruments that should be used to improve framework conditions for business to innovate, and to support the shift towards a more resource-efficient and low-carbon economy.

EU Member States (MS) are in support of the objectives of increasing the volume and the quality of sustainable public procurement, and the complimentary initiative to develop further at EU level easily available tools to promote sustainable procurement.

Many public-sector wood procurement policies (WPPs) are part of, or have evolved from, more general green public procurement policies and initiatives. They are not isolated efforts but part of broader strategies to promote sustainable production and consumption. Their driving forces are grounded in a public consensus for necessary governmental action to combat deforestation, notably in tropical countries, e.g. by reducing illegal and unsustainable production of wood while contributing to sustainable forest management by using market

³ 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;

⁴ Directive 2004/18/EC, Recitals 5 and 6.

⁵ http://ec.europa.eu/environment/gpp/guideline_en.htm

⁶ (COM(2008) 400

⁷ However, some of the criteria subsequently developed have been strongly criticised by environmental NGOs.

⁸ See Communication from the Commission to the European Council of 3 March 2010 COM(2010) 2020 final

rules. In addition, wood procurement is a prominent tool for supporting the EU FLEGT Action Plan, which encourages EU Member States to implement policies that favour sustainable and verified legal timber in their procurement contracts. Also, these policies are tools to help meet the goals of international commitments and agreements, like the CBD and the UN Declaration on the Rights of Indigenous Peoples, as well as in fighting illegal logging directly.

The use of sustainably produced wood and wood-based products, as a renewable natural resource, can be promoted through public procurement, bearing in mind that 85% of the wood consumed in the EU stems from domestic forests.

A total of fourteen countries worldwide presently have operational central government public sector procurement policies for wood and wood-based products (WPP) in place, with particular emphasis in Europe. Here, already eight EU Member States (Austria, Belgium, Denmark, Finland, France, Germany, The Netherlands, The UK) have adopted such schemes, some of which are under revision and which show similarities but also differences in their development and the criteria used. Luxembourg, Italy, Portugal, Spain and Sweden are considering or developing such policies⁹, partly to be addressed in broader green procurement policies.

While comparative data on government purchasing across product types is almost non-existent, it is estimated that governments represent up to 20% of the market for forest products.

During the 106th meeting of the SFC on 1st October 2008, members of the Committee expressed their interest in establishing an ad hoc Standing Forestry Committee (SFC) working group (WG) on public procurement of wood and wood-based products. The group consisted of experts nominated by Member States and relevant stakeholder groups. The members' list is provided in annex B (b).

The Working Group contributes to the implementation of Key Action 17 of the EU Forest Action Plan¹⁰ (FAP). Activity 17.2 of the work programme for implementation of the FAP which calls for an exchange of experience between the Member States, Commission services and stakeholders on developing guidelines for application of the public procurement directives to forest products¹¹.

The exchange of views should serve to achieve better compatibility between different approaches applied in the Member States, and also support the EU FLEGT Action Plan.

According to its terms of reference, the WG is also intended to develop a better understanding of technical aspects of public procurement schemes for wood and wood-based products in the EU Member States and to provide input for the preparation of more detailed guidance for the application of the principles of green public procurement to wood and wood-based products.

This report is divided into 10 parts: introduction; scope of work; framework for public procurement of wood and wood-based products; "legal timber" and its relationship with

⁹ Countries outside the EU with timber procurement policies include: Japan, Mexico, New Zealand, Norway, Switzerland

¹⁰ COM (2006) 302 final

¹¹ The Working Group also at least partially addresses Action 7 of the communication¹¹ from the Commission to the Council and the European Parliament on innovative and sustainable forest-based industries in the EU:

"The Commission and Member States will clarify the application of public procurement Directives for wood and paper products through an exchange of ideas and experiences concerning national public procurement criteria for legal and sustainable timber."

sustainability in wood procurement policies; criteria and indicators for sustainable forest management and sustainability criteria for public procurement; criteria addressing sustainability and their compliance with public procurement rules; means of proof; principle of life-cycle analysis application; impact of public procurement on competitiveness; conclusions and recommendations. Detailed information on existing procurement schemes, on member-state experiences and stakeholders' perspectives is given in the two annexes A (a) and A (c).

2) Scope of work

This report aims to provide guidance for incorporating sustainability goals of the EU and its Member States in public wood procurement policies, while complying with the EU's basic principles of procurement, i.e. non-discrimination, transparency and proportionality. It also seeks, where appropriate, to overcome apparent incompatibilities with prevailing EU legislation. As the EU does not have a uniform policy for public procurement of wood and wood-based products and existing member states' approaches still vary, the need for better harmonisation is increasing as more and more countries implement their own mechanisms. The report will be presented to the Standing Forestry Committee and, after approval, be posted on the DG AGRI Forestry website, as well as distributed to relevant Commission services for possible further consideration.

To this end, the WG met seven times (31st March, 29th May, 18th September, 4th December 2009, 12th March, 25th August, 12th November 2010). On the basis of the terms of reference, a draft work programme had been developed which was adopted by the WG during its first meeting. That included the following topics:

- criteria and conditions for "legal timber" suitable for use in tendering procedures;
- relationship between criteria and indicators for sustainable forest management (such as: MCPFE C&I, CBD, UNCED¹² Forest Principles, ITTO criteria) and sustainability criteria that are suitable to be included in public procurement of wood and wood related products;
- criteria addressing sustainability which comply with public procurement rules (Sustainability PP Criteria);
- forms of proof of compliance with sustainability criteria and its application in tendering procedures;
- impact of public procurement on the competitiveness of wood and wood-based products versus other materials;
- options for the application of the principle of life-cycle analysis;
- suggestions to work towards better compatibility of national schemes and common frameworks.

The Working Group collected information on the above-mentioned topics through presentations by MS and stakeholder group representatives, Commission services' staff as well as invited external experts: MS interventions provided insight on existing national

¹² United Nations Conference on Environment and Development

procurement schemes for wood and wood-based products, with frequent updates on the progress of ongoing revisions (Belgium, Denmark, Germany, The Netherlands, The UK). Other MS reported on the status of development of specific schemes for wood per se (Austria, Finland, Luxembourg, Sweden) or wood in the context of the general national procurement frameworks (Lithuania, Italy, Spain). External presentations (study results) referred to social criteria in public procurement, the application of life-cycle analysis and procurement policies to promote sustainable management in tropical forests, including impacts on the competitiveness of wood.

Due to the extended discussion on the "illegal timber regulation"¹³ in the European Parliament and the Council, which led to a compromise only in July 2010¹⁴, the intended in-depth discussion on the legality aspect in public procurement had to be postponed. Additionally, as no binding sustainability criteria for biomass for energy were proposed in the Commission's report to the European Parliament and the Council, this aspect and its implications for public procurement of wood were not further discussed either.

For each meeting, minutes have been agreed, which are posted, together with the presentations and background material on the CIRCA site of the Working Group (<http://www.circa.europa.eu>).

3) Introduction to the EU Legal Framework for Sustainable Public Procurement

A) Public procurement in the EU

I. Main rules applicable to sustainable public procurement

The general EU legal framework for public procurement of goods and services is set by the Directive 2004/18/EC¹⁵ (hereafter the "**Procurement Directive**"), the rules of which aim at opening up public contracts to competition in the Internal Market. The Directive also "clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contract" when procuring goods, works or services¹⁶. Emphasis is therefore on "how to buy"¹⁷.

¹³ Draft regulation laying down the obligations of operators who place timber and timber products on the market

¹⁴ This was the basis of the final text of Regulation 995/2010 of 20/10/2010 (Official Journal L295, 12/11/10).

¹⁵ 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;

¹⁶ The Procurement Directive cites the implementation of the Integration Principle as one of its objectives:

Under Article 6 of the Treaty [establishing the European Community], environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of that Treaty, in particular with a view to promoting sustainable development. *This Directive therefore clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contract.*

Directive 2004/18/EC, Recital 5 (emphasis added).

See also Recital 6 to the Procurement Directive, stating that,

Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life, or the preservation of plant life, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty.

Directive 2004/18/EC, Recital 6.

Given the absence of clear and categoric guidelines, contracting authorities have been obliged to determine on a case-by-case basis which sustainability considerations are suitable to their procurement, depending on the subject matter of their contract and of their objectives. When determining which sustainability aspects are suitable for their procurement, contracting public authorities must take into account in particular the following rules and principles deriving from the Treaties of the European Union, the Procurement Directive and European Court of Justice case law interpreting the Procurement Directive and relevant Treaty provisions and principles.

1 SUBJECT MATTER OF THE CONTRACT

The ‘subject matter’ of a contract is about which product, service or work is intended to be procured. The process of determination will generally result in a basic description of the product, service or work. In principle contracting authorities are free to define the subject of the contract in any way that meets their needs. To that end, from the viewpoint of the Working Group, sustainably produced wood qualifies as a legitimate definition of the subject matter. Public procurement legislation is not so much concerned with **what** contracting authorities buy but mainly with **how** they buy it. For that reason, neither of the procurement directives restricts the subject matter of a contract as such. However, the provisions of the EU Treaty on non-discrimination, the freedom to provide services and the free movement of goods all apply.

2 TECHNICAL SPECIFICATIONS

(a) Defining technical specifications

Technical specifications set out the parameters of what will be delivered, including: (i) its performance characteristics (e.g. species, quality level etc. of wood); (ii) but also the production processes and methods (e.g. the assurance that the rate of harvesting of wood does not exceed levels that can be permanently sustained, use of environment-friendly non-chemical methods of pest control, the avoidance of use of chemical pesticides, etc.)¹⁸.

Technical specifications may be defined on the basis of: national, European, and/or international standards or their equivalents¹⁹; performance-based or functional requirements²⁰; production- and process-related requirements; or by a combination of these methods²¹. A requirement to hold a

¹⁷ Directive 2004/18/EC *Scope (Art. 7): Threshold amounts for public contracts* This Directive shall apply to public contracts... which have a value exclusive of value added tax (VAT) estimated to be equal to or greater than the following thresholds: (a) EUR 162 000 for public supply and service contracts (b) EUR 249 000 — for public supply and service contracts awarded by contracting authorities other than those listed in Annex IV, ...

(c) EUR 6 242 000 for public works contracts.

¹⁸ According to Annex VI of the Procurement Directive, "technical specification, in the case of public supply or service contracts, means a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures." ;

¹⁹ Which involves a detailed description of the characteristics of the product to be procured

²⁰ By specifying the end-result, but not how to achieve it;

²¹ Article 23 of the Procurement Directive;

specific environmental or a social label or certificate cannot be considered as compliant within the meaning of the Procurement Directive. However, it is possible to request that the product, service, or works meet the underlying criteria of a specific label or certificate and accept that label or certificate as non-exclusive proof of compliance with the requirements.

In addition, it should be mentioned that some requirements regarding labour and social rights (e.g. requirements regarding the maximum working hours, minimum pay, the recruitment of unemployed persons, etc.) may not qualify either as technical specifications within the meaning of the Procurement Directive, but may be included, under certain conditions²², in the contract performance clauses of the contract. As part of a legality definition however, such criteria could qualify to be applied in the section on exclusion criteria.

(a) legal conditions for the suitability of sustainability issues in the technical specifications of a public tender

According to the Procurement Directive, all technical specifications (including those regarding sustainability issues):

- **must be linked to the subject matter of the contract**
- **must not reduce competition**,²³ must be **transparent**,²⁴ must **not discriminate** against possible contractors from outside the member state of the contracting authority²⁵ and of course comply with all relevant Community law

(b) use of the underlying specifications of labels and certificates

Contracting authorities that want to buy sustainable products (e.g. of wood) are not allowed to require a specific certification scheme or label, because this would limit the access to the contract of products which are not so certified but meet similar sustainability considerations.²⁶

In addition, most of the time contracting authorities will not be allowed to include in the technical specifications of their tender all the specifications of a certification scheme or label²⁷, because some of the specifications of such certifications schemes or labels may not be linked with the subject matter of the procurement contract.

Contracting authorities may use in the technical specifications of their tenders only those specifications of a label or certificate which are appropriate to define the characteristics of the supplies or services that are the object of the contract (i.e. this means in particular, to be linked to the subject matter of the contract) and provided other additional conditions are also

²² Please see below the subsection on the “contract performance clauses”.

²³ Article 23(2) of Directive 2004/18/EC.

²⁴ Article 23(1) of Directive 2004/18/EC.

²⁵ Article 23 (3) of Directive 2004/18/EC.

²⁶ According to article 23(8) of the Procurement Directive: “*Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words “or equivalent”.*”

²⁷ Because, some of the specifications of such certifications schemes may not be linked with the subject matter of the contract.

fulfilled (Please refer to Recital 19 and Art. 23.6 of the Procurement Directive regarding eco-labels²⁸)

For some more details and limited examples about the use of labels, please also refer to the section on eco-labels of the Commission services' document "Buying Green – Handbook on Green Public Procurement" (http://ec.europa.eu/environment/gpp/guideline_en.htm)

(c) proof of compliance with the technical specifications

If a contracting authority intends to purchase sustainable goods, it can define in the technical specifications of the tender the relevant sustainability criteria, which must comply with the conditions mentioned in paragraph (b) above. Contracting authorities may stipulate which labels or certificates are deemed to fulfil these criteria, but they must always also allow for other means of proof. Therefore, bidders will have a choice to prove compliance with these standards by using appropriate labels or certificates or by other means.

3. SELECTION CRITERIA

In certain cases, contracting authorities may also address sustainability issues in the selection criteria (in particular in the technical capacity criteria and the exclusion criteria²⁹). The purpose of the selection phase is to identify those tenderers who are considered by the contracting authority to be capable of executing a given contract.

(a) technical capacity criteria

The Procurement Directive contains an exhaustive list³⁰ of selection criteria which can be prescribed by the contracting authority with a view to checking the technical capacity of the tenderers to execute the tendered contract.

In contracts where environmental technical competence is relevant, contracting authorities may include in the technical capacity criteria specific requirements regarding for example, competence in minimising disruption of natural habitats, in minimising waste creation, in avoiding spillage of polluting products etc.

(b) exclusion criteria

According to the Procurement Directive, candidates can be excluded for specific failings. In particular, the provisions of Article 45(2) (c), (d) and (e)³¹ of the Procurement Directive can

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Where contracting authorities lay down environmental characteristics in terms of performance or functional requirements as referred to in paragraph 3(b) they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels, or by and any other eco-label, provided that:

- those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract
- the requirements for the label are drawn up on the basis of scientific information,
- the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and
- they are accessible to all interested parties.

Contracting authorities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents; they must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body."

29

Please refer to article 45(2) of the Procurement Directive;

30

Please refer to article 48 of the Procurement Directive;

31

"Any economic operator may be excluded from participation in a contract where that economic operator:....."

be used to exclude candidates who have not complied with social or environmental legislation. Therefore, such legal criteria may fit better as part of the selection criteria than as part of technical specifications.

4. AWARD CRITERIA

(a) inclusion of sustainability considerations in award criteria

The Procurement Directive explicitly allows social and environmental considerations to be included in the award criteria³². This interpretation of the legislation builds on Court of Justice case law (Case C-513/99 (Concordia Bus)³³). Moreover, subsequent cases, in particular Case C-448/01 (EVN Wienstrom)³⁴, further clarify how sustainability criteria can be included in award criteria. The award criteria must:

- (i) be linked to the subject-matter of the contract

Example: in the context of a contract for the supply of tropical wood (which is the subject matter of the contract), an award criterion based on how much money the contractor would transfer to the local community outside the contract, might not be legally permissible as it might not be sufficiently linked to the subject matter of the contract³⁵.

- (ii) not confer unrestricted freedom of choice on the contracting authority

This means that award criteria must be specific and objectively quantifiable. This would not be the case if the contracting authority were to set criteria against which the information provided by the tenderers could not actually be verified.

- (iii) be expressly mentioned in the contract notice and tender documents, and

- (iv) comply with all applicable EU law, including the fundamental principles of EU law (non-discrimination, transparency, etc.).

(b) exclusion of “abnormally low tenders”

(c) has been convicted by a judgment which has the force of res judicata in accordance with the legal provisions of the country of any offence concerning his professional conduct;

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;"

³² Recital 46 and article 53 of the Procurement Directive;

³³ This case law relates to environmental considerations, but must be extended *mutatis mutandis* to social considerations, given that EU procurement rules and principles are the same, irrespective of the nature of the considerations to be included in public procurement

³⁴ Case C-448/01, EVN AG v Austria [2003] ECR I-14527.

³⁵ However, in some cases such requirements might be justified, for example if the failure to address such needs would risk negatively affecting the future supply of the type of tropical timber in question.

According to the Procurement Directive, contracting authorities may reject a tender as “abnormally low”. This means that the tender price is considered to be in some way aberrant and not to reflect the full cost that the tender should include.

According to the Procurement Directive, if, for a given contract, tender prices appear to be abnormally low in relation to the goods, works or services, the contracting authority **shall, before it may reject those tenders**, request in writing details of the constituent elements of the tender which it considers relevant, including information about compliance with environmental legislation, employment protection and working conditions in force at the place where the work or supply is delivered or the service performed. If it appears that the tenderer breached the applicable environmental and/or social standards, the contracting authority may exclude the tender in question.

5. EXECUTION OF THE CONTRACT

From the outset, it must be mentioned that a public procurement contract must, in any event, be executed in compliance with all mandatory rules which are applicable, including those in the environmental and social fields. If, in addition, the contracting authority wishes a contractor to achieve additional sustainability objectives³⁶, which are not legally obliged, it can do so by using contract performance clauses.

Contract performance clauses set out how the contract should be performed. They are obligations which must be accepted by the tenderer and which relate to the performance of the contract. Whether or not certain contract performance clauses can be effectively monitored for compliance during the contract performance should be considered prior to including a requirement as a contract performance clause.

Sustainability considerations may be included in the contract performance clauses, provided they:

- (i) are linked to the performance of the contract

E.g.

- the obligation to comply with the substance of the provisions of the International Labour Organization (ILO) core conventions during the execution of the contract;
- the obligation to ensure a minimum level of pay for the workers executing the contract or to recruit unemployed people for the execution of the contract. (However, such requirements would not be linked to the performance of the contract if they would also concern the contractor’s personnel who do not participate in the execution of the contract).

- (ii) are clearly defined and published in the contract notice and

- (iii) comply with Community law (amongst which the general principles of the EC Treaties).

³⁶ I.e. objectives that go further than those set by the applicable mandatory legislation and that do not relate to the technical specifications, the selection or the award criteria

However, the Working Group feels that further clarity is needed in order to rightly determine what could and could not be included in the technical specifications, selection and award criteria and contract execution clauses. Overall, a straightforward and applicable approach is needed to avoid unnecessary bureaucratic burdens.

II. Further policy documents addressing sustainability aspects in public procurement

The current part of the Group report is only a simplified and limited summary of the legal EU public procurement framework relevant for public tenders addressing sustainability issues. Some guidance (including a number of ad hoc practical examples) on how to take into account green and social considerations in public procurement may be found in the following Commission documents: the Commission services documents: 1. "Buying Green – Handbook on Green Public Procurement" (http://ec.europa.eu/environment/gpp/guideline_en.htm) and 2. "Buying social – A Guide to Taking Account of Social Considerations in Public Procurement" (reference to be included after publication) and the Commission's Communication COM (2008) 400/2 "Public procurement for a better environment" (http://ec.europa.eu/environment/gpp/pdf/com_2008_400.pdf). However, it has to be stated that these offer only limited guidance, given on a case-by-case basis and cannot offer categorical solutions in all cases.

1). Green Considerations in Public Procurement ("GPP")

The terms "green" and "sustainable" public procurement are often used interchangeably, though, in the context of the generally recognised three pillars of sustainable development (economic, environmental and social), they should not be. Rather, the environmental factors indicated by "green" should be considered as one pillar of sustainability, whereas "sustainable" public procurement integrates criteria relating to all three pillars. The EU explicitly recognises the difference: "Sustainable Public Procurement" means that contracting authorities take into account all three pillars of sustainable development" while "Green Public Procurement" means that only environmental elements are taken into account, both terms relating to procuring goods, services or works at all stages of the project and within the entire life-cycle of procured goods.

The main EU policy documents on how to take into account green considerations in public procurement are:

- (a) the 2004 *Handbook on Environmental Public Procurement (Buying Green)*³⁷ which provides a few concrete examples of how environmental considerations could be inserted in the different phases of a public procurement procedure, such as: the technical specifications, the selection criteria, the award criteria and contract performance clauses³⁸.

³⁷ http://ec.europa.eu/environment/gpp/guideline_en.htm

³⁸ no guidance is provided on how criteria relating to the social pillar of sustainable development should be treated under EU law.

- (b) the Commission's Communication "***Public Procurement for a Better Environment***"³⁹ (the "***GPP Communication***") issued in July 2008, which promotes the uptake of GPP, encouraging contracting authorities to take into account the total life-cycle costs of the products or services⁴⁰.

In the context of the GPP Communication, so far eighteen "priority" sectors have been identified for which GPP criteria have had to be developed⁴¹, chosen on the basis of the importance of the sector as regards its potential for environmental improvements. Member States were invited to endorse the common criteria in their national action plans and in their national guidance on Green Public Procurement.

