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State of Play of Fair Trade Public Procurement in Europe

September 2010
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The legal information in this document is accurate to the best of our knowledge and based on current practices. Guidance provided in this model is based on the European Union (EU) legal framework, but does not constitute an official interpretation of EU law. Contracting authorities wishing to purchase Fair Trade products are advised to follow specific national or regional laws or guidance documents on how to introduce Fair Trade in public procurement. EFTA does not assume liability for misinterpretations or implementation.

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Introduction

What is Fair Trade?

Fair Trade is an alternative way of producing and trading. The main difference with conventional trade is that concerns for social and environmental responsibilities represent an integral part of the transaction, with a North-South focus, and are at the heart of the system. Nevertheless, Fair Trade, as conventional trade, is a free market based system and complies with competition rules at international, EU and national level.

The Fair Trade movement was created with the aim of improving living conditions for small producers. Sales were originally limited to specialised “World Shops” and action groups. The creation of a certification (labelling) system, that permitted the introduction of Fair Trade products in mainstream markets and retail outlets such as supermarkets, permitted to boost Fair Trade sales significantly. Indeed, Fair Trade has expanded hugely in recent years, averaging 40% growth per year, reaching a retail sales value of EUR 2.4 billion in 2007, EUR 2.9 billion in 2008 and EUR 3.4 billion in 2009. Fair Trade bananas are estimated at 1% and coffee at about 4% of global sales of these products. Besides these flagship products that everyone knows, there are more than 1000 Fair Trade products that can be found in supermarkets or in specialised Worldshops, in sectors as varied as food, drinks, textiles, games, handicrafts, cosmetics etc.

A common Fair Trade definition was agreed in 2001 by the four international networks that, at that time, formed the Fair Trade movement, FLO\(^1\), WFTO\(^2\), NEWS!\(^3\) and EFTA\(^4\). It defines Fair Trade as:

“a trading partnership, based on dialogue, transparency and respect, that seeks greater equity in international trade. It contributes to sustainable development by offering better trading conditions to, and securing the rights of, marginalised producers and workers – especially in the South. Fair Trade organisations (backed by consumers) are engaged actively in supporting producers, awareness raising and in campaigning for changes in the rules and practice of conventional international trade.”

The two international Fair Trade standard setters, the Fairtrade Labelling Organizations International (FLO) and the World Fair Trade Organization (WFTO) agreed in January 2009 on a more developed definition based on common principles. The Charter of Fair Trade Principles\(^5\) provides a single international reference point for Fair Trade through a concise explanation of Fair Trade principles and the two main routes by which they are implemented:

- product certification Fair Trade route (otherwise known as Fairtrade product label) covering mostly agricultural products.
- integrated Fair Trade supply chain route (no product label / the Fair Trade certification is for organisations not products).

\(^1\) Fairtrade Labelling Organisations-International  
\(^2\) World Fair Trade Organisation (IFAT became WFTO in 2009)  
\(^3\) Network of European Worldshops  
\(^4\) European Fair Trade Association  
The Charter clearly shows that Fair Trade cannot be confused with the undefined concept of fair trade and with the various sustainable and ethical trade schemes that have developed in the recent years. The Charter also confirms that Fair Trade is not simply a label. While most Fair Trade agricultural products coming into Europe are Fairtrade-labelled products, the concept of Fair Trade goes beyond the product labelling initiatives. The Fair Trade organisations system is also a very valuable tool to ensure public and private buyers that products have been produced according to the Charter of Fair Trade principles.

This clear and unified definition of the concept of Fair Trade was necessary, as a growing proportion of European consumers are caring more and more about environmental and social considerations. These concerns reflect in their purchasing decisions, creating opportunities for ethical products, such as Fair Trade. Citizens’ awareness on the origin, conditions of production and traceability of the products that they decide to buy has significantly increased during the past years. In the UK, 70% of the population recognise the Fairtrade mark6, while 81% of French are aware of the Fair Trade concept7 and 84% of the Swedish people are familiar with the Fairtrade label8.

65 % of Fair Trade product sales in the world take place in Europe (including Switzerland and Norway). The main part of this is made up of certified products. But also Worldshops contribute largely to sales of Fair Trade products. They sold an estimated EUR178 million worth of Fair Trade products in 2007. 80 % of the 4000 Worldshops existing worldwide are concentrated in 15 European countries. Germany, Italy and the Netherlands host almost half of all Worldshops worldwide.

**Fair Trade and public procurement**

Public Procurement is an important sector of the European economy, currently accounting for around 16,3% of the European Union’s Gross Domestic Product (GDP). This purchasing power represents a huge opportunity to boost the sales of Fair Trade products and is an excellent way for public authorities to set an example and show their support to Fair Trade.

The citizens’ concerns used to be reflected in the public authorities’ priorities. Therefore, at EU, national and local level, public authorities and bodies are more and more aware of the importance of environmental, social and Fair Trade criteria, and tend to increasingly include them in their purchasing decisions.

On a technical level, public procurement is the process used by governments, regional and local public authorities or bodies governed by public law (financed, supervised or managed for more than 50% by public authorities) to obtain goods and services with taxpayer money. Different kinds of procedures exist, from direct purchase to EU ruled tenders, passing by open, restrictive or negotiated procedures of which detailed obligations vary from one EU Member State to another. Different thresholds, at national and EU level, define what the applicable rules are. In general, public procurement in the

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7 Figure available on [http://www.actualitesolidarite.com/achat/rubriques/com.htm](http://www.actualitesolidarite.com/achat/rubriques/com.htm)

EU is subject to Community and international rules. In 2004, the European Parliament (EP) and the EU’s Council of Ministers adopted a Legislative package of procurement Directives, which conditions the national rules on this topic, giving a common base to the 27 national rules managing public procurement in the Member States.

The possibility to use public procurement as a tool to support other policy objectives has been acknowledged in the EU Directives on public procurement of 2004, with the principle of most economically advantageous tender that allows taking into consideration other benefits than solely the price when awarding a contract. The importance of public procurement as a tool to support other objectives was confirmed by the Buying Green guide that very same year. Developed by the European Commission, it encourages public authorities to develop Green Public Procurement, in order to support the fight against climate change and environment protection. The inclusion of green criteria is still much more accepted and advanced than the one of social criteria, including Fair Trade. Nevertheless, those are also taken into consideration and the EC is to issue a Buying Social guide by the end of 2010.

The inclusion of other policy objectives into the purchasing one has a cost. Most of the time, products or services certified as green and sustainable, that bring social or Fair Trade guarantees, are more expensive than the “traditional” products authorities can buy to satisfy a similar need. Nevertheless, as the aim of an authority when buying Fair Trade coffee is not only to provide coffee in its offices, but to implement its development or sustainability policy, the extra cost that may result should be seen as an expense for this policy, and not just as an increase of public procurement budget. Moreover, this extra-cost reflects the internalisation of certain externalities, such as social costs. Therefore, when an authority considers introducing Fair Trade to its procurement, it should not consider it as a new cost, but rather as a transfer of a part of its aid to development or its sustainable development budget to the procurement one.

Public Affairs research

In the frame of the Public Affairs project, a 3 years project co-funded by the European Union which aims at mobilising action for Fair Trade public procurement (FTPP), EFTA and its partners (IDEAS, Ctm-Altromercato, Oxfam-Wereldwinkels and ICLEI) have studied the European situation of FTPP. This research permitted to build a European Model on Fair Trade Public Procurement (FTPP). This Model will guide public authorities on how to include Fair Trade criteria in their purchasing procedures and will indicate targets towards purchasing in a Fair Trade manner.

This research also helps to get an overview of Fair Trade Public Procurement practices in the European countries (at local, regional and national level), and to identify the best practices, the existing barriers to Fair Trade Public Procurement, and the lessons that can be learned from the current situation to overcome them.

The research studies political, legal and practical aspects of FTPP at EU, national, regional, and local level, in order to draw recommendations on how the situation could be enhanced. Political commitments to Fair Trade and FTPP that could be collected were studied and analysed, within the different EU institutions, as well as in the EU Member States.
More than the political will, essential as it is in order to use FTPP as a tool for sustainable development, the legal frameworks, the rules surrounding FTPP had to be assessed. An overview of EU clauses, national, as well as regional laws, were analysed in order to determine the possibilities to include Fair Trade criteria into public procurement procedures.

In order to assess FTPP practices, 2 tools have been developed:
- A questionnaire which has been distributed mainly by electronic means, e.g. through e-mailings and the Observatory’s on FTPP website;
- A template for case study analysis and systemisation of the inclusion of Fair Trade criteria in tender documents.

Unfortunately, these tools have not permitted to collect as much information as expected, for the following reasons:
- The language barrier at national and local level has been a huge obstacle to collect information (in every concerned field).
- The spending of public money continues being a delicate topic for public administrations, which are not always willing to share their data.
- Due to a lack of resources, questionnaires and requests of information on other aspects were circulated either directly or through the project’s partners (when possible), or through our network of Fair Trade Organisations and contacts. The involvement of such a variety of actors, with such a different level of commitment towards the project and the topic of the study resulted in very different methods of data collection and very differentiated results.

As the method used to collect the data influences the results, the data we collected are delicate to incorporate, and makes it impossible to build proper statistics. Nevertheless, it permits us to get an overview of the FTPP practices in different countries and to benchmark them.

The data collected at political, legal and practical level all show that certain EU Member States are much more advanced than others in the FTPP field. These countries, located in Western Europe, will be highlighted more than others in the different parts of the research, as they are leaders that set examples for the others - these experiences deserve particular analysis.

The EU level will also get particular attention, as it is key in the frame of such a European research, especially considering that the research field is public procurement, a very integrated policy at European level.

Our description and analysis of the situation of Fair Trade public procurement in the EU will be divided into three thematic axes. First, we will determine and analyse the political framework of FTPP. In a second part, particular attention will be given to the specific legal framework of FTPP. Eventually, FTPP practices that were collected will be analysed in a third part. These different stages of analysis will permit us to draw conclusions on FTPP's current situation at EU level, to give recommendations on the action to be taken in order to enhance it, and to build an EU model on FTPP. The latter, with a particular highlight on legal aspects, will guide public authorities and interested organisations in using FTPP as a tool to support sustainable development through their purchasing policies.
I- The political environment of Fair Trade public procurement (FTPP) – a stronger local commitment, that is increasingly relayed at national and EU level

By nature, Fair Trade is a private scheme that has been developed by civil society, involving all stakeholders, including producers’ organisations from the South. The Fair Trade movement wants to avoid a public regulation of what Fair Trade is, in order to conserve the ownership of its criteria and the possibility of adapting them when necessary through a bottom up process including all stakeholders, including non European ones.

Nevertheless, it is essential for the development of Fair Trade awareness and of the public trust in its guarantees that public authorities recognise it as a reliable tool of sustainable development and poverty reduction, and value its criteria. When it comes to public procurement, it is even more crucial to have political willingness to recognise Fair Trade and its criteria.

Top level political commitment is a key element to develop FTPP. It can take on various forms, from a general strategy on sustainability built by the executive body of a public authority to a solemn commitment to Fair Trade and FTPP adopted by the legislative body. It can concern exclusively purchasing policies or be more general. The political commitments to Fair Trade, whatever form and scope they have, provide transparency to the greater public as well as within the organisation, and are the first step necessary to implement a purchasing policy that includes Fair Trade objectives.

In the following part, we will therefore study the political context of FTPP at national, regional and local level, before seeing how it is echoed at EU level.

A- A growing commitment of public authorities to Fair Trade and FTPP at national, regional and local level

During the past ten years, many European Member States recognised in their law, their plan of actions, or different kind of political declarations, that Fair Trade is a good tool to support development in the South. They often mention it in their programme or objectives for development policies, such as in the Whitepaper on Irish aid, which mentions Fair and ethical Trade under Aid for Trade policy for which it forecasts an increase in budget. They sometimes commit to financially support Fair Trade initiatives through their Aid for development budget, such as in Ireland where Irish Aid announced in September 2008 the allocation of EUR15 million for five years to fund Fair Trade and ethical trade in East Africa; or in the UK, where the government announced in October 2009 that £12 million would be allocated to finance Fair Trade initiatives for four years.

Beyond seeing a tool for development policy in the South, certain Member States also recognise Fair Trade as a sound and comprehensive tool for sustainable development.

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Therefore, at national level, Fair Trade is sometimes mentioned in laws or governmental instruments, and can be the object of more or less concrete political commitments that express support to Fair Trade, in various policies that include sometimes purchasing ones. Certain Ministries are also developing national guides on sustainable procurement that include Fair Trade as a good example of sustainable purchase, or as a specific practice of socially responsible purchasing, encouraging public authorities to switch to FTPP where possible.

**Support to Fair Trade at national level**

The EU Member States that claim their support to Fair Trade and FTPP in laws are not so numerous. Laws are one of the strongest types of commitment (symbolically) as they imply the vote of a democratically elected parliament. Through our research, we were able to list two countries, Spain and France, which inscribed their support to Fair Trade or Fair Trade public procurement in national laws.

In France, the law n°2005-882 of 2 August 2005 on Small Business dedicates its article 60 to Fair Trade. It expresses the fact that Fair Trade is fully part of the national strategy for sustainable development, which constitutes a clear and binding commitment at national level. It is reflected by the mention of Fair Trade in the Action plan for Sustainable development adopted by the government in 2007. As a result Fair Trade was also supported in the field of public procurement in 2009, with its inclusion in the Notice of information about socio-responsible purchasing developed by the Ministry of the Environment. It dedicates a part to Fair Trade and ethical trade, which aims at encouraging Fair Trade public procurement identifying barriers, promoting solutions to overcome them and exposing various examples of good practices.

As part of the implementation of the August 2005 law, a National Fair Trade Commission (CNCE) was also established in April 2010, under the responsibility of the French Ministry of Economy, Industry and Employment. Its members are a wide range of Fair Trade actors, Non-Governmental Organisations, retailers and public authorities. The objectives of this commission are both to clarify the situation of Fair Trade, as well as to raise awareness on Fair Trade. A “referential” that defines what requirements a Fair Trade certification should comply with has been adopted. The Commission also decided to set up a sub-Working Group on public procurement, with the goal to support public procurement of Fair Trade in France.

These different initiatives show the increasing commitment of French national institutions in favour of Fair Trade and FTPP.

In Spain, in December 2007, the Commission on International Cooperation for Development of the National Parliament called on the Spanish government to set up a Commission bringing together the government and the civil society in order to think about how to strengthen Fair Trade and increase Fair Trade public procurement. In 2008, the law 30/2007 on public procurement included the possibility to introduce social criteria in tenders, quoting Fair Trade as being one of them, which is a very clear support to FTPP at national level.

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Apart from Spain and France, other countries are supporting Fair Trade at national level, most of the time through governmental instruments.

In the United Kingdom, it is not the legislative but the executive power that stands for Fair Trade. The country has the highest consumption of Fair Trade products in the EU. Its government started substantially supporting Fair Trade products in August 2003 with the launch of the Public Sector Food Procurement Initiative (PSFPI). Its aim is to encourage public sector bodies to purchase food and manage catering contracts in a way that promotes sustainable development and opens up opportunities for local and national suppliers. Among the objectives of the PSFPI is for public authorities to seek from their suppliers fairly traded products.14

In Luxembourg, the governing coalition adopted the Luxembourgish Governmental Program in August 2009, expressing a clear commitment to FTPP, even if it could not reach a consensus to make its inclusion compulsory in the purchasing policies. Indeed, Luxembourg is taking new path in terms of public procurement and Fair Trade. In the context of public purchasing, the government commits to buy more Fair Trade products. Towns are also encouraged to apply Fair Trade criteria when they tender in the framework of their competence. It also encourages awareness raising activities about Fair Trade to enhance sustainable consumption.15

More result-orientated, the Belgian government adopted a national plan of action for 2009-2011 that targets 50% of sustainable responsible procurement. It developed an online guide to help the Belgian authorities to include social criteria in their tenders. This guide explains and supports the purchase of Fair Trade goods. This guide is currently updated through a consultation process involving all stakeholders including Belgian Fair Trade Organizations.16

More ambitious, the government of the Netherlands adopted a target of 100% sustainable procurement (by all public authorities at national, regional and local level) by 2015. The Sustainable Public Procurement Programme is designed to encourage government authorities to take heed of environmental and social aspects when procuring products and services.17