Regarding the product groups which include wood, all EU Member States and their contracting authorities are recommended to stipulate that all wood and wood-based products be sourced from legally harvested forests as a minimum technical specification for supply contracts and as contract performance clauses for work contracts. In order to gradually move towards both legal and sustainable wood, compliance with sustainability criteria which are linked to the subject matter of the contract is proposed as an award criterion.

On the basis of the Communication, a **toolkit**⁴² has been designed for purchasing officers, which includes concrete examples of how environmental considerations can be included in tendering procedures. The measures in the toolkit remain optional as guidance on how MS should use green criteria, but they are not obliged to do so.

2). Social Considerations in Public Procurement

In 2001, the Commission issued a Communication on social considerations in public procurement^{43, 44}. However, it has to be stated that this document primarily addressed social policy considerations in public procurement, and does not fit with the sustainability criteria in question in the context of wood and wood-based products.

In 2010, the handbook "*Buying social – A Guide to Taking Account of Social Considerations in Public Procurement*"⁴⁵ has been prepared on the basis of the current public procurement Directives^{46, 47}. The objectives of this guide are twofold: (a) to raise contracting authorities' awareness about the potential benefits of socially responsible public procurement and (b) to explain in a practical way the possibilities offered by the existing EU legal framework for public authorities to take into account social considerations in their public procurement..

³⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0400:EN:NOT>

⁴⁰ However, no explanation is given how life cycle assessment can be applied to production processes and methods usable to define sustainable timber and timber products.

⁴¹ The sectors are the following: Construction, Food and catering services, Transport and transport services, Energy (including electricity, heating and cooling coming from renewable energy sources), Office machinery and computers, Clothing, uniforms and other textiles, Paper and printing services, Furniture, Cleaning products and services and Equipment used in the health sector. However, due to issues in the development process, equipment used in the health sector has later on been replaced by gardening products and services.

⁴² http://ec.europa.eu/environment/gpp/toolkit_en.htm.

⁴³ COM 2001(566): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0566:FIN:EN:PDF>

⁴⁴ Case law (ECJ in *Concordia Bus* and *EVN-Wienstrom*) has further clarified provisions of this Communication.

⁴⁵ (*reference to be included after publication*)

⁴⁶ Directive 2004/18/EC and Directive 2004/17/EC

⁴⁷ This handbook is an indicative document of the Commission services and cannot be considered binding to this institution in any way. It should also be noted that the handbook is subject to the evolution of Commission practice and case-law of the European Court of Justice"

In this context, socially responsible public procurement (SRPP) refers to procurement operations that take into account inter alia one or more of the following social considerations: the promotion of employment opportunities; the promotion of decent work; the promotion of compliance with social and labour rights; and social inclusion while observing the principles of the EC Treaties and the Procurement Directives. SRPP may be an important tool both for the advancement of sustainable development and for the achievement of EU (and MS) social objectives. It refers to a number of social considerations which may be integrated by contracting authorities at the appropriate stage of the procurement process.

However, the draft *Guide to Taking Social Considerations in Public Procurement* does not accurately or adequately address how to take social considerations into account in the context of integrated sustainability criteria, i.e. social concerns that relate directly to the sustainable management of forests or other natural resources. In the context of defining wood that has been harvested from sustainably managed forests, the social aspects of sustainable forest management can be understood as the part of the production process for sustainable wood.

Conclusion:

Overall, the procurement directives as well as other EU procurement policy documents allow for the inclusion of all sustainability aspects (economic, environmental and social considerations) in tendering procedures, so far however without acknowledging the appropriateness of an integrated sustainability approach in public procurement. Procurement schemes for wood and wood-based products already applied in member states follow such an integrated approach by either explicitly or implicitly incorporating aspects of all three pillars of sustainability in support of sustainable forest management. Chapters 5 and 6 provide arguments for the compliance of such an approach with the EU procurement rules.

B). Means of addressing illegal logging and related trade at EU level

1. FLEGT Voluntary Partnership Agreements and FLEGT-licensed products from partner countries:

Responding to public concerns about illegal logging and trade, in 2003, the European Commission adopted a European Union (EU) [Action Plan for Forest Law Enforcement Governance and Trade \(FLEGT\)](#). The key regions and countries targeted, which together contain nearly 60% of the world's forests and supply a large proportion of internationally traded wood and wood-based products, are: Central Africa; Russia; Tropical South America and Southeast Asia. The FLEGT Action Plan was endorsed by the Council through [Conclusions](#)⁴⁸ published in November 2003.

As the core of the Plan, the FLEGT Partnership Agreements (VPAs) aim to contribute to wood-producing countries' commitments to promote sustainable forest management by supporting improved forest law enforcement and governance. Since in many countries forest legislation is based on the premise of sustainable forest management, better law enforcement will in general lead to more sustainable forest management. In partner countries where this is not the case, the EU should encourage a review of the legal framework. Better forest governance is therefore an important step on the path to sustainable development.

⁴⁸ COM (2003) 251 final

The Action Plan thus focuses on governance reforms and capacity building, but also ensures by means of a licensing scheme that wood and wood-based products exported to the EU from partner countries come only from legal sources. The Council adopted a [Regulation](#) in December 2005⁴⁹, allowing for the control of the entry of timber to the EU from countries entering into bilateral FLEGT **Voluntary Partnership Agreements (VPA)** with the EU. It also includes ideas for action in areas such as public procurement and the private sector to promote SFM.

According to the EU FLEGT Briefing Note 2 (2007) and following the precedent set up by the VPA agreements already concluded (see below), definitions of legally-produced wood should incorporate laws that address the three pillars of sustainability, i.e., those aimed at economic, environmental and social objectives. A credible definition is likely to include the following elements:

- logging only where there are legal harvest rights, by the holder of those rights;
- complying with environmental and social safeguards guiding logging and forest management planning, including on harvest concession levels, and with environmental and labour legislation;
- payment of stumpage royalties and other directly relevant fees;
- respect for other parties' legal tenure rights that may be affected by wood harvest rights;
- compliance with requirements for trade and exports procedures.

Therefore, this general legality definition is consistent with the one applied in the procurement policies of UK, DK, NL and BE. However, it has to be underlined that the individual definition of legality will differ from one VPA partner country to another.

Three countries (Ghana, Republic of Congo and Cameroon) have already concluded and signed VPAs. Negotiations are currently being conducted with other countries, namely: Indonesia, Gabon, DRC, Malaysia, the Central African Republic and Liberia⁵⁰. Many other countries in Asia and Latin America are also expressing interest to advance towards negotiations.

The impact of VPAs is broader than on exports to the EU market, since the designed legality-assurance systems (LAS) usually cover signatory country's entire wood production, whether for the domestic market or other export destinations.

How does FLEGT VPA work – the example of Ghana

What the EU does:

- adopts and enforces legislation to exclude unlicensed (i.e. illegal) forest products from the EU single market (follow up from Regulation 217/2005 and 1024/2008);
- provides an incentive for licensed products through the recently adopted “Illegal Timber Regulation” as well as awareness raising and public procurement policies;
- promotes trade in legal products through support to the private sector and business-to-business links;
- provides development assistance to build capacity and implement reforms. In the case of Ghana, through a multi-donor sector budget support mechanism – the Natural Resources and Environmental Governance (NREG) Programme. The EC, The UK, F, The Netherlands and The World Bank provide about 20 million € annually.

What Ghana does:

⁴⁹ COUNCIL REGULATION (EC) 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports into the European Community

⁵⁰ List of countries as of December 2010

- defines its forest governance reform process (through a multi-stakeholder process) that builds on existing institutions and policy;
- defines what it means by 'legality' in an objectively verifiable manner, relying on existing laws. The definition addresses the three pillars of sustainability (economic, environmental and social);
- identifies concerns with current legislation (e.g. community responsibilities and rights) and the changes required (both fast-track changes and those requiring considerable political reflection and public consultation);
- designs and implements a legality assurance system (LAS) to monitor, control and verify the sources of all wood and wood-based products. This includes a chain-of-custody system that permits reconciliation of data. The LAS will provide evidence of wood that is compliant with the legality definition;
- appoints an independent auditor to audit the system;
- commits to transparency and information exchange, including making public information about: harvesting schedules; timber rights fees; harvest related payments; social responsibility agreements;
- reviews options for re-structuring its industry (installed capacity is far in excess of the capacity of the forests to supply) and implements policies to re-focus the sector;
- takes steps to deal with illegal practices by the informal forest-based industry sector ("chainsaw loggers") in the domestic market.

A Joint Implementation Committee (JIC - EU+Ghana) will monitor progress.

The first FLEGT licences may be available in 2011. The FLEGT licensing schemes go well beyond bringing assurance to EU consumers and improving standards in wood harvested for the EU market as they introduce fundamental change to the management and regulatory systems, introduce greater transparency and accountability and in some contexts add to the legal frameworks themselves. The FLEGT licence schemes will improve governance and institutional capacities of government, operators and civil society alike. FLEGT partner countries are very interested in having recognition of their efforts towards sustainable forest management at the country level and not only related to basic compliance with legality limited to harvesting rights.

The FLEGT Action Plan encourages EU Member States to implement policies that favour sustainable and verified legal timber in their procurement contracts. This could be done e.g. through accepting FLEGT licences as means of proof for legality or even sustainability. FLEGT licences are already referred to in the UK and will be accepted equally until 2015, in the DK, NL, and French WPPs they are accepted as proof of legality. Generally the WG shares the view that FLEGT licences are stand-alone tools and so have to be differentiated from those means directly addressing sustainability such as certification, even if they may include common aspects. While it is important that member states ensure that their public procurement policies support incentives for FLEGT and are easily correlated with VPA requirements, this does not mean that they cannot also use their public procurement policies to push for additional sustainability requirements, beyond those incorporated in FLEGT VPAs. This could open an option to accept also FLEGT wood in procurement besides legal and/or sustainable wood. . In this context, it also has to be noted that VPAs will be different from country to country and therefore will need thorough assessment before accepting specific licences as means of proof for sustainably produced wood. In addition, it has to be ensured that such attempts do not undermine efforts made by certification schemes.

For further information on FLEGT and public procurement policies please refer to the following website:

http://www.proforest.net/objects/publications/flegt_vpa_briefing_note.pdf

2. Regulation laying down the obligations of operators who place timber and timber products on the market ("Illegal Timber Regulation")⁵¹

Progress in combating illegal logging and related trade at the multilateral level has been relatively slow, and so the EU and the United States have taken their own regulatory measures to address the problem. Since not all wood-supplying countries will find it feasible to sign a VPA, the risk of circumvention remains. In this context, VPA partner countries seek assurance of fair competition for their wooden products. Hence, the Commission, in October 2008, proposed the (then) "Due Diligence Regulation", which was pointedly discussed in the European Parliament and the Council. A political compromise text was agreed before its second EP reading and this was positively voted by the Parliament on 15th July 2010, and the Council on 11th October 2010. The legislative proposal was based on the due-diligence principle, requiring operators to apply a system (a 'due-diligence' system) that minimises the risk of placing illegally harvested wood and wood-based products on the EU market. Such a system should include measures and procedures to enable operators to track their wood and wood-based products; access information concerning compliance with applicable legislation; and manage the related risk of illegality. Due-diligence systems aim to deter operators from supplying wood and wood-based products, without reasonable assurance regarding their legality³⁹, and they place the burden of proof on the operator for the first-time placing of wood on the EU market. Placing for the first time includes both imports and wood produced within the EU which is put on the market the first time.

The regulation was published 12th November⁵², coming into force 2nd December 2010 and will be applicable for operators from 3rd March 2013. Following the prolonged discussions in the EP and Council, the regulation now supplements and reinforces the due diligence requirements with a ban on illegal wood, enforceable against operators who place wood on the EU market for the first time. There are also chain-of-custody provisions for the due-diligence aspect, applicable to operators in the market chain, however limited to the identification of the supplier and buyer (one step up and down the supply chain). The definition of legality formulated in the regulation has also been a point of extended discussion in the Parliament and the Council and is of major importance in relation to public procurement.

The regulation now adopted stipulates that the due diligence system must deliver information on compliance with requirements of the 'applicable legislation'. "Applicable legislation" means the legislation in force in the country of harvest of the wood, covering the following matters (as quoted):

- rights to harvest timber within legally gazetted boundaries;
- payments for harvest rights and timber including duties related to timber harvesting;
- timber harvesting, including environmental and forest legislation including forest management and biodiversity conservation, where directly related to timber harvesting;
- third parties' legal rights concerning use and tenure that is affected by timber harvesting;
- trade and customs legislation, in so far as the forest sector is concerned.

⁵¹ COM(2008) 644/3

⁵² <http://eur-lex.europa.eu/JOHtml.do?uri=OJ%3AL%3A2010%3A295%3ASOM%3AEN%3AHTML>

So far this definition is within the scope of the legal requirements of the FLEGT VPAs, as well as the legality definition applied in the wood procurement policies of BE, DK, NL, and The UK.

It is important to note that the final text also provides for the prohibition of placing illegally harvested wood on the EU market. This stipulates legality as a general requirement. Also, the regulation provides for the concept of negligible risk in the context of the due diligence system.

These developments raise questions as to how public procurement policies will ensure compliance with the “illegal timber regulation” as part their contractual provisions. From the viewpoint of the WG national procurement policy should consequently only refer to the fact that any tender concerning wood and wood-based products shall comply with the provisions of the Regulation.

4. The concept of legal wood and its relation with sustainability in wood procurement policies

All EU Member States’ public procurement policies related to wood refer to the concepts of ‘legality’ and ‘sustainability’, but the approach of verifying evidence varies.

Denmark, The Netherlands, The UK and Belgium define legality and all refer to the same requirements which have to be met:

- the forest owner or manager holds legal use rights to the forest.
- there is compliance by both the forest management organisation and any contractors with local and national legal requirements including those relevant to:
 - forest management;
 - environment;
 - labour and welfare;
 - health and safety;
 - other parties' tenure and use rights;
- all relevant royalties and taxes are paid;
- there is compliance with the requirements of CITES.

This definition is largely consistent with the one used in the context of FLEGT licences as well as in the “illegal timber regulation”.

The above four member states have developed requirements which also define sustainability based on internationally agreed criteria⁵³ for sustainable forest management. The sustainability definitions all require that management of the forest must ensure that the forest productivity, protective function, ecosystem health and vitality, biological diversity and extent of the forest resource be maintained. In addition, the member states also include social aspects such as requiring that legal, customary and traditional tenure and use rights related to the forest are respected, and also that basic labour rights and health and safety of forest workers be safeguarded.

⁵³ The Pan-European Operational Level Guidelines for Sustainable Forest Management, as endorsed by the Lisbon Ministerial Conference on the Protection of Forests in Europe (2to 4June 1998), the UNCED Forest Principles (Rio de Janeiro, June 1992) and the ITTO criteria and guidelines for sustainable forest management.

The sustainability requirements allow for a case-by-case assessment of evidence. In the odd cases where evidence of sustainability criteria being met cannot be provided and where it can be verified that there is no sustainable alternative, evidence of legality only will be required and accepted⁵⁴.

The assessment of forest certification schemes is supported by requirements as to: the standard-setting process; the certification; accreditation and the chain of custody. The member states with a set of criteria assessed the forest certification schemes against those criteria and now in all cases have found that FSC (Forest Stewardship Council) and PEFC (Programme for the Endorsement of Forest Certification) meet their sustainability requirements. Using this approach, the policies are thus largely delivered in practice by the schemes.

The EC's GPP training tool kit and some member states' procurement policies, such as the German and French ones (and the vast majority of private-sector policies), do not define legality and sustainability directly, but refer to evidence such as that from the forest certification schemes FSC and PEFC or their equivalents, when seeking to ensure legality and/or sustainability. Other member states, such as Finland and Austria, have implemented or are in the process of implementing their policies on wood by referring to specific product groups, as recommended in the GPP training tool kits and thereby also taking the same approach of referring to evidence rather than defining legality and sustainability via criteria.

What applies to all the member states' public procurement policies on wood is that they have been developed with a forest management unit (FMU) level approach of verification in mind and with a two-step approach, whereby ensuring legality is a step towards ensuring sustainability. Legality is, in a procurement policy context, often seen as a minimum requirement at least initially and then with a preference for sustainability requirements to be met. However, the relation between legality and sustainability has been shown to be more complex than often assumed. (See annex A (d)).

The forest management unit based requirements defining sustainability results in a heavy reliance on the forest certification schemes. Forest certification's use is so far limited in the tropics and other developing countries and is often highly dependent on the lead from big international companies.. Furthermore, certification in the tropics currently seems to be stalling and a sole reliance on the forest certification schemes therefore potentially presents some shortcomings in delivering the ultimate aim of procurement policies which is to promote sustainable forest management *especially in the tropics*.

The approach where sustainability is clearly defined enables assessment of sustainability on a case-by-case basis and makes it possible to work with producer countries especially in the tropics to move towards sustainable forest management.

It is important to note that there is no clear line between 'legality' and 'sustainability'. Where legality is defined as ensuring compliance with relevant legislation (as in the context of the "Illegal Timber Regulation"), and where legislation covers all three pillars of sustainability and is rigorously enforced, legality can deliver sustainability. In particular, the provisions of Article 45(2) (c), (d) and (e)⁵⁵ of the Procurement Directive can be used to exclude candidates who have not complied with social or environmental legislation.

⁵⁴ It has to be noted, that the German procurement scheme does not allow for that

⁵⁵ "Any economic operator may be excluded from participation in a contract where that economic operator:.....
(c) has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning his professional conduct;
(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;
(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;"

In this context it can be argued that FLEGT VPA agreements share the objective of sustainable forest management, but adopt a completely different approach to tackling the challenges of better forest stewardship. The principle of FLEGT is to establish the institutional capacities for good forest governance (that include ensuring that social, economic and environmental legal requirements related to forest management be met). FLEGT works at a different level to certification schemes. FLEGT works at a national level and addresses concerns of bad governance (leading to illegality – but also to unsustainability) across all sources of wood. FLEGT establishes the means to confirm compliance with all relevant legal requirements and establishes national stakeholder processes to clarify and improve legal frameworks and governance systems. Certification schemes and FLEGT VPAs share the broad objectives of establishing clear norms and supporting stakeholder processes to establish long-term involvement in forest management, but work in fundamentally different ways: certification schemes work with individual units of forest and with operators to provide leadership by example, while FLEGT works to raise standards and capacities across all forest areas and with all forest users. Both confirm, through third-party verification that the objectives and expectations are met.

Legality will, with the new EU “Illegal Timber Regulation”, be a minimum requirement across the EU Member States by early 2013 for EU market access, so MS must implement it to ensure the legality of all timber being placed on the internal market for the first time. Additional requirements, like e.g. sustainability as a best practice via the Green Public Procurement process, remain voluntary. Instructions and guidance on implementation should also be based on experience gained from Member States.

Consistent and harmonised requirements for legality and sustainability with clearly defined criteria should be provided. In this respect, the starting discussion on implementation rules and delegated acts to specify the provisions of the “Illegal Timber Regulation” could be used as regards legality. Further elaboration on a common definition of sustainability for the purpose of wood procurement policies could be based on the Pan-European Operational Level Guidelines for Sustainable Forest Management, as endorsed by the Lisbon Ministerial Conference on the Protection of Forests in Europe (2 – 4th June 1998) and signed by all EU Member States, the UNCED Forest Principles (Rio de Janeiro, June 1992), the CBD and the ITTO criteria and guidelines for sustainable forest management as well as the experiences from MS with wood procurement policies in place.

5. The relationship between criteria and indicators of sustainable forest management and public procurement sustainability criteria

Sustainable development is a fundamental objective of the European Union. The Union's Sustainable Development Strategy continues to provide a long-term vision and constitute the overall policy framework for all Union policies and strategies. Public procurement is a prominent instrument in support of this objective.

That the Integration Principle requires EU policies and activities to integrate *sustainable development* objectives – and not just environmental objectives, social objectives, and economic objectives standing alone – has significant ramifications. The comprehensive concept of sustainable development interweaving economic, environmental, and social components implies that, if environmental factors are not taken into consideration in the formulation and implementation of policies which regulate economic activities and other

forms of social organisation, a model of development that can be inter alia environmentally sustainable over the long term cannot be achieved. In turn, sustainability must also be understood in terms of the increasing interaction between the policy agendas of environmental protection, economic growth, and social development. In other words, the principle of sustainable development incorporates economic and social policy components into environmental policy and vice versa. So, whereas the production and consumption of wood might be understood as primarily an economic activity, the principle of sustainable development requires an understanding of the “sustainable production” of wood to include both social and environmental policy components.

The social component of sustainable development comprises a wide and diverse range of issues, affecting people and their communities and cultures in many different ways. It overlaps with economic development and with cultural and political issues, such as rights, including participation in decision-making. As such, it can be challenging to determine precisely how to incorporate social pillar objectives into specific public policies in a manageable way.