The Dutch government in a letter dated 16 October 2009 informed the President of the Lower House about the mentioned policy. In the part about supplemental standards, it explains that for certain product groups (such as coffee, tea, cocoa, flowers, textiles, natural stone) supplemental standards will be included, including concerning the price that is paid to the producers. Either the criterion of “adequate income” or of Fair Trade standards can be applied, at the discretion of the contracting authority, depending on how ambitious the contracting authority is. The letter explains then that the difference between the two criteria is that Fair Trade standards offer greater protection to producers.18

These national laws, policies, whitepapers and strategies that set more or less clear support to Fair Trade are very encouraging. Nevertheless, it is necessary to also monitor

15 More information on this commitment is available in Transfair-Minka press release, downloadable on: http://www.transfair-luxembourg.org/index.php/communique-04082009.html
16 More information on the action plan and corresponding guide are available on: http://www.guidedesachatsdurables.be
17 More information is available about this Dutch policy on: http://www.senternovem.nl/sustainableprocurement/index.asp
18 This letter is quoted in a preliminary relief judgement of Alkmaar court of 18 March 2010 (117231 / KG ZA 10-44 ) available in Dutch on: http://zoeken.rechtspraak.nl/resulpage.aspx?nzoek=true&searchtype=ln&ln=B7898&u_ljn=B7898
their implementation, to be sure that they are followed by results. The French case is a good example to show that it took five years between the vote of the law that mentions Fair Trade and its implementation.

It can sometimes be more efficient to raise awareness and get commitments at local and regional level, as a previous step to get a national commitment. Most of the time regional and local authorities are more accessible than national ones and willing to act for sustainability, especially in a context in which their responsibilities increase. In most EU countries, the decentralisation of responsibilities is transferring more and more competences from the central states to authorities at regional and local level. Therefore, more and more communities are involved in policy topics that were traditionally reserved to the capitals, such as cooperation and development in the South, or sustainable development and climate change.

**Support to Fair Trade at regional and local level**

At regional and local level, laws, initiatives, policies, political commitments, or public-funded development projects have developed in the past few years, and public procurement is also seen as a way to support other policy goals. Therefore, many authorities have developed green and social purchasing, including Fair Trade.

In certain countries where the regional entities have legislative powers, laws on Fair Trade have been voted, such as in Italy, where 8 regions out of 20 have voted laws on Fair Trade that encourage FTPP so far. These laws are currently implemented, and the regions that voted them are organising training courses for their administrative officers and public authorities, to encourage them to include Fair Trade in tenders explaining them how to do so.

In Spain, 7 autonomous communities ("comunidades autónomas") mention Fair Trade in regional laws, plans or declarations on cooperation for development. Moreover, specific regional laws on Fair Trade, encouraging responsible and Fair Trade consumption and public procurement were voted in 6 other Spanish regions. The Council of Mallorca has also recently issued a declaration encouraging Fair Trade, the Fair Trade Towns initiative and the inclusion of Fair Trade into the procurement of the administrations of the Island. Beyond words, many Spanish regions also show their commitment to Fair Trade and FTPP by developing concrete activities to support the inclusion of Fair Trade in public procurement. The Region of Madrid included Fair Trade products in its catalogue of central purchasing, to be used by all its branches and administrations. Moreover, several regions and provinces invest in training courses on sustainable and Fair Trade public procurement, involving hundreds of public officers within the country.

In Belgium, the Flemish association of Municipalities published a “Guide for social criteria in public tenders” in March 2008 that mentions Fair Trade as a social and ethical criterion that can be included in procurement procedures and gives examples of Fair Trade products that can be tendered for.

The Flemish government adopted on 5 June 2009 an action plan on sustainable public procurement 2009–2011, that aims at having 100% sustainable procurement for 2012. In order to provide the tools necessary for the implementation of such a plan, the

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19 The list of political commitments in Spain at national, regional and local level is available on: [http://www.comprapublicaetica.org/index.php?option=com_content&task=view&id=29&Itemid=43](http://www.comprapublicaetica.org/index.php?option=com_content&task=view&id=29&Itemid=43)
regional government is also developing sustainability criteria, by category of products, such as ‘Food and Catering’, that should include Fair Trade.

**Fair Trade nations**

In the UK, the regions of Scotland and Wales have very strong commitment to Fair Trade. The Scottish government in its note on Sustainable procurement of 2007 gives guidance on the inclusion of Fair Trade in public procurement, clearly stating that it is possible to support development and sustainable development through Fair Trade purchasing. In the beginning of 2010, a motion was presented to the Scottish Parliament in order to reach the Fair Trade nation Status. So far, Wales has been the first and only Fair Trade nation of the world. This status was reached in 2009 after 3 years of efforts funded by the Welsh Assembly government. This governmental body committed to support Fair Trade and Fair Trade public procurement.

**A special initiative: The Fair Trade Towns campaign**

Many European authorities at local level also flaunt their support to Fair Trade, as well as to Fair Trade public procurement. The soundest expression of this local and regional support is the Fair Trade Towns campaign\(^{20}\) and its derivates (Fair Trade provinces, counties, regions, nations ... territories).

The movement was born in Garstang (United Kingdom) 10 years ago, expanded to Ireland in 2003, and then reached continental Europe in 2005, starting with Belgium. Sweden and Norway followed in 2006, Austria one year later, Spain and Denmark in 2008 and Germany, Finland, The Netherlands, France and Italy caught up in 2009. The Fair Trade Organisations in the new Member States are currently assessing the way they could introduce the initiative in their countries, where Fair Trade awareness is relatively low in comparison to the other countries, and where therefore FTPP has not yet developed.

Most countries involved in Fair Trade Towns schemes share at least five common goals:
1. Local council passes a resolution supporting Fairtrade, and agrees to serve Fairtrade products (for example, in meetings, offices and canteens).
2. A range of Fairtrade products are available locally (targets vary from country to country)
3. Schools, workplaces, places of worship and community organisations support Fairtrade and use Fairtrade products whenever possible
4. Media coverage and events raise awareness and understanding of Fairtrade across the community.
5. A Fairtrade steering group representing different sectors is formed to co-ordinate action around the goals and develop them over the years.

When a public authority and its community commit to follow these five goals, they clearly stand for Fair Trade and commit to procure Fair Trade products. More and more European public authorities are involved in the campaign. In July 2010, there were 794 Fair Trade Towns (FTT) in 13 European countries\(^{21}\).

The United Kingdom, for being the starter, is still, and by far, the leader, counting with more than half of the total number of European Fair Trade towns. It is followed by Belgium (almost 80 FTT), Ireland, Austria and Italy that counts with around 40 FTT each.

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\(^{20}\) To know more about Fair Trade Towns campaign, consult: [www.fairtradetowns.org](http://www.fairtradetowns.org)

\(^{21}\) The list of Fair Trade Towns is regularly updated and available at: [http://spreadsheets.google.com/pub?key=tpVc-rN3plSE_QoaOUpqRjw&single=true&gid=0&output=html](http://spreadsheets.google.com/pub?key=tpVc-rN3plSE_QoaOUpqRjw&single=true&gid=0&output=html)
Other commitments
Apart from FTT, there are many towns, cities, regions, departments, counties or public bodies that commit to Fair Trade and include it in their procurement policies without necessarily joining the campaign. These are more difficult to identify, but the national Fair Trade Organisations are meeting many of them in their day to day work on the field. Through our researches for case studies and benchmarking, we could find more than 50 different French public authorities tendering for Fair Trade products while in Italy we could identify 95 authorities in 14 regions. In Spain, 24 local authorities supported Fair Trade and FTPP in political declarations, but many more are including Fair Trade into tenders.

The increased commitment and support to Fair Trade that could be observed at local regional and national level has consequently been echoed at EU level (through different channels), where the concern was relayed by the civil society, the local authorities, the European Parliament and the European Commission.

B- The increased EU institutions’ concern for Fair Trade and FTPP

The EU institutions (European Commission, European Parliament, European Council) as well as certain of their advisory bodies (European Economic and Social Committee, Committee of the Regions) have developed different documents in which they expressed their support to Fair Trade, and more recently, to Fair Trade public procurement.