The objectives of SFM are harmonious with those of sustainable development. The guiding principles for the sustainable management of global forest resources were set at the UN Earth Summit in Rio de Janeiro in 1992. European co-operation on the development of common principles, criteria and guidelines for sustainable forest management began during the preparations for the Second Ministerial Conference on the Protection of Forests in Europe, held in Helsinki in 1993. The development of these guidelines has been continued thereafter through the preparatory and follow-up work of the Ministerial Conference on the Protection of Forests in Europe (now “Forest Europe”), a pan-European policy process for sustainable forest management, involving a broad range of forest-based sector stakeholders and other interested parties and were issued at the 1998 Lisbon Conference. The definition and assessment of the sustainable forest management guidelines incorporate ecological, social, economic and cultural considerations. As all EU MS are signatories to the Forest Europe resolutions, the principles of sustainable forest management laid down in them are also applied in their respective procurement policies or recommendations.

When defining sustainability or sustainable forest management, there seem to be differences with regard to the interpretation of the topic within different member states, but a comparative study by *ProForest* identified seven principles and criteria which are referred to at global level⁵⁶. For example, that which the General Assembly of the United Nations adopted in December 2007 as the most widely, inter-governmentally agreed definition of *Sustainable Forest Management* (SFM):

Sustainable forest management, as a dynamic and evolving concept, aims to maintain and enhance the economic, social and environmental value of all types of forests, for the benefit of present and future generations. It is characterised by seven elements, including: (i) extent of forest resources; (ii) forest biological diversity; (iii) forest health and vitality; (iv) productive functions of forest resources; (v) protective functions of forest resources; (vi) socio-economic functions of forests; and (vii) legal, policy and institutional frameworks⁵⁷.

⁵⁶ <http://www.proforest.net/cpet/international-context/international-policies-1/comparative-study-of-danish-uk-dutch-and-belgium-national-criteria>

⁵⁷ Source: UN 2008, Resolution 62/98

Variation in definitions of SFM can be explained by reference to different types of forests, needs of the population and the different social, economic, environmental and political contexts, which vary regionally⁵⁸.

In April 2008, a comparative study was carried out by *ProForest* in relation to the legality and sustainability criteria used by several Member States (The UK, Denmark, Belgium and The Netherlands) in their public procurement policies for wood. This showed the clear link between inter-governmentally agreed definition of SFM and criteria for legality and sustainability applied in wood procurement schemes.

| | | Belgium (Draft) | Denmark (Draft) | UK | Nether- lands |
|----------------|--|--------------------|--------------------|----|------------------|
| Legality | | ✓ Identical | | | |
| Sustainability | Forest health and vitality | ✓ | ✓ Identical | | ✓ |
| | Production functions of forest resources | ✓ | ✓ Identical | | ✓ |
| | Protection functions of forest resources | ✓ | ✓ Identical | | ✓ |
| | Biological diversity | ✓ | ✓ Identical | | ✓ |
| | Extent of forest resources (conversion) | ✓ | ✓ | ✓ | ✓ |
| | Social requirements | ✓ | ✓ | ✓ | ✓ |

Figure: Requirements for forest standards: sustainability (broad outline)
Source: CPET, S.T. Nielsen, September 2010)

Wood procurement policies in Germany and France implicitly include the same as above sustainability criteria through reference to certification schemes, such as FSC and PEFC or their equivalents.

This study shows that there are clear similarities, especially when it comes to sustainability requirements, with the exception of Belgium. While the UK and the Danish schemes are almost identical, that of the Netherlands cover the same issues but with different criteria while Belgium's criteria are more general. Denmark, the Netherlands and Belgium have included social criteria relating to the social aspects of sustainable forest management in their public procurement policies from the beginning, while the UK until recently had done so only to a limited extent. As of April 2010, the UK also introduced a set of social criteria. The Netherlands has additional specific criteria on certification scheme governance, GMOs and plantations, as well as benefits to local people. Criteria for governance of certification schemes and conversion are now also under discussion in the UK with the aim of including them in the UK policy. GMOs and forest conversion are among other issues being considered within the current German wood procurement policy revision.

In the UK Government's procurement policy on wood and wood-based products, a locally applicable definition of sustainability is required. The policy also sets forth specific requirements on how the definition was developed (e.g. through a multi-stakeholder process).

⁵⁸ Brack, D. (2009). Social issues in timber procurement policies. Fifth Draft, January 2009.

The UK provides an overall set of criteria for public procurement (which is quite similar to those in DK and NL) and includes: minimise harm to ecosystems, maintain forest productivity, ensure forest ecosystems health and vitality and maintain biodiversity.

Some countries refer explicitly to social criteria in public tenders, whereas others include them implicitly through the acceptance of certification schemes with reference to such criteria.

Brack (2009) lists four broad headings that are used to group social issues:

- A) Legality
- B) Rights and interests of stakeholders in forest management
- C) Protection of workers' rights and conditions
- D) Participation in standard-setting and certification processes

The meaning of sustainability in some of these national public procurement policies can be summarised as follows: as seen in the table above, most of them cover seven areas: the productive as well as the protective function of forests; forest health and vitality; conservation of biodiversity; certain social considerations as well as the extent of forest resources and basic requirements for legal production. In addition, they typically make reference to the ITTO and Montreal processes, as well as the international principles of the MCPFE commitments and the related Pan-European Operational Level Guidelines (PEOLG), which have been signed by all EU MS. There is a clear consistency and linkage between the Pan-European criteria for SFM and the sustainability criteria in procurement policies of the MS. Most of these policies either closely follow the structure of the Pan-European Criteria and are consistent with them or make reference to such tools and guidelines⁵⁹. The exception to this is the fact that, in all cases where procurement policies include a sustainability definition, legality is a necessary element of this. Pan-European criteria focus on sustainability without including substantial criteria relating to legality⁶⁰.

When discussing sustainable public procurement, criteria relating to social aspects of sustainable forest management are often neglected when addressing only “green” (i.e. environmental) public procurement, though the concept of sustainable forest management goes beyond the pillar of environmental protection. Social issues are an explicit part of sustainable forest management and the Procurement Directive explicitly refers to “promoting sustainable development” in accordance with the Integration Principle⁶¹ articulated in Article 6 of the Treaty Establishing the European Community⁶² and retained by the Lisbon Treaty.⁶³

⁵⁹ In this context distinction has to be made between the Pan-European Criteria and Indicators and the Pan-European Operational Level Guidelines (PEOLG) for SFM. The latter have been elaborated to further promote the sustainable forest management in Europe by translating the international commitments down to the level of forest management planning and practices. They represent a common framework of recommendations for references at the field level that can be used on a voluntary basis. They follow the structure of the six Pan-European criteria.

⁶⁰ ProForest, 2009: Feasibility study into the using MCPFE tools as an element of public procurement policy. Final report.

⁶¹ The Integration Principle provides that the objectives of sustainable development should be integrated into all the laws and policies of the EU and its Member States.

⁶² Directive 2004/18/EC at Recital 5; *see also* Directive 2004/18/EC at Recital 6

⁶³ The Lisbon Treaty affirms the role of sustainable development at the heart of EU objectives, including through its external relations. The consolidated version of the Treaty of the European Union resulting from the Lisbon Treaty states in Article 3, paragraph 2 that the EU shall “establish an internal market” and

Overall, public procurement policies in place for wood which is legally sourced from sustainably managed forests either explicitly or implicitly include criteria relating to social and environmental aspects of sustainable forest management. These are based on international commitments relating to sustainable development and SFM. In this context a sustainable production process for wood necessarily entails consideration not only of harvesting methods but also whether or not the wood is harvested from a sustainably managed forest, taking into account all three pillars of sustainable development. In the view of the Working Group and based on practical experience, this has implications for the use of criteria relating to sustainable forest management (social and environmental aspects included) in tendering procedures, which may differ from the general interpretation of procurement rules so far.

6. Criteria addressing sustainability and its compliance with public procurement rules

This report aims to provide inputs for guidance on how to incorporate sustainability criteria – including those relating to the social and economic as well as the environmental pillars of sustainable development (see above) – into public procurement policies for wood and wood-based products. This work draws on the experiences of Member States that have adopted or are in the process of adopting procurement policies for legal and sustainable wood and wood-based products.

The Procurement Directive allows for taking into account environmental and social considerations at the various stages of the procurement process (technical specifications, selection criteria, award criteria, contract performance clauses). However, the European Commission has not yet provided any formal recommendation on this issue in the context of an integrated sustainability approach (such as the concept of SFM, see above) and in particular the debate on the inclusion of criteria relating to the social pillar of SFM in procurement procedures is thus unresolved.

The Working Group therefore wants to give reasoning for its understanding sustainability criteria for wood and wood-based products as relating to the production process of wood products and how it relates to different stages of the procurement process; this position is derived from practical experience and supported by a most recent legal analysis⁶⁴.

- Sustainability aspects and stages of the procurement procedure

There is general understanding in EU member states of what sustainable forest management means in the context of public procurement policy, including the fact that all of its three pillars (social, economic, and environmental) need to be taken into account by policies for the procurement of sustainably sourced wood (see chapter 5 for further explanation). Indeed, the recitals to the EU Procurement Directive specifically note that the Directive's aims include

further states, in the same paragraph, that the EU shall pursue the sustainable development of Europe in terms of all three pillars (economic, environmental, and social). Paragraph 5 of Article 3 goes on to state that, in its relations with the wider world, the EU shall contribute to “the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights.” Also, in Article 11 of the Treaty on the Functioning of the European Union, the Lisbon Treaty maintains the provisions of Article 6 of the Treaty of the European Community (TEC), promoting the implementation of the principle of sustainable development in the definition of all other policies and activities.

⁶⁴ Client Earth, 2010: Legal Analysis: The place of „Social Criteria” in Public Procurement Policies for legal and Sustainable Timber.

clarification of how contracting authorities may contribute to the promotion of the EU's sustainable development objectives.⁶⁵ These objectives have been further defined by the European Council to include all three pillars and to be consistently promoted world-wide through the EU's external and well as its internal policies.⁶⁶

What a product is made of, and how it is made, can influence a significant part of its environmental and social impact. Under the Procurement Directive, production methods can explicitly be taken into account when defining the technical specifications.⁶⁷ Wood is a harvested product, not a manufactured product. Therefore, defining a sustainable production process for wood necessarily entails consideration not only of harvesting methods, but also of whether or not the wood is harvested from a sustainably-managed forest. Accordingly, procurement policies for legal and sustainable wood and wood-based products will necessarily require that the procured products be comprised of wood that was legally harvested from sustainably-managed forests. Thus, the policies will need to define comprehensive criteria for the sustainable management of forests.

MS procurement schemes either explicitly or implicitly include criteria relating to sustainability aspects of sustainable forest management including social and environmental considerations. Such recognition of all three pillars of sustainability aims inter alia to contribute to the objectives of sustainable development and is also in support of related international commitments such as the UN Declaration on the Rights of Indigenous People. The importance of the social dimension to safeguard a sustainable future for forests, especially in tropical countries is widely recognised. Accordingly, much of the debate on social criteria is not on the principle but whether any particular social criterion is rightly classified as integral to the sustainable management of forests and thus relate to the production characteristics of wood that could be appropriately evaluated under procurement policies for sustainable wood. However, as argued above (see chapter 5), wood procurement criteria related to social aspects of sustainable forest management are essentially sustainability criteria and should be treated similarly to other sustainability criteria pertaining to the production characteristics of wood. There is no reason why sustainability criteria should per se be excluded from the technical specification or award criteria.

In the view of the Working Group, this assumption suggests including ecological and social criteria as technical specifications and hence also as award criteria in wood procurement.

Contract performance clauses set out how the contract should be performed. They are obligations which must be accepted by the successful tenderer and which relate to the performance of the contract. Whether or not certain contract performance clauses can be effectively monitored for compliance during the contract performance should be considered prior to including a requirement as a contract performance clause. In the context of procurement policies for legal and/or sustainable wood, inclusion of social or environmental criteria that relate to anything other than the method for delivering the procured goods at the contract performance stage might suggest that the goods are being harvested-to-order. However, because wood and wood-based products are most often supplied from warehouse stocks, a contracting authority procuring wood is not going to be able to monitor the *performance* of the contract to ensure that criteria relating to sustainable forest management be complied with. Rather, they must be able to verify that the warehoused supplies from which the order is filled have been legally harvested from sustainably managed forests.

⁶⁵ Directive 2004/18/EC at Recitals 5 and 6.

⁶⁶ Council of the European Union, Presidency Conclusions, 10255/1/05 REV 1, CONCL 2 (15 July 2005) Appendix I.

⁶⁷ See Directive 2004/18/EC at Article 23 and Annex VI.

Accordingly, such criteria are in principle more appropriate as technical specifications (i.e., is the timber supplied *legal* and *sustainable* timber?) than as contract performance conditions. Also, practical experience of implementing procurement policies indicates that drawing a (artificial) distinction between criteria that are explicit (technical) and implicit (performance) complicates procedures unnecessarily; there is therefore a danger of making it more difficult to specify wood products.

However, not each and every criterion of a wood procurement policy may comply with the principles of non-discrimination, transparency and objectivity including measurability and verifiability or will be considered as an indispensable requirement for sustainable forest management and thereby may be questionable to be used in EU public procurement procedures regarding wood and wood-based products. Therefore, the following first attempt is made to provide indicative examples for sustainability criteria suitable to be included in procurement procedures.

- Criteria suitable to be included in public procurement procedures

The EU Public Procurement Directives⁶⁸, allow to take into account environmental and social considerations (from hereafter referring to as “sustainable”) at the various stages of the procurement process (technical specifications, selection criteria, award criteria, contract performance clauses). However, it should be mentioned that some sustainability considerations, depending on their nature and their linkage (or absence of a linkage) to the subject matter of the contract or performance of the contract, can be included only at certain stage of the procurement procedure⁶⁹.

The reason for such limitation is that, according to the Directives, sustainability considerations (no matter if they are of an environmental, social or economic nature) must be: (a) **linked to the subject matter of the contract**, if they are integrated in the **technical specifications** or in the **award criteria** of the procurement or (b) **with the performance of the contract** if they are addressed **in the performance clauses of the procurement contract**. In addition, irrespective of the stage of the procurement in which they are addressed, sustainability considerations must comply with the general principles of EU law (transparency, non-discrimination etc) and with all other relevant provisions of EU law.

Therefore, according to their nature and the existence or not of a link with the subject matter of the contract (or with the performance of the contract), sustainability aspects that are part of the concept of SFM (sustainable forest management) may be broadly classified in **three categories**, depending on their degree of suitability for public procurement.

(A) Sustainability considerations that may be addressed in the technical specifications and in the award criteria of the public procurement procedure. (Provided that they are linked with the subject matter of the contract and comply with all other legal conditions relevant for technical specifications and award criteria). For additional legal details on technical specifications and award criteria, please also refer to the section "EU Public Procurement Legal Framework".

⁶⁸ Directive 2004/18/EC and Directive 2004/17/EC

⁶⁹ For example, social considerations regarding labour conditions are more appropriate to be included in the contract performance clauses, as in general cannot be qualified of technical specifications or selection criteria, within the meaning of the Procurement Directive. On the other part, accessibility and design for all requirements are generally more appropriate to be included in the technical specifications.

Examples of sustainability considerations that might be, in principle, suitable for technical specifications (as production and process methods):

- harvest levels that do not exceed the long-term production capacity of the forest, based on adequate inventory and growth and yield data
- requirements regarding the protection of soil and water of the forest
- genetically-modified organisms are not used in the forest area, unless licensing and risk assessment has been applied
- requirements for proper disposal of waste to minimise any negative impacts on the forest
- only controlled and appropriate use of chemicals in the forest area, in conformity with the EU list of approved chemicals

According to the ECJ case law, considerations taken into account into the technical specifications or award criteria must not only be linked with the subject matter of the contract, but also measurable and verifiable (in order to avoid possible discrimination).

(B) Sustainability considerations that may be addressed in the performance clauses of the procurement contract. (This category covers considerations that are not linked with the subject matter of the contract but only with the performance of the contract and in addition comply with all other legal conditions relevant for contract performance clauses). For additional legal details on contract performance clauses, please also refer to the section "EU Public Procurement Legal Framework".

Examples of sustainability considerations that might be, in principle, suitable for contract performance clauses:

- the obligation to comply with the substance of the provisions of the ILO core conventions during the execution of the contract
- compliance (in relation to the personnel involved in the execution of the contract in object) with national legal requirements including those relevant to employment conditions, welfare, health and safety
- the obligation to ensure a minimum level of pay for the workers executing the contract or to recruit unemployed people for the execution of the contract or to set up training programmes for the execution of the contract However, such requirements would not be linked to the performance of the contract if they would also concern the contractor's personnel who do not participate to the execution of the contract
- the prohibition to use child or forced labour for the execution of the contract

The Working Group agreed that criteria as given above may be addressed in the performance clauses of the procurement contract, but could not reach a common position as regards the options for including such criteria directly in the technical specifications for timber. Many members of the WG held the view that it is possible and in line with the procurement directive to include such criteria in the technical specifications

(C) Sustainability aspects that are not at all suitable for public procurement

Some sustainability considerations will not be suitable at all for public procurement (**Category C, above**), because:

- they are neither linked with the subject matter of the contract, nor even with the performance of the contract, or
- for other reasons, such as violation of fundamental principles of public procurement (for instance, if they are discriminatory) or non-compliance with other relevant Community legislation (e.g. regulations on safety conditions).

Examples of sustainability considerations that are not at all suitable for public procurement:

| |
|---|
| <p>In a contract for the procurement of tropical wood or of furniture,</p> <ul style="list-style-type: none">- a requirement that the contractor use furniture from sustainable wood in its premises or that its personnel use recycled paper in their offices- a requirement that the contractor contribute financially to the building of schools, roads for the local communities or for disadvantaged people- a requirement that the contractor set out (or financially support) an educational programme for the local communities- a requirement that the contractor hire a proportion of long-term unemployed persons on another contract⁷⁰ or for its global activity- a requirement that forest management stimulates employment of the local population, as well as the local processing of timber and non-wood forest products (this is a discriminatory requirement in the context of the Internal Market) |
|---|

Exclusion

It should be mentioned that non-compliance with relevant legislation, including social legislation, can under certain conditions be a reason for exclusion of candidates:

- if the economic operator failed to pay social contributions⁷¹; or
- where the economic operator "has been convicted by a final judgment (which has the force of *res judicata* in accordance with the legal provisions of the country) of any offence affecting his

⁷⁰ However, a requirement to hire a proportion of workers with disabilities for the execution of the contract in question (and not for another contract) could be acceptable as it would be linked to the execution of the contract in question.

⁷¹ Article 45.2(e) of the Directive 2004/18/EC

professional conduct"⁷² or "*has been guilty of grave professional misconduct (proven by any means which the contracting authorities can demonstrate)*"⁷³, as the concept of "*grave professional misconduct*" is defined in national legislation⁷⁴, and

- subject also to compliance with national rules implementing the Directive's provisions (Art. 45.2) on possible cases of exclusion.

Examples of possible reason for exclusion⁷⁵:

- exclusion of a tenderer who has been convicted by a judgment that has force of *res judicata* for failure to comply with national legislation regarding forest protection or waste disposal, or with national rules prohibiting clandestine employment or with national rules regarding health and safety at work
- exclusion of a tenderer who has repeatedly breached environmental provisions under administrative law, resulting in several administrative fines, can be excluded on grounds of grave professional misconduct (if such breaches are covered by the national definition of professional misconduct).

Abnormally low bids

In addition, at the award stage, the contracting authority has the possibility to exclude a tenderer, if as a result of the enquiry carried out in accordance with Art. 55 of Directive 2004/18/EC, the tender price appears abnormally low, as a consequence of non-compliance of the tenderer with "*provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed*".

Examples:

- the contracting authority **may exclude** a tenderer, if as a result of the enquiry carried out in accordance with the above-mentioned rules of the Procurement Directives⁷⁶, the tender price appears abnormally low, as a consequence of non-compliance of the tenderer with applicable rules regarding forest protection, waste management, employment conditions, the payment of social contributions or of additional working hours, applicable rules regarding safety at work or regarding the prohibition of clandestine employment.
- The contracting authority **may not introduce a complete and automatic ban** on considering any tender the price of which falls below a specified proportion (e.g. 80%) of the average price of all tenders received.

In conclusion, when analysing the suitability of sustainability considerations for public procurement, a clear distinction has to be made between the different phases of procurement procedures, as each stage of the procurement process has a different role. The suitability of

⁷² Article 45.2(c) of the Directive 2004/18/EC

⁷³ Article 45.2(d) of the Directive 2004/18/EC

⁷⁴ "*Grave professional misconduct*" is a concept that is not yet defined by the European legislation or EU case law. It is thus for the Member States to define this concept in their national legislation and to determine whether non-compliance with certain social obligations constitutes grave professional misconduct.

⁷⁵ To the extent they also comply with national rules implementing the Directive's provisions (art. 45.2)

⁷⁶ Article 55 of Directive 2004/18/EC; Article 57 of Directive 2004/17/EC

sustainability considerations for public procurement will depend not only on their nature, but also on the stage of the procurement in which they are intended to be addressed. However, certain considerations (**category C above**) will not be appropriate for any stage of the procurement process.

The WG wants to stress that the above-mentioned examples are only indicative. There is a need for further clarification and discussion to extend the list of examples, especially as regards the appropriateness of including criteria for all three pillars of sustainable production. In the view of the WG, it is appropriate to include criteria for all three pillars, such as those regarding the use and tenure rights of the forest, and also those on the maintenance and enhancement of biodiversity, in the technical specification and in the award criteria for wood and wood-based products. The reasoning for this provided in this report should form the basis for further elaboration. Testing of compliance is needed, especially with the principles of the EU Treaty: non-discrimination, transparency and proportionality.

7. Means of proof for legality and sustainability criteria in public procurement of wood and wood-based products

Contracting authorities that want to buy sustainable products (e.g. made from wood) are not allowed to require a specific certification scheme or label, because this would limit the access to the contract of products which are not so certified but meet similar sustainability standards.⁷⁷

If a contracting authority intends to purchase sustainable goods, it can define in the technical specifications of the tender the relevant sustainability criteria, which must be linked with the subject matter of the contract and comply with all the conditions mentioned in relation to technical specifications in the section “Legal Framework”, above.

Contracting authorities may stipulate which labels or certificates are deemed to fulfil these criteria, but they must always also allow for other means of proof. Therefore, bidders will have a choice as to how to prove compliance with these standards by using appropriate labels or certificates, or by other means.

Certification is an easy solution, easy to check and easy to specify. However, it can be costly. As results from the following table show, many member states refer to various certification schemes in their public procurement policies for wood. However, it is not recommendable to use specific concepts or terminologies from a specific certification scheme, like "High Conservation Value Forests" as this might lead to the discrimination of other means of proof. Instead, more generic terms, like "forests with features and species of outstanding or exceptional value" could be used.

Valid forest certification schemes are systems which meet the requirements of standard-setting bodies (sometimes set by the schemes themselves), where the compliance of forest management with the requirements is verified by certification bodies that are accredited

⁷⁷ According to article 23(8) of the Procurement Directive: “Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words "or equivalent".”

according to standards but which are independent of: the certification schemes, the forest owner, and of the forest management operator.

| Country | Legality | Sustainability | | | FLEGT |
|--------------------|---|----------------|-------|---|--|
| | | FSC | PEFC* | Other evidence | |
| Belgium ** | Legality not accepted, as sustainability is the minimum requirement | X | X | Accepted, but no guidance available | Not explicitly referred to in the current policy, but taken up in the evaluation process |
| Denmark | Evidence of legality is accepted. Guidance refer specifically to TLTV (SGS), VLC (Smartwood) OLB and FLEGT licenses. Brief guidance on key requirements for alternatives available tool. | X | X | Accepted, brief guidance on key requirements available. | Currently referred to as evidence of legality |
| UK | Evidence of legality will be accepted where no sustainable supply or alternative is available. TLTV (SGS) and VLC (Smartwood) has been assessed and is listed as ensuring compliance. Other evidence is assessed on a case-by case basis. | X | X | Other evidence is assessed on a case-by-case basis by the UK Government's Central Point of Expertise on Timber (CPET). Detailed guidance available. | X Accepted equally with evidence of legality and sustainability |
| Netherlands | Evidence of legality will be accepted where no sustainable supply or alternative is available. | X | X*** | Other evidence is assessed on a case-by-case basis. Timber Procurement Assessment Committee (TPAC) advices on request. Detailed guidance available. | Not confirmed |
| Germany**** | Legality not accepted, as sustainability is the minimum requirements | X | X | Equivalent is also accepted, but no guidance available | Not confirmed |
| France***** | Any certification or documentation of legality accepted. | X | X | A range of documents listed as providing evidence including custom documents, code of practice, and attestation of forest management plan. | Not explicitly referred to in the current policy but can be used as proof of legality |

* PEFC has endorsed a total of 28 national schemes including SFI and CSA

**The Belgium criteria are under review. The Belgian government has developed new criteria for assessing certification scheme and has carried out an assessment of certification. So far no policy decision has been taken, in the meantime, FSC and PEFC are acceptable.

***PEFC international has been accepted for the NL market. A decision on MTCS is yet to be taken..

****Germany is due to review policy before 17 of January 2011

*****The French policy is due to be reviewed during 2011

FSC Forest Stewardship Council
 PEFC Programme for the Endorsement of Forest Certification Scheme
 FLEGT Forest Law Enforcement Governance and Trade
 SFI Sustainable Forestry Initiative
 OLB Timber Origin and Legality (Origine et Légalité des Bois)
 CSA Canadian Standards Association
 TLTV Timber Legality and Traceability Verification
 VLO Verification of Legal Origin
 VLC Verification of Legal Compliance

Certification is seen as a very useful mechanism to deliver evidence of sustainable forest management (SFM). However, according to the Public Procurement Directives, contracting authorities must always also accept alternative means of proof. Voluntary, third-party verified forest certification systems are an effective means of verifying sustainably produced wood raw material. When linked into a chain-of-custody mechanism, the forest certification schemes may also be used in verifying the traceability of wood embodied in wood-based products from SFM. However, they serve only as a proof of origin of the wood material but do not provide any assurance regarding the overall life-cycle impacts of the end product.

Certification can be used as a supplementary or optional tool, but never as an obligatory means of proof of compliance with the sustainability requirements of the contracting authority. Some member states have developed policies in which they provide contracting authorities with information on how to assess compliance with sustainability criteria.

For example, the UK has developed legality and sustainability criteria which have similarities with those of several other member states. As regards compliance with these criteria, two categories of means of proof have been identified by the UK: **Category A**, which encompasses recognised certification schemes paid for by the forest owner, and **Category B** which is other means of proof. The Category B evidence comprises all other credible evidence proving that wood meets the requirements for sustainability. Several guidance documents have been prepared to support the evaluation of the Category B evidence.⁷⁸

For further information on the use of means of proof in the different national wood procurement schemes, please refer to the member states experiences in annex A.

Contracting authorities are not allowed to set a limitative list of acceptable alternative means of proof. Bidders should be free to submit to the contracting authority any alternative means of proof. If proof submitted is found insufficient or inadequate, a contracting authority may ask for additional means of proof or more specific evidence.

In support of proportionate regulation and to minimise the regulatory burden in assessing compliance with specified criteria, the approach to compliance adopted by contracting authorities could reflect the risk profile of the supply. In implementing procurement policies, a proportionate and risk-based approach may be taken. This is of utmost importance in the context of means of proof other than certification.

Examples of possible alternative means of proof. (The list is of course not limitative):

- alternative documentation submitted to independent third-party assessment;
- documents attesting to a forestry management plan and its implementation, as approved by a relevant authority. (In the case that all requested criteria for SFM are covered by the plan);
- evidence of a company's internal procedures that shows traceability through the supply chain (as an alternative means to proving traceability back to SFM, but not as proof of sustainable forest management per se);
- technical dossiers by wood producers or reports from competent bodies allowing the same level of information as the certification process to which the alternative evidence is being compared;
- self-declaration on compliance with the sustainability criteria applying at the source of supply, together with evidence to verify this information. (To be provided upon request).

⁷⁸ CPET (2006): UK Government Timber Procurement Policy: Framework for evaluating Category B evidence. <http://www.proforest.net/cpet/uk-government-timber-procurement-policy/timber-guidance>

Maintaining market access through a workable form of alternative evidence to certification is of specific interest with regard to wood from small-scale forest properties which often are not certified for economic and other reasons. Such properties form a substantial part of the forest ownership structure all over Europe. Risk-based approaches could limit the administrative burdens related to verification and minimise tendencies only to rely on certificates and thereby exclude those who are not able to afford them.

Due to the fact that 85% of the wood consumed in the EU originates from within the EU, with its fragmented and small-scale forest ownership structures, there is a need for a deeper analysis on possible alternative proof of compliance with SFM in order to avoid unnecessary bureaucracy and cost in public procurement of wood and wood-based products.

The sustainability of roundwood production can also be verified if the wood-based product or wood raw material producer uses a credible environmental system that also encompasses the implementation and supervision of sustainable forest practice. The implementation of such management systems should ideally be verified by an external and independent certifying body that is accredited according to EU standards. Valid systems could include EMAS and the environmental systems and quality systems based on ISO 14001 and 9001 standards and which include an operational model for sustainable forest management. However, they may not be sufficient if they do not include a clear goal and operational guidelines for achieving sustainable forest management. In this respect eco-labels should also be approached cautiously and critically.

The first FLEGT licences may be expected in 2011. While their acceptance as means of proof of legality is not in question, the discussion on whether to use it as more extensive means of verification has just started. In the view of the WG, FLEGT licences are stand-alone schemes that, even if they may include sustainability aspects, have to be differentiated from those means directly addressing sustainability, such as certification. Even if FLEGT licences may be treated equally, as the UK policy suggests for a limited time-frame, they are not the same and cannot yet be proof of sustainability per se. It has to be kept in mind that every VPA and related FLEGT licence will be different regards sustainability aspects. Thorough case-by-case assessment will be necessary. For example, depending on its implementation, the Ghanaian FLEGT licence could be on equal footing with chain-of custody certification as proof of sustainability,.

Standards-compliant eco-labels for wood-based products require sustainably produced wood raw material as well as a manufacturing process which takes environmental impacts into consideration. Criteria for sustainable raw material production can therefore also be verified by means of an eco-label that has been granted for a given product if the eco-label criteria cover the standards of the procurement policy recommendations, potentially including sustainable forest management criteria.

8) Possibilities to apply the principle of life-cycle assessment as a part of public procurement of wood and wood-based products

Thus far, many MS schemes for the procurement of wood and wood-based products have criteria for legality and sustainability of wood and wood-based products in public procurement which usually focus mainly on the origin of the raw material. By doing so, none of the environmental, economic and social impacts throughout the rest of the life-cycle of material or products, which relate also to the processing, use and final disposal of products, is

taken into account, even though a life-cycle approach is now encouraged under green public procurement. (GPP - see below).

Apart from being very incomplete scientifically, this could mark a competitive disadvantage for wood vis-à-vis other competing materials like steel, concrete and plastics, which so far do not often fall under such extensive sustainability requirements as does wood. The application of life-cycle approaches to all stages of a product's life, as well as to those made of competing materials could improve the overall objective comparability of different raw materials by calculating the environmental and other impacts throughout the four life-cycle phases of the product: origin, processing, use, final disposal. After all, in the case of wood, sustainability is not just about SFM but also the use of (non-)sustainable methods along the whole life cycle of a wooden product.

In conjunction with other policy goals, such as social and innovation considerations, life-cycle assessment can thus improve overall public procurement by enabling the procuring authority's scope to set more meaningful contract terms and the tenderer's scope to comply with them. For example, LCA may not only help to make the most sustainable choices (environmental, social criteria) but also to calculate the overall life-cycle costs. When introduced into public procurement, it can also strengthen the role of public entities to contribute to the introduction of environmentally sound and innovative products.

As this approach is in line with the procurement objective of the EU, several processes at EU level refer to life-cycle assessment. For example, the communication Public Procurement for a Better Environment⁷⁹ (the so-called "GPP communication") stresses the need to base work on environmental criteria and sets out a life-cycle approach. The GPP training tool kits referred to in the communication also refer to life-cycle costing approaches, in case contracting authorities wish to ascertain which products are most cost-effective for them. Such analysis means comparing, not just the initial purchase price of a product, but all future costs as well: usage costs (energy and water consumption; consumables such as ink and paper); maintenance costs and disposal costs or resale value. Low life-cycle costs also contribute to more environmentally sound solutions. Furthermore, European Commission mandate (M/350) to the European Committee for Standardisation (CEN), for the development of standardised methods for assessing the integrated environmental performance of buildings, is based on the life-cycle analysis of buildings.

In its GPP communication, the Commission has identified ten priority product groups for GPP, four of which – construction, paper, renewable energy and furniture - relate to wood and wood-based products. Specifically for construction and furniture, LCA could be a calculation tool to assess: emissions; costs; material consumption and energy use during a product's life-cycle, from raw material procurement, through its processing, use and its end-of-life or re-use. LCA could be used to compare different materials, e.g. use of wood versus concrete, plastics, etc. LCA can benchmark technologies, processes, transport vectors and materials using a standardised method (e.g. ISO 14040, 14044). However, because MS PP schemes for wood have so far focused almost exclusively on the raw-material stage of the life cycle, especially SFM and/or legality and their various forms of proof, they have thus focused on the means for delivering only one aspect of the first life-cycle phase, whilst leaving the other aspects of the first phase and all aspects of the other three aspects entirely unaddressed.

The application of an LCA approach in Finland⁸⁰, concerning the energy consumption of buildings, included the production of the building materials and heating and cooling during

⁷⁹ COM(2008) 400 final

⁸⁰ Source: Kimmo Lahti-Nuutila, Metsäliitto group 2009

the building's life cycle of 50-100 years. The study compared different materials for wall structures (concrete, lightweight aggregate block, aerated concrete block, brick, steel-reinforced concrete, wood). In this comparison, wood showed the best results.

The benefits of wood products, as shown by an LCA approach include:

- raw materials used are renewable and the production process produces biomass and/or bio-based energy;
- fossil GHG emissions are significantly reduced due to biomass substitution;
- wood products are carbon sinks and furthermore serve as long-term carbon storage;
- wood products are recyclable and/or can be re-used in energy production.

Overall, wood has proved an eco-efficient building material: less energy is needed in the manufacturing phase and less energy consumed in the use phase. The cost-efficiency is high. In addition, process emissions compared with other materials such as cement are avoided

Such calculations and their presentations may influence consumer attitudes and help improve the status of wood products.

LCA depends on the data and the criteria that are chosen. However, whilst no guideline for selecting such criteria exists, efforts are being made towards this, including some of the work by the UNECE Team of Specialists on Forest Products' Markets and Marketing, which held a Policy Forum⁸¹ on "Building Codes and Standards: Influence on Material Use and Construction Practices". Currently though, different types of LCA are often not always comparable because their frameworks for comparison are not yet the same. The problem can only be solved by using consistency and transparency on the LCAs, to show very clearly the how criteria are set, the parameters to be assessed and how these are to be monitored and used for meaningful comparisons.

In this context, the use of environmental product declarations (EDPs) may be an important step forward. However, information from such environmental declarations is sometimes considered to be too unspecific and wide, as it covers all relevant aspects of the environmental performance of a product. The international EPD[®] system allows adaptation of the given information to specific user needs and market applications by introducing the concept of "single-issue environmental product declaration (EPD)". A single-issue EPD can, for instance, take the shape of a climate declaration, extracting the information related to climate change by describing the GHG emissions in terms of CO₂-equivalents.

Climate declarations can be regarded as a subset of EPDs generated in the international EPD[®] system (www.environdec.com). The difference is that EPDs account for several types of environmental impact, while a climate declaration, being an extract of the information within an overall EPD, focuses solely on the climate issue. Climate declarations were launched by the Swedish Environmental Management Council (SEMCo) in May 2007 as a response to the increasing market pressure for organisations to report on their GHG emissions and their impact on climate change. Climate declarations are based on principles inherent in the ISO standard for Type-III environmental declarations (ISO 14025). This gives them widespread international acceptance. It also brings with it recognition of the information as being objective and covering the full life-cycle, and credibility due to the compulsory requirement for independent third-party verification. For more information, see www.climatedec.com.

⁸¹ <http://timber.unece.org/fileadmin/DAM/meetings/20101011/PolicyForumAgenda210610.pdf>

There is no clear picture as to what extent biodiversity and health & safety aspects of chemicals are a part of LCA where applied.. So far only mass flows, cost and energy flows have usually been included. However, this is a fast-moving field and recent developments may provoke a shift of thinking and practice.

The integration of specific aspects, like carbon footprints, is quite complex to develop at EU level. However, at MS level, e.g. the carbon accounting standard in UK (PAS 2050 standard), there are references specifically to wood which also provide for a mechanism to account carbon. Food products are already available in supermarkets in The UK with carbon information on them.

As intended by GPP policy, LCA could be used in public procurement, thus helping public entities to provide stronger arguments for preferential choice, e.g. wood as an environmentally compatible material. It could also help to shift the central focus of the environmental considerations in wood procurement from origin (wood production) towards a broader consideration of wood products in terms of their overall life-cycle impact (including also processing, use and final disposal). Discussions in some MS on the possibilities to include LCA in (wood) procurement have started. Recently, Finland launched a national public procurement policy for wood-based products. The recommendations for sustainable procurement of wood-based products cover the entire life cycle by taking into account direct environmental impacts during the processing and the use of products as well as the environmental impacts of their final disposal. This is also done in order to promote the use of wood by underlining the advantages of that renewable material.

Other member states have to some extent included LCA considerations when developing and implementing more general guidelines for green procurement, covering many different product categories, not just wood-based products. This has often been through reference to other arrangements, rather than integrated LCA provisions. Such considerations may lead to the conclusion that wood and wood-based products should or could be preferred and ordered rather than products made of other raw materials. In such cases, the public buyer can simply demand wood-based products for a given application, instead of introducing perhaps rather complicated LCA criteria for a given tender.

9) Impact of timber procurement policies on the competitiveness of wood and wood-based products

Inter alia, wood procurement can be used as a driver, an incentive for SFM and for addressing forest-related problems both within and outside the EU. Consequently procurement policies can have significant implications for the EU wood market, bearing in mind that ca. 85% of the wood and wood-based products consumed in the EU are of EU origin.

Public-sector wood procurement policies (WPP) are relatively new instruments and their implementation is at an early stage. Impacts on markets and possibly on the competitiveness of wood and wood-based products are therefore difficult to assess. Nevertheless, all MS with wood procurement schemes have undertaken or are finalising general assessments of their policies, some with a view also towards markets. (E.g. UK pilot study on the construction industry 2009; Assessments in Denmark and France (still ongoing) on volumes of procured wood).

In 2010, the ITTO published a study on the pros and cons of procurement⁸² which elaborated inter alia on market impacts of procurement policies, mainly, but not exclusively, focusing on tropical timber. Its findings, together with the discussions in the SFC Working Group, form the basis for the conclusions which follow.

Wood procurement policies have an influence on: demand; supply; price and trade as well as the substitution of wood and wood-based products by and for those based on other, competing materials.

Concerning the demand, few available and reliable data exist on public-sector wood consumption. Therefore, it is difficult to gauge the potential impact of public procurement policies on the wood trade in the EU MS. Some indications follow. The UK is the fourth largest world-wide net importer of wood, one third of all wood is purchased by public entities. In Denmark the consumption of wood and wood-based products (2005) amounted to 3.76 billion €, or 10% of public purchases. The use of tropical timber in marine construction and public works makes for 15 – 27% of the tropical wood used in Denmark. The Belgian government indicates 18% of the wood on the European market to be destined for the public building sector. Other estimates indicate 3-20% of the total EU wood consumption is by public purchasing. The impact of WPPs on demand appears to be quite modest, but significant. Awareness among procurement agents on the need to specify legality and sustainability is reported to have risen. This suggests a chance to help increase the competitiveness of wood from sustainable sources and can help to raise the image of wood from sustainable forest management as a renewable and environmentally compatible raw material.

For impacts on supply, one of the critical aspects to be addressed is the view of some that disadvantages for the producers of wood and wood-based products may potentially be caused by the application of wood procurement policies. In particular, it is claimed that these policies favour temperate producers, large-scale and integrated operators and plantation wood. This is mainly due to the fact that only 7% of the total global SFM-certified forest area is located in developing countries. This links to concern about increasing the use of social criteria and also indirect encouragement of certification schemes, despite the fact that they are voluntary market-based tools. At the moment, forest products companies capable of delivering SFM-certified products, linked to chain of custody, have gained a competitive advantage over the others, especially in countries where procurement policies are said to be inclusive, i.e. accepting all the internationally known SFM-certification standards.

This situation may represent a disadvantage for small growers, who, to a large extent, cannot provide certification since it would form additional and disproportionate costs. Group certification could be a possible solution. However, so far experiences show that in most cases the extra costs of demonstrating sustainability and/or legality of the wood material or wood-based product have not been recouped in a price premium and so cannot be transferred to the final cost of the product or material⁸³. Thus, the development and application of workable and cost-effective equivalent verification tools is of the utmost importance in this context.

Substitution

Wood is unique in being the subject of procurement policies which are extensively developed in terms of criteria, environmental as well as social. There are only a few or no other similar

⁸² Simula, M. 2010; The pros and cons of procurement: development and progress in timber-procurement policies as tools for promoting the sustainable management of tropical forests, ITTO.

⁸³ Simula, Marrku, 2007: Comparability and acceptance of forest certification systems, ITTO.

examples for other raw material production processes, e.g. conflict minerals or crude oils. Sustainable and legal wood not only compete with unsustainable and illegal wood, but there is also competition for market share with non-wood materials and their derived products, which are not subject to equivalent requirements. This may lower wood's overall competitiveness and even increase the substitution away from wood, thus providing disincentives to harvest sustainably or even to engage in sustainable forestry at all. In addition, connected burdens with direct and indirect transaction costs and complicated administrative procedures may unintentionally favour substitute materials, like steel, concrete and plastic⁸⁴. Clear political commitments towards the privileged use of sustainable wood, e.g. in the public construction sector - as it already exists in several MS, can reverse this situation.