1994-2008: First manifestations of interest for Fair Trade and FTPP at EU level

The issue of Fair Trade started to particularly arise at the EU level during the 1990’s. In January 1994 the European Parliament adopted a resolution on “promoting fairness and solidarity in North-South trade” calling for the EC to support Fair Trade, including through dedicated funding, and to include Fair Trade in Community development and co-operation policies. In 1994 the Commission published a document on Alternative Trade, expressing its support for strengthening Fair Trade both in the South and the North. In 1996, the European body representing civil society, the Economic and Social Committee issued an opinion on the “European “fair trade” marking movement” which in its conclusion welcomed the development of Fair Trade labelling initiatives and called on the Commission to create a dedicated budget line to support Fair Trade activities. This request was reiterated in the report on Fair Trade (Fassa Report) adopted by the European Parliament in 1998 which also put forward a number of proposals for further Commission actions in support of Fair Trade. As a follow up to this growing interest, the European Commission (EC) published a Communication from the Commission to the Council on "fair trade" of 29 November 1999. It described the concept of Fair Trade and its current situation, in order to help develop a European action that would support the development of Fair Trade within the EU, in order to contribute to “the key aims of EU development policy as set out in Article 177 of the Treaty”\(^\text{22}\). During that period, Fair Trade was mainly seen as a development tool only, which would help developing countries producers’ out of poverty, and Fair Trade Public Procurement (FTPP) was not an issue of interest at that moment.

\(^\text{22}\) Communication from the Commission to the Council on fair trade, of 29 November 1999, COM(1999) 619 final, p 3
In the 2000’s, the interest for Fair Trade has continued growing, and was completed by an emerging interest for FTPP. This new concern first appeared in written questions asked by Members of the European Parliament (MEPs) to the EC. The MEP Baroness Sarah Ludford (ELDR) asked a written question to the European Commission, on the 25th November 2003, which was answered by Mr Bolkestein on behalf of the Commission in January 2004. Her question concerned whether the public purchase of Fair Trade products (catering services) would be considered as discriminatory under EU public procurement regulations, showing a real interest in such a practice. The Commissioner for Internal Market’s answer explained that the possibility had to be studied case by case, as the technical aspects of such an inclusion were complicated. This answer focused on the technical aspects of the question, and did not show particular political support from DG Internal Market concerning the inclusion of Fair Trade considerations in public procurement. But neither did it discard the possibility of tendering for Fair Trade products.23

Civil society also became interested in the issue, and the EESC issued an opinion on Ethical Trade and Consumer Assurance Schemes on 27 October 2005.24 This opinion raised concerns about the reliability of consumer assurance schemes related to ethical issues in general including Fair Trade, which is mentioned several times in the text. The EESC in its point 7 “Practical action”, encourages the public procurement of “products with positive social and environmental benefits”, to “achieve tangible outcomes”.

These civil society’s concerns were relayed one year later at higher level, and with a specific focus on Fair Trade, through the vote of a European Parliament resolution on Fair Trade and development (P6_TA(2006)0320). The Resolution gives a definition of Fair Trade that lists the main criteria agreed by the FT movement and calls to the EC to give financial and political support to Fair Trade. It also counts with several points directly encouraging FTPP:

The main highlight on FTPP is in point 22, when the European Parliament called “on public authorities in Europe to integrate Fair Trade criteria into their public tenders and purchasing policies and asks the Commission to promote this by, for example, producing guidelines for Fair Trade procurement;”25 So far such a precise guidance is still awaited. The EP also called in particular the regions “to give special consideration to Fair Trade products” in their tenders. It also praised its own efforts in offering Fair Trade products and invited all EU institutions to adopt the same policy for their internal services.

Two years later, in the absence of any guidance of the EC on FTPP, a new written question was asked to the Commission by MEP David Martin, on 18 February 2008, in order to determine whether local authorities could consider ethical considerations in order to reject a tender. Such a question confirmed the will of the MEPs (in particular UK ones) to relay at EU level the local and national concerns for taking into consideration Fair Trade in procurement. The answer of Mr Mc Creevy, Commissioner for Internal Market, focused again on the technical aspects, concluding that certain ethical considerations (such as ILO conventions) provided they were objective (and therefore non discriminatory) could be included in tenders. Without being an encouragement, such

23 Written question E-3517/03 by Sarah Ludford (ELDR) to the Commission (25 November 2003) (2004/C 88 E/0479)
an answer gave indication about the legal room of manoeuvre for Fair Trade criteria inclusion.

2009-2010: Recent growing attention for FTPP of the EU institutions

Facing this growing interest for Fair Trade public procurement, the EC decided to update its policy towards Fair Trade, by publishing a new communication on “Contributing to Sustainable Development: The role of Fair Trade and nongovernmental trade-related sustainability assurance schemes”, 10 years after the first one, on the 5th May 2009. In this communication, the Commission endorses the international definition of Fair Trade such as agreed by the Fair Trade movement and supported by the EP and reiterates its support to Fair Trade. It also dedicates a large part to Fair Trade public procurement, in which it sets out main principles and definitions. It recalls the fundamentals for the procurement of sustainable goods and services, as well. For the EC, providing the adequate guidance is the best way “to help realise the potential contribution to sustainable development from public purchasing decisions”.

In that view, the Commission has also been working for two years on a “Buying social” guide which includes a chapter on ethical trade (including Fair Trade). This guide aims at clarifying the legal framework of social public procurement. Given that “social”, has a very broad meaning, is cross-bording the competences of different General Directorates (DGs), and is not an exclusive competence of the EU, the writing of the guide has been long and its publication delayed several times. In the answers of the different EU institutions to the EC communication of Fair Trade of 5 May, these delays were often deplored, and the importance and expectations from these guidelines reminded.

Indeed, the communication of the Commission was addressed to the European Parliament and Council, but it aroused quicker reactions within the consultative bodies: the EESC first and then the Committee of the Regions (CoR), that represents the European regional and local contracting authorities.

The first one issued an opinion in January 201026, highlighting the importance of Fair Trade as a consumer-assurance scheme and calling on the EU to support Fair Trade. Its message did not really change from the one that had been expressed through the report of October 2005.

The CoR issued its opinion in February 2010. It is particularly positive towards Fair Trade and more particularly Fair Trade public procurement. It dedicates a specific part counting 11 points to FTPP, in which it welcomes the existing initiatives favouring Fair Trade public procurement at regional and local level, such as Fair Trade Towns Campaign, and stresses the importance of the inclusion of Fair Trade in public procurement as a tool for sustainable development, trade justice and poverty reduction. It also calls on the Commission to provide adequate guidance to support regional and local authorities including Fair Trade into public procurement and encourages the exchange of good practices, as well as the development of incentives at regional and local level that stimulate Fair Trade procurement in business. Eventually, it calls for “a common European Fair Trade Strategy for Local and Regional Authorities to be drafted, accompanied by an action programme that fulfils environmental and social criteria, in order to support Fair Trade and environmental and social procurement.” This opinion is a

clear expression of the support to FTPP from regional and local authorities all around Europe, relayed at EU level.

A few months later, in May 2010, the European Parliament also reacted to the EC communication, through a report on “new developments in public procurement”. It counts with a specific point (the 33rd) on Fair Trade public procurement, in the part dedicated to social procurement, in which it "Calls on the Commission to encourage public authorities to use Fair Trade criteria in their public tenders and purchasing policies on the basis of the Fair Trade definition as recognized by the European Parliament resolution on Fair Trade and Development of 6 June 2006 and the recent European Commission communication of 5 May 2009; reiterates its earlier call to the Commission to promote this by, e.g., producing constructive guidelines for Fair Trade procurement; welcomes the unanimous adoption of the opinion of the Committee of the Regions on 11 February 2010 calling for a common European Fair Trade strategy for local and regional authorities".

Unfortunately, that call for precise and constructive guidance on Fair Trade public procurement was not completely heard by the European Commission. In the final draft of the Buying social guide to be issued by the end of 2010, Fair Trade is mentioned as an example in the part dedicated to ethical trade. Therefore it is not much more helpful regarding the practical inclusion of Fair Trade criteria in tenders than the existing documents.

In spite of the slightly deceptive guidance published by the EC, it appears unquestionably from our policy monitoring at EU level, that Fair Trade has been a subject of growing interest for the institutions since the beginning of the 1990’s, and has benefited from an increasing support not only from the consultative bodies representing the civil society and the local and regional authorities, but also from the Parliament that is the co-legislator at EU level. The interest of these institutions has been extended to Fair Trade public procurement since the early 2000’s, and has been growing for the past ten years. Therefore, we can hope that this political support expressed at EU level will translate into concrete undertakings, including a guidance dedicated to Fair Trade inclusion in tenders as well as through the next revision of the EU Directives on public procurement in the coming years. The rules of public procurement should take a greater account of sustainable and social aspects, including Fair Trade, and the legal manner to include those should be clarified, in order to facilitate it for contracting authorities in Europe.