Substitution effects may also occur between wood products and/or their producers. For example, impacts of WPPs on prices are uneven among different types of wood. While for coniferous wood the policies are probably largely neutral, temperate hardwoods could most likely gain advantages against tropical hardwoods when, for example, technical requirements do not need tropical timber⁸⁵. In terms of substitution between materials, additional costs for wood and wood-based products - mainly related to verification, may have a negative but probably limited impact, being more significant for tropical wood. The uncertainty in purchasing wood-based products compared with those of other materials (e.g. additional risks) is likely to be more important than cost impacts (e.g. especially for furniture and joinery products). Impact on direct consumers, e.g. architects, remains unknown but the risk of exclusion of wood remains if procurement appears complicated or problematic to such users. However, the contribution of sustainable procurement and related verification to reverse the potential negative image of wood in their eyes should not be underestimated.

Wood is pioneering in the demonstration of legality and sustainability, while most other sectors are lagging behind; concrete being a notable exception. However, in the future other sectors will also have to follow, through e.g. green building initiatives. Stiffer overall sustainability requirements could strengthen the role of wood as a competing material. However, there is still a lack of agreed methodology for the comparison between like products made of different materials through life-cycle analysis. Difficulties of comparison persist, due to the diversity of individual products and their applications which challenge general comparisons between materials, especially if measurable parameters cannot be identified or agreed. However, recent work indicates progress to overcome such hurdles.

To minimise any possible unintended disadvantages for wood versus other materials, lessons being learnt from the development and application of wood procurement policies should be spread to other sectors in order to further the development of an overall sustainable public procurement policy. Wood is the only material to be featured so far in the MSs' implementation of GPP and sustainable PP. Clear, comparable environmental criteria for the competing materials have still not been developed, agreed and adopted.

Possible solutions could include the development of priority lists for environmentally compatible products and materials. The introduction of GPP procedures based on product groups having environmental focus and criteria over their entire life cycle should be furthered. To this end, more information on the impacts of procurement policies, including on wood markets and competitiveness of wood products, is needed.

⁸⁴ True substitution provided that the requirements for the material are technically equal

⁸⁵ Simula, M. 2010; The pros and cons of procurement: development and progress in timber-procurement policies as tools for promoting the sustainable management of tropical forests, ITTO.

10) Towards guidance on public procurement of wood and wood-based products: Conclusions and recommendations

Conclusions

Driving forces for a public procurement policy on wood are grounded in a public consensus for necessary governmental action to combat deforestation and forest degradation notably in tropical countries, e.g. by reducing illegal and unsustainable production of wood and related trade by using market rules, while contributing to sustainable forest management. Also these policies are tools to allow meeting the goals of international commitments and agreements like the CBD and the UN Declaration on the Rights of Indigenous People, or in fighting illegal logging directly.

Public procurement policies on legal and/or sustainable wood are dynamic. Strong debate is taking place to explore the possibilities to make sustainable procurement as effective as possible by including social, environmental and economic criteria and improving its efficiency. Revisions are a common practice. It is important to exchange views and to build on the experience of MS that have already policies in place. Information on assessments and their results are of specific interest.

Given that +/- 85 % of wood and wood-based products consumed in the EU originate domestically, to promote the better functioning and transparency of the EU's Internal Market for wood, as well as to facilitate and render transparent the participation of imported wood and wood-based products in that market, the closer approximation and comparability of such MS schemes is seen as desirable and necessary.

In the continued absence of EU-level, material-specific sustainability criteria for wood, some EU MS, especially significant importers of wood and wood-based products, have developed public procurement schemes for wood and in some cases for wood-based products which seek to favour wood, largely based on its origin in sustainable forest management and/or legal harvesting and trade. In almost all cases, certain social criteria are also included. However, so far these focus mainly on the origin and production of the wood rather than being concerned with its overall life-cycle performance.

The harmonisation of criteria and requirements has made progress (mainly between Denmark, The Netherlands and The UK) and there is a common view that public procurement should be ambitious and therefore aim for sustainability. It is widely understood and has been repeatedly affirmed by the EU that sustainable development entails social and environmental as well as economic considerations. Accordingly, public procurement in pursuit of sustainable development goals should address social and environmental as well as economic considerations. These three components of sustainability — social, environmental and economic - have to be understood as inherently integrated and all three components incorporated into public procurement policies.

Analysis of EU WPPs demonstrates that environmental and social criteria relating to the production method or provision conditions of goods or services can be incorporated into the various phases of public procurement. However, problems stem from a lack of clarity regarding the requirements of EU law governing public procurement, thus causing uncertainty and hence confusion regarding what criteria are permissible. This is particularly so with regard to criteria relating to the social aspects of sustainable forest management and the maintenance and enhancement of biodiversity. This gap needs to be addressed further by an open debate with the European Commission. The Working Group is of the opinion that

“sustainable produced wood” can qualify as subject matter and that criteria for all three pillars of sustainable production, including criteria regarding use and tenure rights of the forest, are appropriate in the technical specifications and/or the award stage for the public procurement of wood and wood-based products. Such criteria are widely accepted as indissolubly part of the sustainability concept of forest management, the production process of wood. SFM includes horizontal objectives which could be seen as equal to functional objectives for inclusion in technical specifications, which is consistent with the European Court of Justice’s jurisprudence on EU procurement law. However, not each and every criterion of a wood procurement policy may comply with the principles of non-discrimination, transparency and objectivity or will be considered as an indispensable requirement for sustainable forest management. For these cases, a fuller explanation of how these principles are to be applied in the context of wood procurement criteria, consistent with the manner in which these principles have been applied by the European Court of Justice in the public procurement context generally.

Implementing public procurement remains challenging. There is a need for increased uptake and reporting across all levels of the public sector. At the same time it has to be ensured that wood procurement policy does not become a barrier to the use of sustainably produced wood or the sustainable management of woodlands but as long as unsustainable practices exist, consumers want to have guarantees for sustainable wood. The requirements for wood for instance are far higher than for many other construction materials. Therefore, the sustainability of all construction materials has to be ensured by developing sustainability criteria for other types of materials as well and encouraging the use of the most sustainable options, without lowering standards for sustainable wood. It is important to retain the primacy of international forestry processes and commitments in relation to sustainable forestry, such as the Forest Europe (MCPFE) criteria and indicators, which form the basis for the definition of sustainable forestry in many MS as well as for certification schemes.

Solutions in sustainable procurement have to be found that are proportionate to risk. Risk-based approaches are considered as a very pragmatic and sensible way forward. It is also important to retain market access, especially for wood from non-certified small woodlands in the EU, which is a particular issue in many MS and elsewhere.

Whilst FLEGT works at a different (national) level from certification schemes, which relate to the forest management level, its content is in support of the same objectives, the sustainable management of forests. In the view of the Working Group, FLEGT licences are stand-alone schemes that, even if they include sustainability aspects, have to be differentiated from those means directly addressing sustainability, such as certification. Even if FLEGT licences may be treated equally, e.g. within a limited time-frame, they are not the same and cannot be proof of sustainability. The acknowledgement of the efforts countries undertake when entering a VPA could be made through accepting also FLEGT wood in procurement e.g. through the option to require legal, FLEGT and/or sustainable wood in procurement

In implementation, regulatory burdens have to be minimised and woodland management should not be discouraged through imposing additional costs. Therefore, it is important to maintain market access through a workable and cost-effective alternative form of evidence besides certification.

In addition to sustainability criteria, the provision of help, training and advice for wood producers and procurers is definitely necessary for successful implementation of a

procurement policy. Assessments of procurement policies have been punctually carried out but lack reliable and comparable data. More information on the impacts of policies including on markets and competitiveness of wood is needed.

Recommendations

The recommendation derived from the deliberations in the Working Group meetings. They are structured in three fields of possible action: 1. further policy development and guidance , 2. implementing, improving and extending policies and 3. monitoring and coherence.

In the field of further policy development and guidance the Working Group recommends to the **European Commission:**

- 1) to provide a further analysis of the possible legal framework and guidance on how to incorporate the principles of sustainable development into clear public procurement policies and guidelines for wood and wood-based products from sustainably managed forests. This could build on MS experiences through their active participation and consultation. The analysis could contribute to the evaluation of the current EU procurement legislation and policy, which is ongoing;
- 2) to clarify its concerns about so-called social criteria in wood-procurement policies, with an appropriate legal analysis pertaining to **sustainability** criteria, including criteria relating to social aspects of sustainable forest management;
- 3) to elaborate, in close co-operation with the Member States, further guidance on the various means of proof which may be used for the criteria concerning the legal and sustainable production of wood and wood products, with a preference for generic specifications for certification schemes as well as for alternative means of proof. Practical examples should be indicated where possible. While FLEGT licences will be accepted as proof of legality, a common assessment of Voluntary Partnership Agreements (VPAs), with the aim to develop a common approach on whether and how VPAs could be included in wood procurement as delivering means of proof going beyond the verification of legality, should be undertaken;
- 4) to strive for consistency in the use of definitions and criteria and indicators in the various policies in support of sustainable forest management, including public procurement, in combating illegal logging and attempts towards good governance. In this context, further clarify the usage of FLEGT licences in relation to criteria for sustainably produced and legal wood.

Encourages **Member States and the European Commission:**

- 5) to work towards the use of the same sustainability criteria regardless of the end-use of wood, including as biomass for energy. This means that all forest-related policies in the EU - such as Green Public Procurement (GPP), Renewable Energy (RES), FLEGT - should base their sustainability on a commonly accepted definition of and criteria for sustainable forest management and also legality requirements. Criteria and indicators for SFM as developed by the Forest Europe (MCPFE) process, the International Tropical Timber Organisation (ITTO) and work done by CBD could form the basis.

In the context of implementing, improving and extending wood-procurement policies
the Working Group:

invites the **Standing Forestry Committee and the Member States**

- 6) to continue the exchange of experiences and frequently update between member states, including their designated centres of expertise in order to reach better comparability of wood procurement schemes and to give advice to MS e.g. through an SFC expert group. Further guidance e.g. input for developing procurement policies in other countries and procurement model texts could be elaborated through such a process.

Proposes to **Member States:**

- 7) to undertake promotional measures to encourage the up-take of legally and sustainable produced wood and the use of the identified good practices in its public (and hence private) procurement, including the provision of information, training and support material for procuring agents at regional and local levels.

Calls on Member States and the Commission:

- 8) to consider the support of extending sustainable public procurement to other raw materials and products other than wood and encourage contracting authorities to integrate life-cycle analysis in environmental impact assessments, while supporting the development of workable assessment standards. The inclusion of sustainability considerations related to processing, use and disposal of (wood-based) products in procurement policies should be further explored; studies on the application of the life-cycle approach could be initiated in order to develop harmonised criteria;
- 9) to work together with relevant stakeholders towards a common implementation horizon for the application of EU PPP policy (including: GPP, social, innovative, competitive and other criteria) for wood and wood-based products to correlate with this implementation horizon, since with the implementation of the Illegal Timber Regulation⁸⁶, due in early 2013, all wood and wood-based products traded on the EU market will be subject to its legality requirements. After its achievement, a common set of necessary, preferred and desirable procurement criteria for wood and wood-based products could be derived.

To foster monitoring and coherence in wood procurement, the Working Group

suggests to **Member States:**

- 10) in order to improve information on the achievements of procurement policies, to initiate research and evaluation work which considers economic, environmental and social impacts and includes market analysis. Options for the establishment of an integrated procurement assessment system may be discussed.

⁸⁶ NB this is the ad interim informal name of regulation 995/21010.

Recommends **the Standing Forestry Committee and the Member States:**

- 11) to launch a pilot project initiative which will provide an integrated and common approach on the implementation of different countries' wood procurement policies.

Finally, the Working Group invites **the Standing Forestry Committee** to adopt the content, including conclusions and recommendations, of this report and feed them into the ongoing process of evaluation of EU procurement legislation and policy as well as to consider relevant future steps to facilitate the procurement of sustainably produced wood and wood-based products.

The **European Commission** may consider this report in its future elaboration on sustainable (wood and wood-based product) procurement, e.g. to set the further development of GPP for different product groups in line with the findings.

Annex A

(a) Member state experiences in public procurement of wood and wood-based products⁸⁷

Existing EU procurement schemes

On public procurement policy governments are acting not as regulators but as consumers and as buyers. They operate within EU law governing public procurement, including the EU Treaties, the EU Public Procurement Directives, and relevant case law of the European Court of Justice which basically are about equal treatment and fairness in the policy of buying products and services. There is a fair amount of latitude for them to set the conditions and requirements they need for these products and services.

Motivations

Member state experience indicates that the number of governmental instruments to put international agreements into practice seems to be limited which gives public procurement policy a specific importance. In the view of the **Netherlands (NL)**, TPP is very important to give forestry countries a clear signal regarding consumers' willingness to purchase sustainable produced products at reasonable prices and thus increase such sales. It also sets an example for semi-governmental and the private sector to introduce sustainably produced timber in their procurement criteria

In **France (FR)** for example the actual policy was developed due to the estimate that public procurement presented about ¼ of the French consumption of tropical timber and France is among the main countries for its import mainly from Africa. Only legal and sustainable timber will be used in public construction in 2010 and the minimum level of wood in new buildings should be increased.

The main objective of the current policy in **Germany (DE)** in place since January 2007 was to contribute efficiently towards the implementation of SFM and to promote the use of timber from sustainably managed forests, to avoid unreasonable obstacles for market operators, to comply with national and international competition and trade regulations and to meet the European public procurement law. Also in **Belgium (BE)** the aim is to promote timber from sustainably managed forests in public procurement and indirectly sustainable forest management. The policy in Belgium was developed to also form an incentive for certified forest production in support of sustainable forest management. In **France** the objective has been introduced that the share of timber and wood products from legal sources and sustainably managed forests purchased by public buyers should increase from 50% in 2007 to 100% in 2010. These objectives are mandatory for the State and recommended to local authorities and include all wood products from the tropics and the temperate zone.

Procurement policies specific to timber are relatively new instruments and many countries are still in early phases of development or implementation. In the **UK**, voluntary guidelines were

⁸⁷ Based on the presentations and updates provided during the WG meetings as well as from study results and websites dedicated to timber procurement policies of MS. A detailed overview on the development and status as well as the relevant characteristics of the existing six national public procurement schemes for wood in the EU, namely Belgium, Denmark, France, Germany, the Netherlands and the UK is given in the annex.

issued as early as 1997 and Germany 1998 but the first specific policy was issued by **Denmark (DK)** in 2003.

Many apply stepwise approaches and include ambitious targets. . Stepwise approaches have been adopted that started with legality as a first step in the direction of sustainability. Some of the schemes are at the moment under review.

Definitions and Criteria

The six existing member state (MS) schemes show differences and similarities (Table 1¹). Differences relate to minimum requirements, the coverage, the criteria and the acceptable proof. Some of the schemes specify that timber should be from sustainable sources. Others allow timber from legal sources and motivate also for sustainable timber; others have a clear timeline in terms of requirements. Those countries that have developed self standing sets of

| | France | Germany | Belgium | DK (draft) | UK | NL |
|---|-------------------------------------|--|-------------------------------------|------------------------------------|-------------------------------------|-------------------------------------|
| Policy enactment date | 2005 | 2007 | 2006 | 2003 | 2000 | 2008 |
| Product coverage | All | Not paper | Not paper | All | All | All |
| Binding on: 1. Central state 2. Sub national | 1) Mandatory 2) Encouraged | 1) Mandatory 2) Encouraged (partly Mandatory) | 1) Mandatory 2) Encouraged | 1) Voluntary 2) Voluntary | 1) Mandatory 2) Encouraged | 1) Mandatory 2) Encouraged |
| Minimum requirement: Legal or legal and sustainable | Legal | Legal & Sust | Sust. | Legal, Sust pref | Sust. or FLEGT (April 09) | Legal, Sust pref |
| Govt. criteria to evaluate schemes/evidence | No | No | Yes | Yes | Yes | Yes |

criteria for legality and sustainability namely the UK, Denmark, Belgium and the Netherlands maintained already for several years an informal collaboration,. That included sharing of experiences in the development and implementation of timber procurement policies. For these countries similarities in terms of defining legality and sustainability can be observed with the exception of Belgium which uses more generic criteria. The UK and the draft standards of Denmark are quite identical. This is also the case for other criteria like e.g. related to standard setting for means of proof. While the UK and the Danish are quite close, the Netherlands cover the same issues but with different criteria and the Belgium criteria are more general. Denmark, the Netherlands, the UK and Belgium include criteria relating to social aspects of sustainable forest management. . Also, the Netherlands have additional specific criteria on certification scheme governance, GMOs and plantations as well as benefits to local people. Criteria for governance of certification schemes and conversion were included in the UK policy in April 2010In the UK recycled wood and recycled wood products are accepted equal to sustainable wood products..

Denmark has launched a set of draft criteria for legal and sustainable timber in 2007 in an open consultation also with organisations from abroad. For the criteria efforts were made to

build on existing frameworks like MCPFE criteria and indicators and ITTO work as well as other relevant regional processes, but summarized in one set of criteria. 20 of them are identical with corresponding UK criteria for legal and sustainable timber, six a little different in phrasing and four additional once in particular on social criteria for sustainable timber and on option on conversion of natural forests. Revised and updated guidelines from May 2010 maintain a reference to criteria for legal timber identical to the previous ones (that is identical to those in the UK). For sustainable timber reference is made to the overall framework conditions set out in the draft of 2007. However, the guidelines recommend making direct reference to FSC or PEFC or similar standards for forest management for definitions of sustainable timber in public procurement procedures. Decisions regarding finalisation of the DK draft criteria of 2007, if any, awaits the outcome from the working group.

In **Belgium**⁸⁸ eleven criteria have been developed to evaluate on forest certification schemes. These include social criteria and minimum thresholds for sustainability unlike other countries which favour a stepwise approach (legality and sustainability preferred). For legality the outcome of the negotiations on the “due diligence regulation” is awaited.

Social criteria have also been included in the list of criteria and could be included in different stages at the level of standard setting (e.g. representation and participation in stakeholder decision making), standard content (e.g. right of indigenous people) and certification process (e.g. stakeholder consultations during audits).. Currently Belgium is revising its public procurement policy for timber and timber products and a policy update is expected in due course. New criteria were already elaborated in 2009 and in early 2010 an assessment of certification schemes against the new set of criteria was conducted.

The **UK** has developed legal and sustainable criteria which have similarities with those of several other MS. The criteria are all based on internationally agreed criteria of sustainable forest management in Forest Europe/MCPFE..

Since May 2009 the minimum requirement of the UK policy is sustainable wood or FLEGT license timber only, but from April 2015, only sustainable timber is accepted. Criteria relating to the social aspects of sustainable forest management are articulated as contract performance clauses only in line with the EU procurement rules. The policy is mandatory for all government departments, agencies and non-departmental public bodies. It works via assessing evidence towards a set of criteria for legality and sustainability.

The legality definition is aligned with those from DK, NL and BE (new criteria) containing the 4 criteria: legal use right, compliance with all laws relevant to forest operations, payment of all relevant royalties and taxes and CITES requirements should be respected. The British sustainability definition acknowledges the fact that SFM varies from country to country by requiring local applicable definition of sustainability. The overall set of criteria which is quite similar to those in DK and NL includes: minimise harm to ecosystems, maintain forest productivity, ensure forest ecosystems health and vitality and maintain biodiversity. Since April social criteria are also in place in the UK.

The **Dutch** public procurement criteria for timber, the Timber Procurement Assessment System (TPAS), have been established in June 2008 based on a multi-stakeholder consultation and approved by Parliament.

Requirements for the criteria include: Applicability to different certification schemes, acceptance of equivalent proof of evidence, coverage of social, ecological and economic aspects of sustainable forest management.

⁸⁸ the Belgian policy is currently under revision

Germany – like France – has not developed a self standing set of criteria but refers to the certification schemes FSC and PEFC while allowing also for alternative means of proof. The policy is mandatory to all Federal institutions but with flexibility for the regional governments and covers all types of timber and wood products excluding paper products.

Evidence

In general evidence requested by MS for legal and sustainably managed forests refers to certification schemes (e.g. FSC, PEFC) or equivalent means of proof.

In **Belgium** for the PEFC timber two positive country lists were created on the basis of the fulfilment of social criteria. These lists will not be retained after completion of the policy revision. No request for an equivalent mean of proof has been received in tendering procedures so far, but nevertheless policy implementation problems exist that have led to the inclusion of non certified wood.

In **Denmark** the new revised guidelines of 2010 recommend that timber from FSC- and/or PEFC-certified forests as well as other forests managed according to corresponding standards are considered as legal and sustainable timber. They recommend that all PEFC and FSC Chain of Custody certified timber are considered as legal timber, which also represent a share of timber that are sustainable and/or recycled (normally, if not otherwise informed on invoice or the like, at least 70 %, although only 50 % for particle board).

Additionally, the guidelines list other schemes, which are considered sufficient for verifying legal timber, currently TLTV (SGS), VLC (Smartwood), OLB and upcoming FLEGT licenses.

In all cases alternative means of appropriate and equally convincing evidence are allowed for, although special rules apply for smaller purchases, if of interest for Danish suppliers only. It may be requested by the buyer to have alternative means of evidence independently verified.

The guidelines recommend two options for buyers, when inviting tenders for legal and/or sustainable timber:

- Either set minimum requirements for legal timber and a certain amount of timber that are either sustainable or recycled (typically at least 70 %, although only 50 % for particle board)
- Or set minimum requirements for legal timber only and (optional) award criteria for a high share of timber that are either sustainable or recycled.

The **UK** refer to 2 types of evidence: Forest certification schemes or Category A (Cat A) evidence and Category B (Cat B) evidence were all other types of credible evidence is subsumed, which have to meet also all the same criteria. The UK has most advanced in developing CB evidence.

Certification over all is an easy solution, easy to check and easy to specify. But the sole reliance on certification is not possible, so criteria have to be developed against which schemes can be assessed; following procurement and WTO rules, performance has to be specified and appropriate means of proof have to be in place. Also a reflection on the international processes is necessary like MCPFE, UNFF and other processes. In addition the situation in the UK has to be taken into account, showing that at least 95% of the woodland owners and 75% of the private woodland area are not certified. Though certification is seen as

a very useful mechanism to deliver evidence of sustainable forest management (SFM) its not seen in defining SFM in its self

In the UK the forest certification schemes has been assessed every second year since 2004 to ensure the schemes continue to deliver compliance with the UK sustainability criteria. Both FSC and PEFC meet these criteria. The Canadian CSA, the US SFI and the Malaysian scheme MTCS have been also endorsed by the PEFC scheme as well as another 23 national schemes. Cat B evidence shows traceability through the supply chain (CoC) and compliance with legality and sustainability criteria. It can be equivalent to Cat A evidence were strong and robust documentation and evidence is provided. Assessment is carried out on a case-by-case basis based on the level of risk involved. Different types of Cat B apply: a) Broken chain of custody e.g. the supplier is not certified but proves that his supplies are certified wood. The further down the supply chain the certificate is originating, the more evidence of compliance is requested as the risk of a mix of materials from sustainable and unsustainable sources is increasing. b) No certificate in the supply chain. Here information is needed on the forest and whether the forest management meets the UK sustainability criteria. Basically alternative evidence is required where not buying from certified sources.

Overall in practice Cat B evidence is applicable to short or straightforward supply chains, where broken CoC or uncertified small local producers are involved. In other cases, using Cat B evidence to proof sustainability is a challenge, unless another scheme is available to match it against. For long or complex supply chains adequate Cat B evidence of sustainability is hard to achieve. Experience with Cat B evidence over the last years shows that certified timber and wood products are now widely available. Category B cases are rare and being mostly broken CoC and assessing invoices. Having a support body is important to ensure consistency in acceptance, ensure technical level expertise and clarify on critical cases.

For Category B evidence forest management plans may be accepted on a case-by-case basis where the risk is considered low Chain of custody has to also be in place.

Concerning risk assessment, various information on forest management issues in different producer countries is referred to. Also contacts are used to do assessments in specific cases. Reference is also be made to the Transparency International's Corruption Perception Index, for an indication on the level of risk involved. Every assessment has to be made on a case to case basis as there is no overall standard for evaluating risk.

In low risk situations not as much evidence of compliance would be required. In high risk cases it would require independent verification. Also each link in the supply chain would have to be looked at for adequate evidence of compliance. But these cases are not frequent, counting for about 2 per year, while short chain of custody cases are very common.

The Netherlands – like other MS - are in support of certification, having the view such schemes being the most reliable proof of evidence while also considering their activities all over the world. As a side effect, the Dutch public procurement criteria serve as a reference for certification systems. Nonetheless procedures are in place for the assessment of alternative proof of evidence (Category B).

The Timber Procurement Assessment Committee (TPAC) assesses certification systems. The Netherlands has accepted timber produced under the certification schemes FSC and PEFC for the latter with the restriction to the present PEFC supply to the Dutch market with the exception of MTCS. Here TPAC has revised its judgement and holds that MTCS does not conform to the Dutch criteria. The Dutch State Secretary for Infrastructure and the Environment will decide whether MTCS – certified timber will be accepted under the Dutch sustainable procurement policy. Assessments are done through desk work and an internet forum using a fixed procedure. If deemed desirable, parties which have commented on the

Internet Forum, will be heard. Only in case there still no decision is possible, TPAC will undertake a field test.

The tenderer should have a appropriate supply chain management to make sure they can offer sustainably produced timber. Timber should preferably comply with the TPAS. Legal timber is accepted if sustainably produced timber is not available. Fines will be set if contractors do not use sustainable or legal timber.

In **France** two categories of products are concerned which differ according to the means of proof that could be used. The first category includes timber, sawing and veneering products and plywood. Here the buyer can refer to SFM schemes which include mandatory information on the origin, name of species, name and address of the suppliers. The second category relates to all products of the second processing stage like particle boards, windows, furniture, paper products where it can be referred to SFM schemes and eco-labels. These two categories will most likely be suppressed by 2011 in the course of the current revision of the French policy.

Five options exist to prove the origin of category I products, all to be verified by an independent body: Certificate delivered by the producer on the legality of the timber logged, SFM certification (e.g. FSC, PEFC etc.), document on forest management plan approved and regularly checked by local authorities, document attesting the subscription of a code of good conduct with legal and sustainable forest management commitments by the forest manager/owner or document attesting the subscription of a code of good conduct with commitments on buying timber from legal and sustainably managed forests by the supplier. Local forest management plans are set up according to the forest regulation, they are based on management documents agreed by the administration and can give a guarantee of sustainability. However, this type of evidence is related to the existing system in France and can not be applied to imported timber.

The minimum requirement of the current **German** public procurement policy is legality and sustainability. The evidence of compliance is verified by a two level system similar to the UK category A/B evidence. The first level is evidence provided by recognised certification schemes PEFC (with reference to the MCPFE criteria and indicators for sustainable forest management and the PEOLG) and FSC (10 FSC principles and 65 criteria). The second level contents other means of evidence e.g. by recognised independent third party verification. The bidder must be able to provide proof that the wood product has been produced in compliance with the according standards from FSC or PEFC valid in the country of origin. Furthermore proof of traceability of chain-of-custody has to be delivered. The Federal Research Institute for Rural Areas, Forestry and Fisheries (vTI) and the Federal Agency for Nature Conservation (BfN) are responsible for the verification of alternative certificates or other means of proof. Throughout the 4 years the policy is in place, several verifications were proceeded. In all cases the means of proof were not comparable (either invalid or only giving evidence of legality) and thus did not meet the requirements of the German procurement policy. Germany therefore has no experience yet about alternative means of proof besides FSC/PEFC certification.

Implementation

Belgium – like Denmark - runs a central purchasing agency which develops framework contracts and a large majority of the products being purchased go through this agency. The biggest product category they deal with is furniture. Also the building agency plays an important role in public purchases but they do not implement the policy arguing not to buy wood products directly on the market but through subcontractors.

For the **UK** implementation of the procurement policy, a Central Point of Expertise on Timber (CPET) was set up in 2005 by DEFRA. It provides police advice, training, a website and advice notes on timber procurement. CPET includes elements of independent advice in relation to the assessment of certification schemes i.e. which certification schemes meet the defined criteria.

National procurement policies seem to be a prerequisite for the existence of schemes on sub-national level. While central policies usually are not mandatory for these other levels they are encouraged to follow the national setting by e.g. receiving guidance. The evaluation in **Denmark** shows that applications of the guidelines varied a lot amongst both central and local governments and institutions, and their experience is that complicated models could have a hard time to find acceptance in local governments. The Danish government will communicate and promote the revised guidelines of 2010 in close collaboration with timber trade, public buyer organisations as well as other relevant stakeholder groups. Tools include partnership agreements on green procurement between central and local governments, seminars, articles in relevant papers and magazines, internet promotion etc.

Local authorities in **France** have their own public procurement policies and compared to the State more stable staff which eases the implementation of public procurement.

In **Germany** the TPP is implemented on the central level in all governmental institutions and subordinated agencies. On the local level the Federal Procurement Regulation is adopted by the Federal States of Baden Württemberg, Bavaria and the City of Hamburg. Likely Lower Saxony and Berlin will follow soon. Furthermore the TPP is implemented by the "Deutsche Bahn" corporation as well as several municipal administrations and public institutions.

The development of standard contracts in the **Netherlands** will be finalised by the end of this year but is facing the following problems: Public buyers rather want to rely on certified timber than alternative proof of evidence to avoid loopholes for unsustainable products with a vague label as well as extra costs and time for additional checks. Dutch GPP on timber works in practice.

Revision

The need for policy revision has usually been identified 3–5 years after initial development. Revision processes appear to be as time-consuming as the initial development due to different stakeholder views on the procurement criteria that should be applied but also due to discussions on compliance with general EU procurement rules. Evolution in policies and certification schemes is also a factor.

Several countries are in the process of revising their public-sector TPPs. Belgium and Denmark are in the final stages of the adoption of new policies, the UK just finalised a process of revision and modification but no further modifications are now planned and focus will be on implementation of the policy. Germany's TPP will be reviewed in 2010 and France will revise its policy to include criteria for the recognition of forest certification schemes. Formal *ex ante* impact assessments have not been conducted but, in some countries (Belgium, Denmark, France and the UK), the impacts of TPPs have been assessed during implementation.

In **Belgium** the policy review process has started in 2008 as an internal reflection process (conducted by the UK consultancy "ProForest") on how to move forward and how to contribute to an EU driven process. This starts with a reflection on the features of certification

schemes which should include the five elements "Standard", "certification process", "accreditation", "tracing" and "product labelling and claims" and related criteria: This encompasses criteria on the content of the standard as well as on the standard setting for sustainable forest management certification schemes. The Belgian used in the current policy don't cover all these five elements, are very often too generic and sometimes incomplete. In 2009 a new list of criteria was developed, together with regional governments and subject to a consultation process. An assessment of certification schemes took place in early 2010. However, due to the lack of a federal government no policy decision was taken yet. In the mean time a range of measures like training and workshops was taken to increase policy implementation.

The **UK** has revised its policy in asking for legal and sustainable timber as minimum requirement and including certain social criteria. Revision processes include stakeholder consultations.

The **Netherlands** will on a regular basis revisit the procurement criteria, taking into account experiences of TPAC and comments made by stakeholders.

The revision of **German** TPP will be finalised by the end of 2010. The status and planned developments of the FSC and PEFC schemes were assessed. Special emphasis was put on the improvement of control mechanisms and transparency, the inclusion of high ecological standards, criteria for forest plantations, the responsible use of primary forest and other ecologically high value forest, as well as forest conversion issues and the treatment of GMOs.

Policy Assessments

Policy implementation has been assessed in the past in **Belgium, Denmark, France** and the **UK** in order to identify barriers to implementation and measures to improve effectiveness. Key constraints include limited awareness among purchasing agents and suppliers, inadequate guidance, sometimes-confusing definitions, complicated modalities, and a lack of effective monitoring and reporting (Proforest 2007c; CPET 2008a; CPET 2009; Rambøll Management 2006). Several other countries are in the process of assessing the implementation of their TPPs.

In the **Netherlands** in order to see how public procurement effect the amount of sustainably produced timber on the market, research on has been carried out in 2005 and 2008 and will be repeated in 2011. Procurers also got visits from NGOs to determine whether sustainable timber has been used. Also a monitoring system has been developed for GPP in general that will be presented to parliament. Therewith all public buyers are requested to give information how they implement GPP.

In **France** an assessment is still ongoing. Four preliminary conclusions can be drawn from the assessment: 1. Given the importance of the paper transactions it appears that action based on a product-based approach could be more efficient than a general policy. 2. Simple, easy to use information on procurement is often lacking. 3. While the 100% target for timber and wood products from legal sources and sustainably managed forests in 2010 was a political statement necessary in 2005 to launch the policy, the effect is very hard to measure. 4. An increased concentration on sustainability can be observed from the buyers` side while the legality aspect is less in the focus.

The French observatory body collecting the data on the public procurement contracts has been operational only since 2007. However, specific information on wood is hard to obtain as the forms used are not precise enough. Therefore a specific monitoring system is envisaged, based on the check of contracts on a sample basis. Uncertainty also exists in terms of the future procurement targets which are politically set.

In **Germany** the Federal Ministry of Food, Agriculture and Consumer Protection (BMELV) started in 2008 an assessment concerning the implementation and first experiences of the public procurement policy in the Federal ministries and subordinated agencies. The main results reported by the BMELV were:

- the entire amount of purchased wood products (2007-2009) was about 20 m €,
- only FSC/PEFC certified wood products have been purchases,
- no additional administration efforts have been occurred by the implementation of the TPP,
- only marginal recommendation for future improvement have been made.

However, in some cases failures occurred which give reason for future improvements.

In the **UK** a study on putting into praxis and monitoring the implementation of the timber procurement concludes that it is not possible to collect data on all timber purchases, due to the very different ways people buy timber and the related administrative burden. This is specifically the case for large tenders like road construction. In conclusion it will be a requirement that major construction projects will collect data on timber. For all other purchases there is the requirement for a monitoring of the implementation of the policy by the related public body having a system in place to check the compliance with the policy. Focus is not on the amount but on ensuring sustainability.

The implementation of the **Belgian** policy has been evaluated in 2008 by ProForest looking at the policy and the criteria as well as interviewing key players of the Federal Administration and working with questionnaires: 58% of the respondents find the policy difficult to understand mainly because they are not familiar with forestry certification schemes and with the policy as such including the uncertainties on its applicability. Also the two positive lists turned out to be difficult to implement in practice. 55% are actively implementing the policy. A majority feels that the policy is rather easy to implement due to the mostly applied certification schemes FSC and PEFC. There is no experience with equivalent means of proof. But also almost 60% state that they would need more support to implement the policy mainly through assistance and training to better understand the system.

Over all evaluations have usually led to recommendations for the simplification of approaches, improvements in the clarity and practicality of procedures and guidance, better integration of sectoral policies into over all public procurement policies and the revision of procurement criteria and requirements for proof of compliance.

Guidance

UK has the most detailed guidance for implementation of timber procurement both to central and local governments (<http://www.cpet.org.uk/toolkit/>): The Central Point of Expertise on Timber CPET provides information on the UK's timber procurement policy and how to ensure compliance. To do so a helpline and a website is maintained containing i.a. all reports and assessments on national and international criteria for sustainability. CPET also runs an awareness campaign to inform buyers about compliance with the procurement policy. Major task is to support implementation and assess evidence of compliance. The services are open to all public buyers and suppliers/contractors free of charge.

Denmark has since mid 1990ties develop almost 50 products specific guidelines on green procurement, covering a broad variety of products, many containing wood and language on legal and sustainable timber. Following up on a separate political focus on demands for verified legal and sustainable timber, specific timber procurement guidelines have been developed on top of that. The first set of guidelines of 2003 covered tropical timber only, whilst the current and updated ones of 2010 covers all kinds of timber. They identify different

types of user groups (harbour construction, engineers with different needs etc.) and aims to provide targeted guidance particularly addressing the needs of those different groups.

Belgium is planning to develop appropriate guidance in the future. An assessment in the **Netherlands** identified that little knowledge on certification schemes and the importance of buying sustainably produced timber exists. Therefore public buyers are offered support in the form of training, brochures and a helpdesk.

Schemes under development

Finland finalised a national public procurement policy for wood-based products in June 2010, Austria, Italy, Lithuania, Luxembourg and Spain are planning or considering implementing a national TPP. Sweden is also in the process of developing generic national sustainable public procurement criteria for wood-based products. The following country cases were presented:

In **Lithuania**, a national green public procurement programme has been developed in 2008 aiming to inform about and support GPP as well as monitor its implementation. By 2010 a 25% sustainable procurement target should be reached. While an overall scheme on wood and wood based products has not been developed so far, as one out of 11 products, criteria for paper and paper products have been set. Experiences on procurement of paper products may be helpful in the development of the criteria for wood and wood based products. Related criteria have been derived from FSC and PEFC which will be used besides others also as means of proof. The system is facing lack of suppliers probably due to too high requirements or underdevelopment of the market.

The National Forest Administration in **Luxembourg** started the initiative to draft a public procurement policy at governmental level together with NFP stakeholders and national certification bodies and by the end of 2008 an informal agreement was achieved about the possible procurement system resulting from political pressure of the parliament.

The system itself was elaborated with orientation towards other existing systems abroad in order to build on lessons learned, avoid shortcomings and to create an easy to use system.. Both legality and SFM should be considered. The idea was just to require certified timber to forgo the formulation and establishment of a new set of criteria for SFM. The basic elements of the prospected system consisted of a broad product scale including timber, wood products and paper with progressive implementation. It should be applicable to all public services also with a possible progressive implementation. Concerning the specification of the subject matter it stated that timber and timber used in wood products has to originate from forest with an independent third party certification. Only two sets of criteria were foreseen: One on the standard and one on the certification scheme and chain of custody. The criteria towards the certification systems and of the chain of custody were about participation, transparency, equitable decision making, traceability and independent accreditation of the certification organizations.

However, the process was halted as a Commission assessment came to the conclusion that the intended scheme does not comply with EU procurement rules: The major reason for making the prospected system incompatible with procurement rules was requesting for independent third party certification as it is not related to the subject matter. The subject matter of the contract would be sustainable timber, therefore its not possible to ask exclusively for certified wood. Contracting authorities cannot require a specific certification scheme. All interested buyers must have access to the market and all kinds of proof have to be accepted. It is up to the contracting authority to ask for more information if the means of proof isn't detailed

enough. In addition, criteria used should be defined in an objective, transparent and quantifiable manner.

In **Sweden** in the year 2007 a working group of representatives of forest industry, forest owners, eNGOs and observer from Dept for Agriculture started to develop generic Swedish GPP approach to wood based products. Guiding principles for development were that the criteria should not disfavour wood based products versus other competing material, be transferable to other materials and as easy as possible to implement.. The scope in the first step of the process comprises legal compliance and acceptable sourcing.

Legal compliance in operational language means management units that hold legal use or tenure rights, pay all taxes and fees applicable to forest management; comply with all local regulations and national laws applicable to forest management, environment, labour and welfare, health and safety, and other parties' legal tenure and use rights, comply with ILO's core conventions, comply with the provisions of CITES and implement appropriate mechanisms for consulting and resolving disputes with local stakeholders, and for ensuring that local legal and customary rights are not relinquished without free, prior, informed consent and adequate compensation.

The legality approach is inspired by the PP timber policies of a number of countries. It also combines national and international perspectives (legislation, international agreements) and assumes that relevant social criteria may be included.

Acceptable sources mean legal sources where High Conservation Values are not threatened, the natural ecosystems are not converted to plantations or other land use. The 'acceptability' approach has links to the FSC controlled wood, different commodity roundtables (e.g. roundtable on sustainable palm oil, RSPO), the bio-fuels standards, the EU Renewable Energy Directive and the EU Criteria on tissues or photographic paper. It also integrates the multi-stakeholder definitions and governance of the High Conservation Values (HCV) concept. Good definitions are crucial to make the partly quite general references in eco-label or some procurement policies more operational.

The implementing of the criteria includes the definitions of acceptable and legal sources in technical specifications of the procurement process.

The scope of second step comprises sustainable source and will start during fall 2010.

Concerning the verification of compliance, suppliers self declaration is given a quite prominent place. They would have to address the performance of the supply (the procedures in place used by the supplier itself) e.g. a 'due diligence' approach. A two dimensional risk analyses would be applied: Starting at the regional level and assessing a low regional risk (guidance is necessary for that, FSC and PEFC have such guidance in place) no additional verification is necessary. If the risk is unspecified or high compliance has to be verified at the forest management level unit. Third party audited criteria like through certification don't need any additional verification.

To simplify the implementation the buyers should use a standard template for contracts that include binding self-declarations from suppliers and also include that suppliers provide a description of potential verification mechanisms (list or outline). Such a list would be reported to a central unit which would be set up to administer controls. That body could also deal with the national implementation of the FLEGT Action Plan. The unit would also evaluate the list of evidence based on the scope of the schemes, the risks that exist in certain regions and how much wood is part of the contract. Various levels of intensity of control would be categorised. The control intensity depends on the risk levels and on the verification mechanisms.

A couple of issues are still open, like the lack of robust data on the number of contracts etc. Complementary mechanisms need to be in place especially when certification systems exist that do not cover all criteria. Communication, guidance and information also play an important role. The report on the scheme may form the basis for a proposal to the Swedish

government. A Swedish competent timber/resource expert body like the above described will be discussed and might be in place in 2011. The expert body might be part of the new action plan on GPP for 2011 – 2013 that the Swedish government will decide on in late 2010.

Italy does not conduct a self standing policy for the public procurement of wood and wood based products. Timber purchase is included in some priority products and services namely office furniture and construction materials, of the Italian Green Public Procurement national action plan (GPP NAP) which was adopted in April 2008. The GPP NAP is being implemented by a “GPP Committee” (an inter-ministerial working group) and by an “Advisory Board” which includes representatives from trade associations, scientists institutions and other stakeholders.