In spite of the work that still needs to be done at EU level, many contracting authorities across Europe already include Fair Trade criteria into their purchasing policies, expressing a clear political support to Fair Trade and FTPP.

Our research has permitted us to observe a great variety of commitments to Fair Trade and FTPP. Nevertheless, such commitments should be followed by implementation to be efficient. In that regard, we have inventoried effective commitments in several dynamic countries, which can set an example for the countries wishing to increase their commitment to sustainable development through Fair Trade.

This political support at local, regional and national level is reflected in the increased concern of EU institutions for Fair Trade and FTPP. Fair Trade started being a subject of interest for the EU institutions over 10 years ago, but in the past 18 months, two of the three main institutions reiterated their commitment to Fair Trade and to Fair Trade public

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procurement in three different documents, while the two advisory bodies issued opinions on these issues.

What can be concluded at this stage is that political commitments and their concrete follow up (action plan, practical guidance, FTPP practices) could only be found in Western Europe, in particular in countries where Fair Trade sales are important and Fair Trade Organisations flourishing and very active, such as the UK, France, Germany, Scandinavia, Italy, Spain or the Netherlands. In these countries Fair Trade awareness is high, people recognise and adhere to the concept, which encourages public authorities to follow the lead of public opinion (which represent what “voters” think). On the contrary, we could not find evidence of commitment or Fair Trade practices in the EU New Member States, Portugal and Greece, where Fair Trade initiatives have a weak or very recent development, where there isn’t a strong political support to Fair Trade activities and which don’t yet have any FTPP practices. Nevertheless, the awareness and interest for Fair Trade is rising in these countries, which represent a huge potential for Fair Trade and FTPP development in the coming years. Accordingly, the EU documents supporting Fair Trade recently encouraged the exchange of good practices from the more advanced countries to the new coming ones, in order to start exploiting this potential and expand Fair Trade and FTPP from Western to South and Eastern Europe.
II- The legal framework of FTPP: incomplete emerging legislations, and their interpretations

The political commitment to Fair Trade and its mainstream to procurement policy have increased over the past 10 years. More and more local and regional authorities are concerned about sustainable development and want to support Fair Trade including through their purchases. Their concern is more and more relayed at national and EU level, and progressively reflected in the legislations and their interpretations. Nevertheless, as this process is still in a starting phase, the public procurement legal framework for social ethical and Fair Trade criteria still lacks clarity, as was very recently reminded both by the CoR and the EP in their 2010 respective opinion and resolution. Therefore it is essential to study the current public procurement legislations at EU, national and regional level, as well as their interpretative documents, such as existing guides. We will then focus on the few existing case laws that already clarified certain legal dispositions, as only the courts have binding interpretation of legislation. This legal study will allow us to identify the current possibilities to introduce Fair Trade criteria into procurement policies, from a legal point of view.

A- The legislation on public procurement and their interpretative documents on how to include Fair Trade

In the European Union, tenders abide by common rules and common shape. A tendering process is the contracting procedure through which public authorities can purchase goods or services. It counts with different key phases that can be defined as follows.

The ‘subject matter’ of a contract regards which product, service or work you want to procure. The process of determining the subject matter will generally result in a basic description of the product, service or work. When defining the subject matter of a contract, contracting authorities have great freedom to choose what they wish to procure.

The ‘technical specifications’ describe the contract to the market so that companies can decide whether it is of interest to them. They provide measurable requirements against which tenders can be evaluated. They constitute minimum compliance criteria. They must be linked to the subject matter of the contract. Offers not complying with the technical specifications must be rejected.

“Contract Performance clauses” are used to specify how a contract must be carried out. They should be linked to the performance of the contract, and must be transparent and non discriminatory.

“Awarding” the contract is the last stage in the procurement procedure. At that stage, the contracting authority evaluates the quality of the tenders (the offers) and compares prices. Contracting authorities shall base the award of public contracts either on:
- various criteria linked to the subject-matter of the public contract in question when the award is made to the most economically advantageous tender
- the lowest price only.

These phases are those we will refer to in the following EU Directives’ analysis.
a) EU Directives analysis

Public procurement in the European Union is essentially ruled by two directives and their implementing Regulations and Decisions\(^{28}\), commonly referred to as the Public Procurement Legislative Package:

- Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004), and

These Directives have been implemented into member states’ legislation, and they form the basis for the procedures for awarding public contracts in the EU. Of the two Directives, the one relevant to our analysis from a FTPP perspective is Directive 2004/18/EC, here referred to as “the Directive”.

As we will better explain in the part on National legislations, the Directive lays down certain thresholds\(^{29}\) below which its provisions do not apply and procurement contracts are subject exclusively to national procurement law. Contracts below these thresholds must still abide by the principles of EU law, in particular the free movement of workers, the free movement of goods, free movement of services and freedom of establishment and free movement of capital, as well the principles deriving from them, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. The European Commission has also published an Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives\(^{30}\).

We should, however, note that supply contracts for Fair Trade products are usually well below the thresholds laid down in the Directive, falling mostly under the scope of national law.

The Directive clearly states that contracting authorities may “use criteria aiming to meet social requirements”\(^{31}\). In fact, art. 26 of the Directive, when referring to the “Conditions for performance of contracts” states “contracting authorities may lay down special conditions relating to the performance of the contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.” We can, therefore safely say Fair Trade criteria can legally be introduced into public tenders as a social requirement, as long as it is clearly stated and in accordance with EU principles.

\(^{28}\) A full, updated overview of the legislative package can be found here: http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm

\(^{29}\) Threshold amounts for public contracts are laid out in art. 7 of the Directive, and art. 78 foresees the revision of these values every two years from its entry into force. The current thresholds are established in Commission Regulation (EC) No 1177/2009 of 30 November 2009 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts, in its art. 2.

\(^{30}\) Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (24.07.2006)

\(^{31}\) Recital 46, paragraph 3 of Directive 2004/18/EC
The Directive, in art. 53, referring to “Contract award criteria”, also establishes an alternative to awarding contracts solely on the basis of the lowest price: the most economically advantageous tender (MEAT). If a contracting authority wishes to award a tender using MEAT, various criteria linked to the subject matter in question are introduced (e.g., price, quality, services, etc.). These various criteria are then attributed a certain “weight” or value that will serve to evaluate the overall offer, permitting the contract authority to procure the best value for money.

Much discussion has taken place on where and how to introduce social considerations in public tenders. Unfortunately, though the Directive has given clear guidance on how to introduce environmental criteria in its recitals and provisions, particularly in art. 23, not much clarification has been given regarding social aspects. This is something which needs urgent clarification through the revision of the Directives. In the meantime, we must refer to guidance provided by both civil society and the EU institutions.

It is our understanding, as well as that of others\(^\text{32}\) that, lacking specific provisions for social considerations, the environmental provisions should be applied to social aspects by analogy. This, of course is a progressive interpretation unfortunately not shared by the European Commission.

The European Commission has long been preparing an interpretative guide on the inclusion of social aspects in public tenders. To be issued by the end of 2010, the guide “Buying social: A guide to taking account of social considerations in public procurement” will aim at giving guidance to contracting authorities in Europe on how to introduce social considerations in public procurement. It is a non-binding document and it does not constitute an official interpretation of EU law (this is only prerogative of the courts, and ultimately the European Court of Justice).

The “Buying social” guide will include a section on the use of social labels and its implication for ethical trade, where the EC will first remind that the use of a label as such is prohibited, as it is seen as an unfair restriction of competition.

The European Commission elaborates on the rather theoretical distinction between technical specifications (that should be linked to the characteristics of the product or its production process) and the performance clauses (that should be linked to the execution of the contract). The last draft of the EC guide lays down that certain ethical criteria, because they are not directly linked to the characteristics of the products or the production process, cannot be included in the technical specifications. In the case of Fair Trade, the EC interpretation would imply that the social and economic criteria of Fair Trade would fit in the contract performance clauses and the environmental criteria of Fair Trade would fit in the technical specifications.

In the same way, many contracting authorities refer in the contract performance clauses to the core conventions of the International Labour Organisation (ILO). Fair Trade is one of the ways to prove compliance with these ILO conventions.

\(^{32}\) See “Study on the incorporation of Social Considerations in Public Procurement in the EU” carried out by the ITC-ILO at the request of the EC Directorate General Employment, Social Affairs and Equal Opportunities found here: [http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=417](http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=417)
Contract performance clauses are not directly regulated by the EU Public Procurement Directives. They are nevertheless mentioned in the Recital 33 of Directive 2004/18/EC which states that provided they are not discriminatory, performance conditions can set social and environmental requirements. Tenderers must still be able to prove by any other means deemed appropriate that their products comply with the required specifications.

Alongside the more progressive approach of introducing Fair Trade directly in the subject matter of the contract and its technical specifications, and in addition to the options of introducing Fair Trade through award criteria and contract performance clauses mentioned above, it is also possible to introduce Fair Trade in a more conservative manner through variants. For additional information and examples on how to include Fair Trade criteria in public tenders, please refer to our “EU Model on FTPP” presented in the Conclusion.

b) National Legislations on public procurement and the possibilities to include Fair Trade criteria

The national laws on public procurement in the EU Member States result from the implementation of the EU procurement Directives. Therefore, they all have common main principles and similar dispositions. Nevertheless, under EU thresholds, there may be other certain national particularities. We will first see here where the national laws can differ from the EU ones in general, before focusing on the specificities of EU countries studied.

National procurement procedures

At national level, there are often various thresholds that define different types of procedures, below the EU Directives thresholds. Depending on the quantity and product a contracting authority wishes to purchase and its monetary value, it may not be necessary to go through a tendering procedure. In that case, the EU Directives are not applicable and there are no specific rules on how to include Fair Trade criteria. General EU principles of transparency, objectivity and non-discrimination must be respected.

Purchasing procedures under the EU Directives’ thresholds vary from country to country. You can find a table of national threshold and description of the associated procedures in Annex 1. In that part of the research we will give the common points of those procedures, before getting into the specific dispositions of national laws on Fair Trade and social criteria inclusion.

When the amount to be spent is particularly low, it is procedure for a public authority to do direct purchase. Through this procedure, the authority is free to purchase from any supplier without seeking a minimum number of quotations or conducting a tender procedure. A negotiated procedure takes place and in many cases a simple invoice is sufficient (without a formal contract). The contracting authority is free to purchase any supply or service by choice. This procedure is intended for:

- low value purchases, where the cost of a formal tender procedure is not in proportion to the value of the contract,

and

33 The national procedures (under EU thresholds) should always abide by EU fundamental principles.
a single purchase of a supply or service which is not regularly used, and which is not within a framework agreement (e.g., the supply of promotional Fair Trade t-shirts or bags for an event). Direct procurement is intended for single purchases over a year. If repeated purchases are intended, a framework agreement should be signed. Split purchases in lots for the purpose of purchasing without a formal procedure are not allowed.

For higher amounts (that are still low), the public authorities can carry on a quotation procedure. The contracting authority seeks a minimum number (usually 3-5) of quotations from market participants. No national-wide publication or formal procedures are required, and no complex drafting of technical specifications. Usually some kind of paper trail is required to demonstrate that several quotes had been sought.

Above the threshold allowing quotation procedure, a tendering process is necessary. Purchases above this national threshold but below the EU Directives threshold need to follow a “national” tendering procedure, which is generally less strict than the one defined by the EU Directives. Nevertheless, the national laws on public procurement result from the implementation of the EU public procurement Directives. If certain aspect can be slightly different, the spirit and the general principles are the same, as well as the main dispositions.

Fair Trade in national laws on public procurement

Specific Fair Trade legal dispositions

Thanks to the EU Directives of 2004, the national public procurement laws of every Member State include the possibility to use the “best value for the money” criteria to choose an offer. Nevertheless, the way they define the criteria, besides the price, that can be taken into account to choose an offer varies from country to country.

Spain is the only country our research identified that mentions “Fair Trade” in public procurement law. The law 30/2007 first mentions Fair Trade in the third point of the exposition of motives. It states there that the novelties brought by the law is the prevision in the law of a mechanism permitting the introduction of social and environmental considerations in public contracts, as special contract performance clause, and as awarding criteria. Those mechanisms should be adapted to new ethical and social requirements such as “the demand for a fair trading relationship with developing countries, as planned in the Resolution of the European Parliament on Fair Trade and development (2005/2245 (INI)).

This is confirmed in the article 102 on special contract performance clause and in the 6th additional disposition.

According to article 102, the special contract performance clause can refer to social considerations that “guarantee the respect of basic rights of workers all along the supply chain through the respect of the fundamental ILO conventions”.

More specifically, the 6th additional disposition in its point 4 states that “the contracting authorities will be able to mention [...] preference in the awarding phase of the contract for the proposal presented by recognised Fair Trade Organisations when the object of the contract is products for which a Fair Trade alternative exists, as long as that proposal is the most advantageous from the point of view of the award criteria”.

This is the most favorable national legal disposition towards FTPP Europe wide. The Spanish law permits the inclusion of Fair Trade in the performance clause of the contract
as well as in the awarding criteria. Therefore, Fair Trade aspects are taken into account both in the description of the execution of the contract, as well as criteria to choose the best offer.

**Socially friendly legal dispositions**
Other European Member States do not mention Fair Trade, but they introduced provisions about social criteria inclusion in their public procurement national laws. The cases of France and Italy can well illustrate this evolution in legislation thanks to the implementation of the EU Directives of 2004.

In France, the updated version (2009) of the code of public procurement\(^{34}\) does not mention Fair Trade, but sustainable and green procurement, as well as social clauses. The inclusion of social aspects is mentioned in the article 14 (chapter VI – Social and environmental clause) where it recommends including social aspects “that take into account sustainable development objectives, conciliating economic development, protection of the environment and social advances” in the contract performance clause of a tender, provided that those are not discriminatory for potential applicants and that they are indicated in the tender documents.

In Italy, social considerations are mentioned in the article 2 of the public procurement law\(^{35}\) that defines the principle of Best value for money, specifying that “The principle of best value for money” can be subordinated, in the framework established by this law and the other laws in force, to some criteria foreseen by the tender, inspired by the need to face social demands, to respect health and environmental standards and to promote sustainable development.”

This article clearly gives considerable room to include social and sustainable development aspects in the awarding phase of a public contract, which benefits Fair Trade in practice.

**Fair Trade in national guides on public procurement**
In certain countries, special guides on public procurement are dedicated to sustainable procurement or even to Fair Trade. These guides allow a better understanding how Fair Trade criteria can be included as social considerations under the new dispositions resulting from the 2004 EU Directives’ implementation.

For example, in the UK, the OGC (Office of Government Commerce) published guidance on Fair Trade and public procurement in 2008. This note recalls the support of the government to Fair Trade and explains how to introduce it to purchasing policies. According to that document, it is only possible through variants, meaning not requesting only Fair Trade products, but Fair Trade products as a possible option. Therefore Fair Trade criteria are not used in the awarding phase.

The result of our research suggest that the anglo-saxon approach is one of the most conservative of Europe, and is very restrictive towards “not purely economic” criteria, such as environment and even worse, social.

Nevertheless, the UK is the biggest consumer of Fair Trade in Europe, and the country counts with as many Fair Trade Towns as the rest of the world. As the condition to be a Fair Trade Town (or territory) is to procure Fair Trade, we can conclude that even a very

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\(^{35}\) More information on Italian legislation can be found on [www.eftafairtrade.org/observatory](http://www.eftafairtrade.org/observatory) and on the cd-rom on which this research is published
A conservative and restrictive legal approach is far from impeding public authorities to procure Fair Trade products.

In France, guidance on sustainable development was developed by the Ministry of Environment in 2009. It dedicates a large part to Fair Trade analysing extensively the context (at legal and practical level) of Fair Trade in public procurement at EU and national level. Its conclusion from a legal point of view is that the safest approach is to use only the most adequate dispositions of the Public Procurement Code for Fair Trade Organisations, such as allotment (if the supply chain is not sufficiently developed to be able to fulfil all the needs of the contracting authority) and variants (to avoid being too selective and restraining competition too much, while welcoming what is best on the market).