Unlike the EU GPP Toolkit, the GPP NAP does not identify “comprehensive” criteria, but only core ones. More advanced environmental performances of the products may be used as award criteria. Minimum Environmental Criteria are technical indications applicable to several categories (i.e.: eliminating the use of toxic products). They are linked to environmental and - where possible – social /ethic considerations and form the base elements to qualify for green products.

Consip, a public stock company, acts as an “awarding administration and contracting authority” that defines, implements and awards tenders on behalf of other Administrations (framework contracts). This includes the adoption of environmental criteria agreed by the main associations of the economic operators and formally adopted by the Ministry of the Environment (with a Ministerial Decree).

Environmental criteria for furniture, derived from ecolabels and standards worked out on an European level (Ecolabel, Nordic Swan, Der Blaue Engel) as well as International levels (ISO), focus on the origin and typology of wood (Assessment and verification). Bidder must provide a declaration, ensuring at least one of the following three options:

1) Wood coming from forests managed according to sustainability, 2) Use of 100% post-consumer recycled wood, 3) Combination of 1) and 2)

The declaration provided by the bidder must contain the following documents:

- 1) Certificate of Origin issued by the local supplier.
- 2) Export permit from the country of origin.
- 3) Documents certifying the ownership of the land and the granting of the right of use.
- 4) Documents certifying that local entities had granted the exploitation of land.
- 5) Any other document that demonstrates the contribution/commitment, social/environmental given by the producer in the country that supplies the raw materials

Certificates like PEFC and FSC are accepted as means of proof, while self declaration does not qualify.

In **Austria** after two rounds of consultations with different procurement agencies and stakeholder discussions the Action Plan for Sustainable Public Procurement has been adopted adopted by the Council of Ministers on 20 July 2010. It is mandatory for the Federal Administration (Ministries and subordinate agencies), recommended to the Provinces and municipalities.

The National Action Plan comprises core GPP criteria for 16 product groups. The following product groups for public procurement contain **requirements on wood**:

- **Fresh fibre paper**
- **Furniture**

- **Building construction (new buildings & renovation):** Timber
- **Indoor equipment:** Baseboards, construction boards made of wood and wood-based materials incl. laminate floors
- **Office materials**

The criterion for wood encompasses: **Wood and wood-based materials must be procured from legal and, if possible, from sustainable forest management.** (Wood and wood-based materials for furniture must be procured from legal forest management.)

Accepted systems of verification include:

- (a) Certificates for the traceability of the chain of custody for the wood certified according to FSC or PEFC standards and other equivalent certificates will be accepted as proof of compliance.
- (b) The legal origin of wood can also be demonstrated with a tracing system. These voluntary systems may be certified and are often part of ISO 9000 or EMAS management systems.
- (c) If wood stems from a country that has signed a Voluntary Partnership Agreement with the EU, the FLEGT licence may serve as proof of legality.
- d) If non-certified fresh fibres are used in production, the bidders shall indicate the types, quantities and origins of the fibres used in pulp and paper production, together with a declaration demonstrating that they originate from legal forest management. The wood shall be able to be traced throughout the whole value-added chain.

For the following product groups the National Action Plan includes also a special **recommendation for the use of timber:**

- Furniture
- Building construction (new buildings & renovation)
- Indoor equipment

For office materials, wood is to be given preference over plastics.

Annex A

(b) Implementation steps towards a public procurement policy – the UK approach.

The UK government took the approach to avoid procuring timber from illegal and controversial forest sources, by setting up and implementing a timber procurement policy.

This implementation can be identified in 6 steps:

1) Announce the policy

The policy was first announced in 2000 with a minimum requirement for purchasing legal with a preference for sustainable timber. In 2009 the policy was taken a step further and now demands that all timber and wood-derived products must be from independently verifiable legal and sustainable sources or FLEGT-licensed timber or equivalent only.

2) Define legality and sustainability and who and what the policy applies to

The UK Government developed a set of criteria defining legality and sustainability. See [UK Government Timber Procurement policy: Definition of legality and sustainability](#)

The policy applies to all wood and wood product (inc. paper, furniture and construction) and is mandatory for all Government departments, agencies and non-departmental bodies.

3) Develop a clear guidance on implementation of the policy for public sector buyers

Defra developed the Timber Procurement Advice Note (TPAN). See [UK Government's Timber Procurement Advice Note \(April 2009\)](#) for the most recent version.

A Commitment of sufficient expertise and adequate resources to enable effective policy implementation was identified. The UK Government achieved through the creation and resourcing of the Central Point of Expertise CPET service to bridge this gap.

4) Develop clear guidance on how compliance with the criteria can be achieved and ensured

- a. The Central Point of Expertise CPET was set up to provide support and guidance on implementation and compliance with the policy. CPET is a helpline, website, offers training and general support. All these services are provided free of charge to the public sector and their suppliers.
- b. Guidance documents developed by CPET on accepted evidence of compliance with the policy include

For certified timber and wood products:

- i. [UK Government Timber Procurement Policy: Criteria for Evaluating Category A Evidence](#) please see methodology approach described on the CPET website [here](#)

For non-certified timber and wood products:

- ii. [UK Government Timber Procurement Policy: Framework for Evaluating Category B Evidence](#) please see methodology approach described on the CPET website [here](#)

The above documents are all supported by handbooks detailing how to complete the associated checklists and how to evaluate risk through the supply chain and at the forest source:

[CPET Practical guides: Category B evidence, supply chain information](#)

[CPET Practical guides: Category B evidence, forest source information](#)

5) Raise awareness of the policy within the public and private sectors

- a. The UK Government is running awareness raising campaigns and
- b. Provides free training sessions via CPET across the country for the public sector and their suppliers and contractors
- c. Provides free support via the CPET helpline and website to the public sector and their suppliers and contractors

6) Monitoring the implementation of the policy

- a. The UK Government is investigating reporting requirements for all major construction projects and
- b. Monitoring requirements at different levels across the public sector is being implemented

The UK has had very positive feedback with this approach in avoiding procuring from illegal and controversial forest sources. This has been achieved with minimal amounts of resources but strong willingness and political support.

The UK Government would welcome the opportunity to share its experiences.

Annex A

(c) Stakeholder perspective on public procurement of wood and wood-based products criteria

Environmental non-government organisations (eNGOs)

After years of implementation of timber procurement policies, NGOs conclude that procurement policies can play an important role in pushing for sustainable forest management practices in the EU and at global level. But much more is still required. The EU needs to act to ensure that timber procurement policies across the EU further good forest management.

Public procurement and the discussion of what public procurement can and should address within the EU has been a subject for debate for a range of years now. Since the adoption of the EU Public Procurement directives in 2004, political changes in the EU took place that stressed more the importance of environmental matters within EU policies, both at EU and at Member State level. The discussions in the different EU Member states as well as in the Ad hoc working group on Public Procurement have shown that Public procurement, as envisaged today, has changed towards the way it was determined in 2004. This report has adopted the term of “Sustainable Public Procurement” in difference to “Public Procurement”. The difference between “public procurement” vs “sustainable public procurement” is such that public procurement per se is the way how public authorities do procure products that shall be used for public matters (e.g. school buildings, town administrations etc.). Public Procurement has to incorporate and address all legal aspects related to a product procured. Legality per se should not be a criterion for Sustainable Public Procurement but an underlying condition – as it should be a condition to enter the EU market.

From an NGO perspective, sustainability is a very important point regarding the EU commitments towards responsible procurement of natural resources, as stated in the EU 2020 strategy on smart, inclusive and sustainable growth.⁸⁹

Unsustainable forest management practices are today – even in Europe – still a reality. Case studies exist that demonstrate that there are even problems with illegal logging in the EU⁹⁰.

Based on the EU law governing public procurement, including the Treaties, the EU procurement directives and relevant case law, there it is legal ground to conclude that all three pillars of sustainability are linked to the subject matter of a contract for the procurement of legal and sustainable wood or wood products. Therefore, social aspects relating to sustainable forest management should be taken up in the technical specifications or award criteria. Environmental NGOs advocate a debate to clarify this understanding as well as other requirements of EU procurement law. NGOs have researched and analysed the requirements of EU procurement law and are contributing this analysis to the debate on controversial issues in order to resolve these controversies. Furthermore, NGOs insist that the European Commission, for its part, provide sound legal argument grounded in ECJ jurisprudence to support its assertions about the requirements of EU procurement law.

⁸⁹ <http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf>

⁹⁰ http://bspb.org/show2.php?id=1442&menu_id=37

NGOs advocate for ambitious sustainable timber procurement policies as well as greater harmonization of policies throughout the EU. From the NGO point of view, the objective should not be to compromise on the lowest level but to harmonise upwards.

Sustainability standards should be suitable to assess minimum performance standards at forest management level and the standards should be used in the context for which they were developed. Sustainability criteria have to be linked with stringent verification tools in order to properly check the impact on the ground. To define common or harmonized criteria and indicators for Sustainable Public Procurement, principles and criteria of Forest Europe (former MCPFE) as defined in their PEOLG (Pan European Operational Level Guidelines), could form a basis for the discussion, but there are shortcomings: the criteria were created for reporting on national level and not for forest management unit level, and are therefore not suitable for verification of sustainable forest management at unit level. The monitoring and implementation of those has proved difficult over the last years with very mixed results.

The role of Voluntary Partnership Agreements “VPAs” still needs further follow up within the debate on Sustainable Public Procurement. In its briefings, the European Commission refers to Voluntary Partnership Agreements in the following way: “VPAs aim to contribute to timber-producing countries’ commitments to promote sustainable forest management by supporting improvement in forest law enforcement and governance.”⁹¹ However, it states as well in the same briefing that: “These agreements are designed ultimately to eliminate illegally-produced timber from a Partner Country’s international and domestic trade”. Although addressing governance and social issues underpinning illegal (and potentially unsustainable) forest use are among the aims of FLEGT,⁹² and the role of the VPAs within the context of sustainable forest management is specified in all signed VPAs,⁹³ it is important to note that no agreement is currently operational. Even though VPAs are to date addressing governance or social problems related to the forest sector, the focus on governance and sustainable forest management has to remain at the centre of efforts in VPA implementation. Therefore, it should be further debated how the monitoring of Voluntary Partnership Agreements and of VPA achievements in governance reform and sustainable forest use should be treated within the framework of Sustainable Public Procurement, and how EU policies will continue to support the efforts of civil society and partner country governments in improving the way they use forests.

⁹¹ http://ec.europa.eu/development/icenter/repository/B2_Flegt_Br6_2007_en.pdf

⁹² The Council Conclusions on FLEGT (OJEU 2003/C 268/01), endorsing the Commission’s FLEGT action plan, acknowledge specifically that “forest law enforcement, governance and trade needs to be addressed within the framework of sustainable development, sustainable forest management and poverty reduction, as well as social equity and national sovereignty.”

⁹³ The three signed VPAs with Ghana, Republic of Congo and Cameroon state as objective of the agreement to provide the legal framework to support the commitment of the parties to the sustainable management of forests.

Forest owners view on the sustainability criteria of EU green public procurement policy

The basic objective of the EU public procurement policy is to enhance free movements of services and goods by eliminating trade barriers. At the same time public procurement policy aims at guaranteeing equal market access to all suppliers and raw materials. These underlying principles form also the foundation of EU green public procurement together with environmental aspect. Forest owners see that the success and functioning of green public procurement can be assessed against these basic principles.

Unfortunately we have lately witnessed on Member States level a diversified policy development on GPP for wood and forest based products. As a result of varied national approaches to legality or sustainability of wood forest producers are faced with an incoherent and arbitrary framework for GPP within the EU. Therefore forest owners call on the Commission to take the lead by providing coordination towards an EU-harmonised framework for GPP. Commission's intention to increase cooperation between member states is warmly welcomed but more concrete actions should be presented to illustrate how Commission is about to fulfil these goals.

Consistency is not only needed between MS policies but also in all EU policies setting sustainability or legality requirements on forest and forest-based products. Forest owner can not decide or even know the end use of his wood. From the same forest and even from the same tree different parts go to different uses. All a single forest owner has to know and be responsible for is the sustainable management of his forests. Thus it should be obvious that the same sustainability criteria should be used regardless the end-use of wood. This means that all forest-related policies in the EU - such as GPP, RES, FLEGT - should base their sustainability and also legality requirements on a commonly accepted definition and criteria of sustainable forest management.

Since all EU Member States as well as the European Commission are signatories to the MCPFE process - today known as Forest Europe- its sustainability definition and criteria and indicators for sustainable forest management are a natural basis for GPP. Forest owners want to stress that the criteria and indicators created under the auspices of Forest Europe are built on the highest possible base of scientific and government agreement. However, to enhance their use in GPP an analysis is needed to illustrate which criteria and indicators are related to environmental characteristics and to subject matter of the contract.

Besides their own national needs Member States have also international obligations to verify and report on the sustainable forest management. Since most Member States have reliable and functioning governmental tools for verification these should be used also in the context of GPP. As a voluntary market tool certification can not replace laws, administrative procedures and parliamentary processes. Therefore forest owners are worried about the willingness of some Member States to use forest certification as a primary tool for verification. Forest certification schemes should be treated exactly as they are, namely voluntary market mechanisms. Certification can be used as a supplementary or optional tool to verify the sustainable origin of timber but never as obligatory measure..

From forest owner's perspective also the current trend to compare and assess different certification schemes against varying national or even regional standards is confusing. Since all EU Member States and the EU are signatories to the MCPFE / Forest Europe process (as

mentioned before) it would be natural to use these criteria and indicators. There is an urgent need for EU-wide, objective criteria against which to assess the eligibility of different certification schemes as a verification tool.

Practical cost-efficient means of proof need to be developed. The GPP policy should help the public authorities to compare easily the different options and to select the environmentally friendly ones as well as award those forest producers who really invest in SFM.

Forest owners support the principle of green public procurement to enhance sustainably produced and environmentally friendly products and services. As a producer of sustainable and renewable raw material wood forest owners in the EU have the right to expect that GPP would support the use of wood. It is of great importance that inconsistent and complex GPP regimes do not lead to a situation where a renewable product, with such green credentials as EU produced wood, is handled unequally compared to other products and raw materials.

A fair approach should be taken, which assesses the sustainability and legality of all possible products in a product group thus providing a level playing field for different raw materials. Comparable criteria should be applied to all materials in a product group. The criteria for all raw-materials should cover the same basic requirements of sustainable raw material production and traceability. Setting requirements to one raw material or product only can lead to unwanted substitution effects where purchasers discriminate wood due to its more complicated purchasing rules and higher transaction costs in public tendering.

In order to develop green public procurement into a real environmental friendly initiative the focus should be turned from sustainable raw material production into the sustainability of the whole life-cycle of the product. Production of raw-material is only one part of raw product's environmental impact and a policy concentrating on this part only is fully ignoring the damages caused to environment during processing, use and disposal phases. Therefore GPP should include also criteria relating to renewability and recyclability of the product, energy efficiency during the processing and use of a raw material as well as carbon sequestration and emissions.

Forest-based Industries position on sustainability criteria and means of proof in public procurement for wood and wood based products

Green Public Procurement is defined as "the approach by which public authorities integrate environmental criteria into all stages of their procurement processes, thus encouraging the spread of environmental technologies and the development of environmentally sound products, by seeking and choosing outcomes and solutions that have the least possible impact on the environment throughout their whole life-cycle". The focus is clearly laid on environmental aspects.

Green public procurement can be a useful tool to prove that the forest based industry (FBI) in the EU can combine in an exemplary way competitiveness and sustainability. Public procurement is developing rapidly and can be a potential powerful instrument. The industry will be responsive and provide the consumer – public or private - with the products which are wanted fulfilling different demands: if there is a demand for green and sustainable products the industry will deliver. The industry believes that the market rules and the customer demands always work towards the right balance. The governments have two roles to play– on the one hand as policy makers they are setting the framework conditions for economic activities, on the other hand they are market partners, when purchasing goods and services. But they are not standard customers, because they are buying with tax payer's money.

The forest based industries expect from the Commission and MS to start greening public procurement from the perspective of the most environmental harmful products that are put on the market (first the fossil-based and non or slowly renewable products) and to acknowledge and promote renewable products versus non-renewable products. There is also a need for equal treatment among the different raw materials/resources: currently it seems that timber and timber products are the only category where "green" criteria would be applicable not only at the use and disposal phases (which is the case for all the manufactured products), but to the raw material extraction and the processing phases as well. The same sustainability requirements should be applied as well for wood for energy. This was not the case from the very beginning of the discussion on renewable energies in Europe and still the recent report to be reconsidered in 2010 only makes recommendations to the Member States. Paper and wood products from third countries should be treated equally as the domestic paper and wood production in the EU. The FBI request clarity on the margins of Green Public Procurement in the use of social criteria, the application of eco-label schemes and criteria not related to the subject matter of the contract. (e.g. forest certification and content of recycled material in wood products). Existing margins exceed legal requirements giving a lot of the room for interpretations thus creating uncertainty. The forest based industries expect a harmonised European approach to Green Public Procurement in the single European Market, improving the comparability of different national approaches.

Green public procurement contains a policy, a legal, a market and a technical dimension. These four dimensions need to be addressed together, in an integrated and balanced manner. Unclarities in the EU legislation (e.g. EU Directive 2004/18/EC, EU Handbook "Buying Green", Communication on "Public procurement for a better environment", FLEGT) and differing national approaches create uncertainty for the economic operators. The industry also is concerned that certain implementation policies of public procurement at the moment are actually resulting in discrimination of certain materials namely wood and paper. It is not easy to explain why the requirements in public procurement are only focusing on paper and wood products and not looking on the impacts in the production/extraction and processing of other

raw materials. It has also to be questioned why social criteria should be required besides environmental criteria in public procurement.

The Commission is being requested to provide legal clarity. In the view of the industry an EU-wide Green Public Procurement policy should be proportionate (balancing the requirement, the economic value and the desired objective of the buyer) and transparent (accessible for and verifiable by everyone), i.e. people should be aware of the content. All bidders should be treated equally (equitable). The requirements have to be realistic and achievable (workable). A Green Public Procurement policy should also be non-contentious, open for continuous improvement and based on commonly accepted and "ratified" principles (e.g. MCPFE). In that respect, both FSC and PEFC certificates and other evidence should be accepted and the principles have to be compatible to a single-Market and WTO rules to avoid difficulties in these areas.

When talking about sustainability the FBI basically refer to all the three pillars of sustainability. However, when talking about Green Public Procurement the focus is on greening, therefore it should be started with environmental aspects before expanding to other aspects. If sustainability is the intention, then the economic sustainability has not been addressed so far in the debate besides environmental and social aspects. Then the FBI would urge to reflect the full range of sustainability in the definitions, taking the fact that the greening and environmental criteria in public procurement in general form only one aspect. Also, the expertise of public buyers might be rather low, hence possibly leading to making the easiest (and not the best) purchase decision if the criteria used are not as simple and easy to interpret as possible to be rightly understood. Another problem seems to be how to weight different criteria – economic, social environmental - and how it can be assured that the criteria are not discriminatory.

ANNEX A (d)**An LCA approach for comparing legality with sustainability aspects of wood and wood-based products (ex. DG ENTR⁹⁴):**

Legality and sustainability are often seen as a progression, with legality even being regarded as a first step towards sustainability. In fact their relationship is much more complex. Using the time dimension enables a more complete view of their complex relationship and could facilitate their integration into an LCA-based approach to PPP.

Diagram A shows the “natural” life-cycle phases of wood & wood-based products and some of the legality and sustainability aspects which occur in each. This shows that there are overlaps and gaps between legality and sustainability. Therefore, they cannot logically be considered as a step progression, except perhaps in certain cases. Thus, they should in any case be regarded as complementary and could even be considered (in a simplistic way) as equally valid and viable alternatives in the context of PPP. Ideally, it should be agreed which factors from either/both should form the basis of e.g. technical specifications, award criteria, etc. In any case, a possible approach could be to set a limit on the % of award points attributable to either legality or sustainability or an admixture derived from both. This could not only help avoid discrimination against legal timber, such as that from FLEGT VPAs, but moreover put the origin phase of wood into perspective as regards an LCA approach.

To permit an LCA-based approach to PPP, life-cycle phases and their boundaries need to be agreed, as well as the criteria to be used for each. This would help move the focus of PPP/GPP away from the origin of raw materials, such as wood, by also looking at the other, downstream, life-cycle phases. A first attempt to do this is shown in **diagram B**. (NB This uses the “classical” LCA phases, but thus groups the forest growth phase together with the harvesting and trade phase, which were shown separately in diagram A. This fudges much of the distinction between legality and sustainability. However, it does permit an initial appreciation of the use of LCA parameters and their possible means of proof.

LCA criteria should be functionally rooted (performance-based) and their parameters need to be measurable, so as to permit fair comparisons between products of different materials. One tool which could help to set them is the environmental product declaration (EPD), which should provide neutral, science-based information about like products. LCAs and EPDs are a relatively new field, without a standardised approach. Therefore, their use needs to be done on a step-by-step basis but a phased timetable could be established, building criteria as and when methodologies become established.