In the Netherlands and in Belgium, the governments are developing new guidance to help implement the new policies that aim to increase sustainable public procurement (new policy, definition of criteria). These guides are not finalised at the time we are writing.

**c) Regional Legislations on Fair Trade and FTPP**

Through our research in the partners’ countries, we were able to list regional legislations on FTPP in Italy and Spain, where the regions have legislative powers.

In Italy, 12 regions out of 20 have laws on Fair Trade: Piemonte, Veneto, Liguria, Toscana, Abruzzo, Marche, Lazio (it is a more general low on alternative economic initiates), Toscana, and Umbria. A law of this type is under discussion in Emilia Romagna.

Most of the time, these laws define what Fair Trade, or Fair Trade organisations or Fair Trade products are. At the International level, the Fair Trade movement doesn’t want to benefit from such an official definition, in order to be able to keep the ownership of its criteria and to be able to change and adapt them if necessary, as well as to keep its bottom up approach that involves all stakeholders, including those from the South.

Nevertheless, from a public procurement point of view, it facilitates the definition and therefore the inclusion of Fair Trade criteria, when they have been defined by a law. Besides the definition aspects, most of the Italian laws encourage FTPP, although not specifying how it should be carried on from a legal, technical point of view. The most advanced Italian region in the support of FTPP is Liguria. In the article 5 of its law on Fair Trade, it creates a system to support the introduction of Fair Trade in public procurement of products and services respecting competition rules. In particular, it made funds available to support the extra costs for public authorities that purchase Fair Trade products. In 2008, EUR250 000 were made available.

In Spain, the regional laws that mention Fair Trade public procurement encourage the regional governments to define a legal framework to increase FTPP, but do not define how public authorities should procure Fair Trade.

In Belgium, both the federal and the Flemish government are working on the definition of sustainability criteria, in order to facilitate the implementation of the targets set for sustainable procurement for their public authorities. The definition of these criteria
involves all stakeholders. For certain product categories (mainly food), Fair Trade should be included.

In Scotland, the “Introduction for purchasing officers on Sustainable Public Procurement” (2007) states that public procurement can support fair trade items, but it gives the same guidance as the OGC (UK) note, recommending the inclusion of Fair Trade criteria in variants only. Nevertheless, the Scottish guidance considers that requiring caterers to supply Fair Trade products as part of a catering contract (e.g. tea and coffee for official meetings) is fine as this does not distort competition between caterers.

In conclusion of this wide overview of procurement legislations in the EU, the first observation we can do is that legal dispositions on sustainable and social procurement exist at EU, national and regional level. Nevertheless, these dispositions often lack of precision and clarity. Moreover, Fair Trade is very rarely directly mentioned. As a result, various interpretations of the legal framework of Fair Trade public procurement are made by the different executive bodies or agencies at EU, national and regional level. Our research shows that the situations vary depending on the EU countries that are considered. As a result, legal uncertainties at EU and national level create legal insecurities for contracting authorities and are one of the main barriers to FTPP. A revision of the procurement legislations or indisputable and compulsory interpretations of legal courts at EU or national level would be necessary in order to clarify the existing legal uncertainties that handicap FTPP.

**B- Legal Cases ruling on the inclusion of green, social and Fair Trade criteria into tenders**

The Court of Justice of the European Union (ECJ) is tasked with interpreting EU law and ensuring its equal application across all EU member states. The ECJ has not yet been called to address the subject of inclusion of Fair and ethical trade considerations in public procurement.

It has, however, issued rulings on environmental matters, in some cases going further than the European Commission’s interpretation of procurement law and in effect prompting changes that have been included in the current Directives on public procurement in regards to environmental considerations. It has also ruled on unemployment cases.

Landmark cases on environmental considerations are, among others, The Concordia Bus case\(^{36}\) – Finland, and The Wienstrom case\(^{37}\), Austria; cases on unemployment aspects include the The Beentjes case\(^{38}\) - The Netherlands and The case of Nord-Pas-de-Calais\(^{39}\) – France.

Even though the ECJ has not ruled any case on Fair Trade public procurement, certain national courts have (e.g., in the Netherlands). Their interpretation of the inclusion of Fair Trade in the national and EU public procurement legal framework can therefore be useful and give us an insight on how the courts interpret the Directives.

\(\text{36 A6.1.3 C-513/99 Concordia Bus Finland (Concordia Bus Finland Oy Ab (formerly Stagecoach Finland Oy Ab) v (1) Helsingin Kaupunki (2) HKL-Bussiliikenne (2002))}\)

\(\text{37 A6.1.4 C-448/01 - (1) EVNAG (2) Wienstrom GMBH v Republic of Austria (2003)}\)

\(\text{38 A6.1.1 C-31/87 Gebroeders Beentjes B.V. v The State (Netherlands)}\)

\(\text{39 A6.1.2 C-225/98 Nord-Pas-de-Calais Region (Commission v the French Republic)}\)
a) ECJ cases on green and unemployment aspects in public procurement

The Concordia Bus case

This judgement acknowledged that a contracting authority was entitled to include environmental considerations in its award criteria. The ECJ was clear that award criteria do not need to be purely economic:

"Article 36(1)(a) [of Directive 92/50] cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature. It cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority."\(^40\)

The ECJ further held that the principle of equal treatment does not preclude the taking into consideration of criteria connected with protection of the environment. On this point the judgment states:

"In the light of ... Article 6 EC, which lays down that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, it must be concluded that Article 36(1)(a) of Directive 92/50 does not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender."\(^41\)

The judgment lays down the conditions under which such criteria may be used. It sets out that "the criteria adopted to determine the economically most advantageous tender must be applied in conformity with all the procedural rules laid down in Directive 92/50, in particular the rules on advertising".\(^42\) Criteria must also comply with the fundamental principles of EU law, in particular the principle of non-discrimination. The judgment concludes that a contracting authority may take into account ecological criteria provided that:

- they are linked to the subject-matter of the contract;
- do not confer an unrestricted freedom of choice on the authority;
- are expressly mentioned in the contract documents or tender notice;
- comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.\(^43\)

The Wienstrom Case

In the Wienstrom Case, the ECJ confirmed the Concordia Bus Finland case judgment, in particular the fact that "Directive 92/50 cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the most economically advantageous tender must necessarily be of a purely economic nature". Therefore, environmental criteria could be taken into consideration under the conditions laid out in the Concordia Bus Finland case. The particular criterion used in this case, requiring that

\(^{40}\) C513/99 - Concordia Bus Finland Oy Ab (formerly Stagecoach Finland Oy Ab) v (1) Helsingin Kaupunki (2) HKL Bussiliikenne (2002), para 55
\(^{41}\) ibid., para 57
\(^{42}\) ibid., para 62
\(^{43}\) ibid., para 64
the electricity supplied under the contract be produced from renewable energy sources, was acceptable as a matter of broad principle. Provided the criteria comply with the Treaty principles, contracting authorities are free to choose both their award criteria and the weightings attached to them, provided that the weightings enable an evaluation of the most economically advantageous tender to be made.

However, the ECJ held that the actual criterion used was not permissible on the basis that it infringed, for a number of reasons, the principle of equal treatment and transparency. This included the premise that "an award criterion which is not accompanied by requirements which permit the information provided by the tenderers to be effectively verified is contrary to the principles of Community law in the field of public procurement". The accuracy of the information sought from tenderers must be capable of being verified so as to preserve the objectivity and transparency of the procedure.

* In the case, which concerned a procurement of electricity from sustainable sources for the regional administration's office buildings in Carinthia, points were given for the amount of excess supply - above the needs of the offices - that the suppliers could generate, supposedly with a view to ensuring reliability of supplies. The ECJ stated in its judgment that such an award criterion was not permissible because "an award criterion that relates solely to the amount of electricity produced from renewable energy sources in excess of the expected annual consumption, as laid down in the invitation to tender, cannot be regarded as linked to the subject-matter of the contract". 44 As such, the ECJ ruled that award criteria which are not linked to the subject-matter of the contract were not permissible.

**The Beentjes Case**

In Beentjes, the ECJ ruled that a condition of contract performance which required the successful contractor to employ long-term unemployed persons could be compatible with the procurement directives if it complies with all the relevant provisions of Community law, in particular the principle of non-discrimination, and is mentioned in the contract notice. The ECJ held that a condition in a procurement contract requiring the employment of long-term unemployed persons would be acceptable if it was non-discriminatory, both directly and indirectly, in the light of all the circumstances of the case.