⁹⁴ This annex is an extract of informal work in progress at the time of the last meeting of the SFC WG on Wood and Wood-based Products Procurement. It does not necessarily represent a view or opinion of either DG Enterprise & Industry in particular or of the European Commission in general. It is presented to help demonstrate indicatively the complexity of the legality/sustainability relationship, but does not necessarily reflect a consensus view of the WG

A. Incidence of sustainability and legality aspects over a life cycle of wood (including its growth) and wood-based products:

| Growth of forest (rotation) | Harvest and trade of wood | Wood processing | Use of wooden products | End-of-life |
|---|---|--|--|--|
| <p>SUS</p> <p>◀ SFM ▶</p> | <p>TAI</p> <p>?Sustainability?</p> | <p>NAB</p> <p>Sustainable design and processing</p> | <p>ILI</p> <p>Sustainable use (e.g. low energy)</p> | <p>TY</p> <p>Recovery, re-use, recycling, energy recovery</p> |
| <p>LE</p> <p>Legal title Legal compliance with management requirements</p> | <p>GA</p> <p>Legal harvesting and trade: e.g. Regulation 995/2010:</p> <p>rights to harvest timber within legally gazetted boundaries;</p> <p>payment for harvest rights, including duties related to timber harvesting;</p> <p>timber harvesting, including environmental and forest legislation and bio-diversity conservation where directly related to timber harvesting;</p> <p>third parties' legal right concerning use and tenure that are affected by timber harvesting;</p> <p>trade and customs, in so far as the forest sector is concerned.</p> | <p>LI</p> <p>Legality (health & safety? ILO?)</p> | <p>T</p> <p>Legality e.g. conformity with product standards, such as those relating to the Construction Products' Directive (Regulation).</p> | <p>Y</p> <p>Legality: e.g. conformity with the waste directive, such as avoiding land-fill.</p> |

B. Indicative allocation of life-cycle phases and their parameters to wood and wood-based product

| <u>LCA phase</u> | <u>Raw material production:</u> Growing of wood in forest | <u>Processing:</u> (including: wood harvest, , packaging, transport & distribution) | <u>Use:</u> (including useful working life of wood (product) by final consumer | <u>Post-consumer phase</u> Direct decomposition → Full carbon release Sustainable recovery: - re-use → Slow release - recycling → (Optimal carbon footprint?) Energy recovery → Full carbon release | | |
|--|--|--|--|--|--|--|
| LCA criteria and indicators, and/or other LCA/EPD information | E.g. carbon storage Increasing to maximum E.g. processing energy - v.low E.g. Methane storage/release | Slightly decreasing Low – moderate Low -moderate | Negligibly decreasing Low – high Low-high | Releasing at different rates: Low - high Low-high | | |
| Incidence of sustainability/legality/responsible production: (including consequences) | SFM Responsible production (RP) Legal forest ownership and management | Sustainable design and processing | Sustainable maintenance and use | Sustainable disposal Land-fill tax Emissions Other than CO ² ? | Sustainable re-use/recycling/energy recovery | |
| Acceptable means of proof: (including alternatives) | SFM, RP: forest certification; EPDs Legal forest mgt: Land title/gazetting/ forest plan/felling licence, EPD | SFM, RP, legal: C-o-C certification EPDs Alternatives? | SFM, RP, legal: C-o-C certification EPDs? Alternatives? | C-o-C EPDs? | C-o-C EPDs | |

Annex B

a) Abbreviations

CBD: Convention on Biological Biodiversity by the UN

C&I. Criteria and indicators

CEN: European Committee for Standardisation

CITES: Convention on International Trade in Endangered Species of Wild Fauna and Flora

CoC: Chain of custody

EC: European Commission

EMAS: EU Eco-Management and Audit Scheme

EPD: Environmental product declaration

FBI: Forest-based Industries

FE/MCPFE: Forest Europe, formerly Ministerial Conference for the Protection of Forests in Europe

FERN: Forest and the EU Resource Network

FLEGT: Forest Law Enforcement, Governance and Trade

FSC: Forest Stewardship Council

GMO: Genetically modified organism

GPP: Green public procurement

ILO. International Labour Organisation

ISO: International Organisation for Standardisation

ITTO: International Tropical Timber Organisation

LCA: Life-cycle analysis

MS: EU Member States

NFP: National Forest Programme

PEFC: Programme for Endorsement of Forest Certification

PP: Public Procurement

PPP: Public procurement policy

SFC: Standing Forestry Committee

SFM: Sustainable forest management

SRPP: socially responsible public procurement

TPP: Timber procurement policy

UNCED: United Nations Conference on Environment and Development

UNECE: United Nations Economic Commission for Europe

VPA: Voluntary Partnership Agreement

WPP: Wood procurement policy

Annex B**b) Working Group members and meetings list****SFC ad hoc working group on public procurement of wood and wood-based products***Members of the ad hoc working group***1. Member State Representatives**

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3. External presenters to the Working Group

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|------|------------------------|
|------|------------------------|

| | |
|-------------------|--|
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List of meetings

| <u>Date</u> | <u>Content</u> |
|--------------------------|--|
| 31 March 2009 | Terms of reference, work programme |
| 29 May 2009 | National experiences; criteria addressing sustainability which comply with public procurement rules; Relationship between criteria and indicators for sustainable forest management and sustainability criteria that are suitable to be included in public procurement; social issues in timber procurement policies |
| 18 September 2009 | National experiences, forms of proof of compliance with sustainability criteria; certification of sustainability or verification of legality |
| 04 December 2009 | National experiences, sustainability criteria and means of proof in public procurement for wood and wood based products; Criteria and conditions for "legal timber" suitable for use in tendering procedures; first draft outline on criteria addressing sustainability which comply with public procurement rules |
| 12 March 2010 | Policy update from MS; impact of public procurement of wood and wood-based products on the competitiveness of wood and wood-based products versus other materials; the principle of life-cycle assessment as a part of public procurement of wood and wood- |

| | |
|--------------------------|--|
| | based products; 1 st discussion draft final report(Chapters 4a,7a,7c) |
| 25 August 2010 | Policy update from MS; discussion of the draft final report |
| 12. November 2010 | Policy update from MS; final discussion of the draft final report |

Annex B

c) Terms of reference of the SFC ad hoc working group on public procurement of wood and wood-based products

Background

During the 106th meeting of the SFC on 1st October 2008, members of the Committee expressed their interest in establishing an ad hoc Standing Forestry Committee (SFC) Working Group (WG) on public procurement of wood and wood-based products. The possibility to set up working groups is laid down in Article 7 of the rules of procedure of the SFC (AGRI/2001/53015/02 EN).

The exchange of views on the application of rules and procedures from the public procurement (PP) directives to wood and wood-based products was placed on the agendas of the SFC meetings held on 30th May and 20th July 2007. In the context of implementation of the EU Forest Action Plan (FAP), two workshops were organised on the subject in 2008. One - on public procurement policies for timber - was organised in Copenhagen by the Danish Ministry of the Environment and Chatham House (Royal Institute of International Affairs) and took place on 7-8th April. Another workshop - on public procurement policy on wood and wood-based products - was organised by the European Commission in Brussels on 13th June.

On 16th July 2008, the Commission adopted the Communication on Public Procurement for a Better Environment (COM (2008) 400). The Communication provides for a process of co-operation with the Member States, aimed at setting common criteria for use in green public procurement (GPP) for a series of identified priority sectors. Out of these four sectors (construction, paper, furniture and energy) are relevant for wood and wood-based products.

Objectives and scope of work

This WG will contribute to the implementation of Key Action 17 of the FAP. Activity 17.2 of the work programme for implementation of the FAP calls for an exchange of experience between the Member States, Commission services and stakeholders on developing guidelines for application of the public procurement directives to forest products. According to the work programme, this exchange of views should serve to achieve better compatibility between different approaches applied in the Member States, and also support the EU FLEGT Action Plan.

An overall objective of this WG is also to promote the active participation of more EU Member States in the discussion on public procurement (PP) of wood and wood-based products. The WG contributes to the follow-up of the Commission Communication on Public Procurement for a Better Environment (COM (2008) 400), by providing input for the preparation of more detailed guidance for the application of the principles of green public procurement to wood and wood-based products.

Specific issues to be addressed by the Working Group include:

- How to apply the concept of "legal timber" in Green Public Procurement (GPP) and what means of verification of compliance with "legality" requirements could be used in tendering procedures, taking into account the draft regulation⁹⁵?
- How should sustainability be addressed in the different stages of a public tendering procedure for wood and wood-based products (i.e. in the technical specifications, the selection and award criteria and/or in the execution clauses)?
- What is the relationship between criteria and indicators for Sustainable Forest Management (hereafter **SFM Criteria**)⁹⁶ on the one hand, and sustainability criteria that are suitable to be included in public procurement of wood and wood-related products (hereafter "**PP Sustainability Criteria**" on the other hand, also taking into account ongoing discussions and possible proposals concerning sustainability criteria for woody biomass for energy?
- How to avoid discrimination and distortion of competition between raw materials and products with and without legality and/or sustainability requirements in public procurement procedures? How to apply the principle of Life Cycle Assessment for wood-based products?
- What forms of proof of compliance with Sustainability PP Criteria could be included and how should they be applied in tendering procedures?
- How to use existing certification schemes and/or "any other equivalent means of proof" as proof of compliance with Sustainability PP Criteria? How to assess these other means of proof?

The above questions should be addressed within the existing framework of EU public procurement. The work should help to clarify the relations between sustainability criteria that may be applied in public procurement (Sustainability PP Criteria) and those applied to SFM (SFM Criteria) as well as those used in other related contexts, in particular renewable energy.

The above list of issues and objectives to be addressed by the WG is not exhaustive. The group itself may propose additional elements of the subject to be considered. It will take into account outcomes of the ad hoc expert meeting of legal and sustainable timber, 26th January 2009⁹⁷. The work in the WG will be co-ordinated with similar developments in other frameworks (e.g. eco-label, bio-energy).

Mode and timing of work

⁹⁵ Draft regulation laying down the obligations of operators who place timber and timber products on the market

⁹⁶ Such as the Criteria and Indicators endorsed by the Vienna MCPFE (2003) to report on the Pan-European Operational Level Guidelines for SFM (PEOLG) that were adopted at the Lisbon MCPFE (1998) – see also background information

⁹⁷ Preparatory meeting with a limited number of GPP experts who have experience with national or international policies in the field of procurement of sustainable and/or legal timber in order to provide general guidance for the SFC WG.

The WG will be composed of experts nominated by the members of the SFC and several Commission representatives from relevant Commission departments. The working group should seek appropriate coordination of their positions with other working groups and processes (e.g. the respective national representatives in the Public Procurement Consultative Committee (CCMP) and in the expert group on Green public procurement (GPP expert group) in order to avoid overlaps, ensure coherence and consistency and benefit from work already done.

The Advisory Group on Forestry and Cork and the Advisory Committee on Forestry Policy and the Forest-based Industries will be invited by the Commission to nominate experts representing forest-based sector stakeholders, who will also contribute to the work of the WG. The Green 10 (group of major environmental NGOs with representation in Brussels) will also be invited to participate in the WG. The MCPFE Liaison Unit will be invited to nominate a representative to follow the work. The WG may suggest other experts to be heard on specific issues⁹⁸.

The mode and detailed timing of work of the WG will be decided by the group itself during the first meeting. The WG will hold from four to six meetings during a period of 18 months, starting in the first half of 2009. DG Internal Market (Unit C.3) from the Commission will be closely associated with the work and shall be the main point of contact for issues relating to the interpretation of EU public procurement legislation. In the process of work, the WG will periodically report to the SFC about progress, completing the work and presenting a final report to the SFC by the end of 2010.

All members are expected to contribute actively to the deliberations in the WG as well as by providing the necessary information. Meetings will take place in Brussels and will be chaired by the Commission; English will be used as a working language. To facilitate the work, the WG may appoint *rapporteur(s)*, who will aid the chairman in reporting back to the SFC and preparing the group's final report.

Travel costs will be reimbursed to the participants of the WG meetings according to the same rules and procedure as applied to those attending SFC meetings.

Expected outcome

This WG is intended to develop a better understanding of technical aspects of public procurement schemes for wood and wood-based products in the EU Member States and contribute to the guidance to be given by the Commission on the application of GPP principles to wood and wood-based products.

The outcome of work of this WG will be a report:

- Clarifying the concept of "legal timber" and its relationship with the PP Sustainability Criteria;

⁹⁸ Any conflict of interest between their function as experts regarding the subject matter to be discussed in this working group and their other occupations should be avoided.

- Clarifying the relationship between the criteria and indicators for SFM (SFM Criteria) and sustainability criteria that are suitable to be included in tendering documents (PP Sustainability Criteria), also taking into account ongoing discussions and possible proposals concerning sustainability criteria for woody biomass for energy;
- Providing guidance on criteria addressing sustainability which comply with public procurement rules (PP Sustainability Criteria) and proposing objective means to assess such compliance;
- Providing guidance on how to use existing certification schemes and how to assess alternative and equivalent means of proof, as compared witho e.g. FLEGT licences in the context of public procurement;
- Aiming to ensure that the PP procedures for wood and wood-based products are consistent with the voluntary nature of the means of proof, such as certification schemes, and with the principles of credibility, transparency, cost efficiency, open access and non-discriminatory character with respect to forest types and owners;
- Assessing the impact of technical specifications, selection and award criteria applied in GPP on the competitiveness of wood and wood-based products versus other materials;
- Clarifying how the principle of life-cycle assessment could be applied as part of the GPP requirements;
- Providing guidance to work towards better compatibility of national schemes and common frameworks in order to avoid market uncertainties.

Annex to the terms of reference: Background information.

Background information

Communication on GPP

The Communication on Public procurement for a better environment (COM (2008) 400 of 16th July 2008) provides for a process of co-operation with the Member States aimed at setting common criteria for use in green public procurement for a series of identified priority sectors. Four sectors (construction, paper, furniture and renewable energy) are relevant for wood and wood-based products. Criteria which are being developed should be compliant with public procurement legislation (Directives 2004/17/EC and 2004/18/EC) and therefore transparent, objective, verifiable and linked to the subject matter of the contract. Where individual materials, such as wood, are addressed within the context of several priority sectors, one coherent set of criteria should be developed. Where different materials can be used to serve the same purpose, criteria setting will take into account the possibility to increase the use of renewable substitutes where appropriate.

The accompanying Staff working document (SEC (2008) 2126) provides for specific legal and operational guidance, including a chapter on the procurement of wood and wood-based products. It discusses frequently used concepts of legality and sustainability and how these concepts may be used in the framework of a green procurement policy. In reference to the Forest Law Enforcement Governance and Trade (FLEGT) Action Plan, the document indicates that contracting authorities should require all wood to be legally logged (as a technical specification in supply contracts and a contract performance clause in works contracts) and to promote compliance with sustainability criteria (considered to better assure observance of environmental and social aspects of forest management than the implementation of the legality principle, by way of award criteria. To ensure compliance with public procurement legislation, only those specifications and criteria can be included which are related to the subject matter of the contract.

These recommendations are also included in the examples of green tender specifications for four product groups, including paper, as part of the Staff working document.

Open questions which require further co-operation with and among the Member States

Which criteria/conditions for legally logged wood are suitable for use in tendering procedures?

To be in line with public procurement legislation, all conditions for contracting authorities to verify when checking compliance with the legality principle need to be linked to the subject matter; further discussion may be necessary in order to identify those that can be used in tendering procedures.

– Proof of compliance with legality.

According to the recommended GPP criteria:

"Certificates of chain of custody for the wood fibres certified as FSC, PEFC or any other equivalent means of proof, will be accepted as proof of compliance. The legal origin of wood

can also be demonstrated with a tracing system being in place. These voluntary systems may be third-party certified, often as part of ISO 9000 and/or ISO 14000 or EMAS management system.

If wood stems from a country that has signed a Voluntary Partnership Agreement (VPA) with the EU, the FLEGT licence may serve as proof of legality.

For the non-certified wood fibres bidders shall indicate the types (species), quantities and origins of fibres used in the pulp and paper production, together with a declaration of their legality. As such, the fibres shall be able to be traced throughout the whole production chain from the forest to the product.

In specific cases, where the evidence provided is not considered sufficient to prove compliance with the requested technical specifications, contracting authorities may ask suppliers for further clarifications or proof."

There is a need to assess what other means of proof would be considered as acceptable.

- **Which award and selection criteria can be considered appropriate for use in tendering procedures?**

Commission services propose to co-operate with member state experts who have gone through the exercise of examining existing sustainability criteria (developed under various international certification schemes) and identifying which ones can be considered sufficiently objective, transparent, verifiable and linked to the subject matter (wood) in order to be considered compliant with public procurement legislation (UK, DK, NL, FR, BE, DE). The purpose of this work is to guide procurers with a series of simple, understandable, ready-to-use criteria. We should aim at not being exhaustive as regards the definition of sustainability criteria, but formulating or selecting the main relevant sustainability criteria for use in green public procurement.

GPP criteria are based on eco-label criteria which refer to the criteria and indicators endorsed by the Lisbon Ministerial Conference on the Protection of Forests in Europe (2 to 4th June 1998). Outside Europe, they shall at least correspond to the UNCED Forest Principles (Rio de Janeiro, June 1992) and, where applicable, to the criteria or guidelines for sustainable forest management as adopted under the respective international and regional initiatives (ITTO, Montreal Process, Tarapoto Process, UNEP/FAO Dry-Zone Africa Initiative. Those criteria relate to environmental aspects (appropriate enhancement of forest resources, maintenance of forest ecosystem health and vitality, biological diversity, production functions, protective functions) as well as to social and economic aspects (maintenance of other socio-economic functions and conditions). Criteria related to social and economic aspects would need to be closely examined for compliance with the EU public procurement rules.

The Commission's proposal for a directive on renewable energy (RES Directive) includes a proposal for a sustainability scheme for (a) biofuels for transport and (b) bio-liquids used in other sectors. It further provides that the Commission should, by 2010, report on requirements to extend the sustainability scheme to other energy uses of biomass (including biomass from wood). Co-ordinated action is necessary.

- **Proof of compliance with the PP Sustainability Criteria.**

"Certificates of chain of custody for the wood certified, such as FSC, PEFC, etc., or any other equivalent means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body will also be accepted."

It will be necessary to further refine what can be considered equivalent means of proof.

Example from European Eco-label criteria

For paper stemming from virgin wood fibres, the following core criteria are recommended:

Specifications

1. The virgin wood fibres for pulp production shall come from legal sources.

Verification

Certificates of chain of custody for the wood certified, such as FSC⁹⁹, PEFC¹⁰⁰, etc., or any other equivalent means of proof, will be accepted as proof of compliance.

The legal origin of wood can also be demonstrated with a tracing system being in place. These voluntary systems may be third-party certified, often as part of ISO 9000 and/or ISO 14000 or an EMAS management system.

If wood stems from a country that has signed a Voluntary Partnership Agreement (VPA) with the EU, the FLEGT licence may serve as proof of legality¹⁰¹.

For the non-certified wood fibres, bidders shall indicate the types (species), quantities and origins of fibres used in the pulp and paper production, together with a declaration of their legality. As such, the fibres shall be able to be traced throughout the whole production chain from the forest to the product.

In specific cases, where the evidence provided is not considered sufficient to prove compliance with the requested technical specifications, contracting authorities may ask suppliers for further clarifications or proof.

2. The paper must be at least Elementary Chlorine Free (ECF).

Verification

A technical dossier of the manufacturer will serve as means of proof.

Award criteria

Additional points will be awarded for:

⁹⁹ FSC (Forest Stewardship Council): <http://www.fsc.org/en/>

¹⁰⁰ PEFC (Programme for the Endorsement of Forest Certification): <http://www.pefc.org/internet/html>

¹⁰¹ <http://ec.europa.eu/environment/forests/flegt.htm>

Sustainable forestry sources: additional points will be awarded in proportion to the amount of virgin wood fibres for pulp production that come from forests that are verified as being managed so as to implement the principles and measures aimed at ensuring sustainable forest management, on condition that these criteria characterise and are relevant for the product. In Europe, these principles and measures shall at least correspond to those of the Pan-European Operational Level Guidelines for Sustainable Forest Management, as adopted by the Lisbon Ministerial Conference on the Protection of Forests in Europe (2nd to 4th June 1998) and endorsed by the Vienna MCPFE (2003). Outside Europe they shall at least correspond to the UNCED Forest Principles (Rio de Janeiro, June 1992) and, where applicable, to the criteria or guidelines for sustainable forest management, as adopted under the respective international and regional initiatives (ITTO, Montreal Process, Tarapoto Process, UNEP/FAO Dry-Zone Africa Initiative).

Verification

All products carrying the European Eco-label will be deemed to comply. Other national type I eco-labels fulfilling the listed criteria can also be accepted. Certificates of chain of custody for the wood fibres certified as FSC, PEFC or any other equivalent means of proof will also be accepted as proof of compliance. Any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body will also be accepted.