**The Nord-Pas-de-Calais Region Case**

In Nord-Pas-de-Calais Region the contracting authority had included in its contract notices a reference to the ability of the contractors to combat local unemployment as an award criterion. The Commission attempted to differentiate the case from Beentjes, arguing that while employment-related matters may be regarded as a condition of contract performance, such matters could not be characterised as an award criterion. The ECJ rejected the Commission's argument, holding that contracting authorities could use such an award criterion provided that it was consistent with the fundamental principles of Community law, in particular the principle of non-discrimination; and it was expressly referred to in the contract notice. However, as the Commission had not presented an

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44 C 448/01 - (1) EVNAG (2) Wienstrom GMBH v Republic of Austria (2003), para 68
argument to the effect that the criterion was discriminatory or that it had not been published in the contract notice, its complaint on this point was rejected.

b) The Dutch cases on Fair Trade public procurement

While there is no ECJ ruling on FTPP, a few national court cases have popped up quite recently, mostly in The Netherlands. It is important to note that these court cases do not constitute European Case Law per se. However, national law and case law on public procurement are resulting from the EU Directives implementation. It is therefore important and useful to study the legal interpretations given by the national courts in this matter.

**Douwe Egberts vs. The Province of Groningen**

The landmark case Douwe Egberts Coffee Systems Netherlands B.V., vs. The Province of Groningen in 2007 was the first of its kind. The Province of Groningen published a public European invitation to tender for the supply of hot beverage machines (including ingredients such as coffee, tea, cocoa and hot water) as well as the provision of maintenance and service. The requirements of the product sought were as follows:

“The coffee ingredient currently used is 100% Arabica of supreme quality. In addition, coffee and tea are Max Havelaar and EKO certified. It is a requirement that the qualities remain of this high standard.

Coffee: Max Havelaar and EKO
1. Tea: Max Havelaar and EKO

You are required to demonstrate that your products are allowed to bear both quality marks.

Answer
Compliance 5
Non-compliance KNOCK-OUT”

Via a legal procedure Douwe Egberts asked Groningen to terminate the EU procurement procedure and start a new procedure, arguing the product requirements violated the principles of transparency and equality, the prohibition on discrimination and the provision of free movement of goods.

At the time of the judgement the five tenders received remained unopened. Douwe Egberts sought, via a legal procedure, to ask Groningen to terminate the EU procurement procedure and start a new procedure. The company argued that the actions of Groningen contravened the principles of transparency and equality, the prohibition on discrimination and the provision of free movement of goods.

It’s worth clarifying here that Max Havelaar awards the international fair trade quality mark under the name of "Fairtrade Max Havelaar" to promote fair trade conditions in the Netherlands.


46 Author’s note: Max Havelaar is the Dutch member of FLO International, which unites 23 Fairtrade producer and labelling initiatives across Europe, Asia, Latin America, North America, Africa, Australia and New Zealand.
Any bids not compliant with this specification would effectively be eliminated. Douwe Egberts was not able to supply Fair Trade certified coffee but was able to supply Utz certified coffee. In Groningen’s view, the objectives of Utz Certified were not as far reaching of those of Max Havelaar, so Utz Certified coffee would not be considered an equivalent.

In a second Summary of Additional Information the following was added:

"Enclosed is a 2nd summary of additional information in response to a question asked in relation to the listed Max Havelaar quality mark. (...) Answer

The specifications 'Hot-beverage facility for the Province of Groningen' 2007/S 140-173300 state that the Max Havelaar quality mark is a knock-out requirement. The purpose of this requirement is to indicate that we pursue only the highest possible sustainability. In addition, we referred to this quality mark to indicate which requirements should be met by the producer. However, other quality marks which also meet the basic premises applied by the province as regards sustainability will be considered for further assessment of the tender. The basic premises are:

• The supplier guarantees that the coffee is purchased directly from small farmer cooperatives.
• A cost-effective minimum price: The supplier guarantees a fixed minimum price to ensure that the costs for socially and environmentally friendly production are covered.
• Supplement on the world market price: If the world market price exceeds the guaranteed price, the world market price will be paid.
• Pre-financing: Coffee farmers may, if desired, receive a percentage of the selling price of their product before shipping, so that they can make the necessary investments.
• Long-term trade relations: The partnership is for the long term.
• Free entry to the support programme. The phrases 'coffee, Max Havelaar' and 'Tea, Max Havelaar' included in paragraph 3.6.3 should be read in conjunction with the foregoing. The basic premises listed above will be used for the assessment."

In its defence, Groningen stated that the basic premises set out in its clarification during this EU procedure were completely in accordance with tendering law. The specification had not amended the criterion but had clarified, at Douwe Egberts’ request, how it should be interpreted. The Judge agreed with this opinion and held that the principles of transparency and equality were not violated by supplying this clarification to all tenderers.

The Court went on to examine whether Groningen was entitled to use the basic premises, considering it to be sufficiently related to the subject matter and were acceptable "in accordance with European and national policy – to pursue sustainability and positively influence social and environmental standards". As there were at least 20 suppliers capable of meeting the standard, including suppliers in other European countries and Douwe Egberts would be able to meet the basic premises, there was no evidence of any breach of Article 23(11) of the Bao (the Dutch legislation implementing the EU Directive). Furthermore, there was no unequal treatment and/or a restriction of free movement of goods. In its reasoning, the Court referred to

“The Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public
procurement COM (2001) 566 of 15 October 2001 mentions – insofar as currently important – on page 7: "In general, any contracting authority is free, when defining the goods or services it intends to buy, to choose to buy goods, services or works which correspond to its concerns as regards social policy including through the use of variants, provided that such choice does not result in restricted access to the contract in question to the detriment of tenderers from other Member States."

as well as to the European Resolution on Fair Trade and Development⁴⁷ when giving its favourable ruling to the Province of Groningen.

**Douwe Egberts vs. Alkmaar and Den Helder municipalities**

Another recent Dutch court ruling - Douwe Egberts Coffee Systems Netherlands B.V., vs. the municipalities of Den Helder and Alkmaar⁴⁸ - concerned a tender for “Warm beverage vending machines for the Municipality of Den Helder and the Municipality of Alkmaar”.

The requirements of the contract included a part on “Trading conditions” requiring “the ordinary coffee fresh brew, the water-based chocolate drink and chocolate milk to have the Fairtrade mark or a similar mark. For the Municipality of Alkmaar, the tea bags must also have the Fair trade mark or a similar mark. The corresponding requirements were defined.

An award criterion setting that “The tendering parties are expected to play an active role in the development of the Fair Trade market and optimising the availability and quality of Fair Trade products or similar products” was also mentioned in the awarding criteria.

Douwe Egberts objected to the sustainability criteria applied by the Municipalities and asked that these be amended in such a way that the Utz principles and Douwe Egberts’ Utz certificate are considered suitable.

The Municipalities published a summary of additional information postponing the deadline for submitting a tender until after the Primary relief proceedings. It also amended the definition of Fair Trade given in the part on “Trading condition”:

“**The ingredients offered for coffee fresh brew, water-based chocolate drink, chocolate milk and tea must comply with the sustainability principles detailed below.**

**Principles of sustainability:**

- **A cost-effective minimum price (guarantee price) for the producer.** The supplier guarantees a fixed minimum price to ensure that the costs for socially and environmentally friendly production are covered.
- **Producers receive an additional premium for the further development of the their business and for investments in the producer’s community.**
- **Pre-financing:** Coffee farmers may, if desired, receive a percentage of the selling price of their product before shipping, so that they can make the necessary investments.
- **Long-term trade relations.** The cooperation between producers and buyers of the products is as long-term as possible.”

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and cancelled the award criterion mentioning the development of Fair Trade market, as it was not linked to the subject matter of the contract.

Douwe Egberts sought, via a legal procedure, that the municipalities cancel the specific conditions on the manner in which the sustainability is achieved in the form of minimum requirements or award criteria. The company argued that the Municipalities were free to pursue sustainability and positively influence societal and environmental standards, but that they were doing so in a wrongful manner, as they were not authorised to prescribe one way to do so at the exclusion of others. Moreover, it maintained that Utz Certified mark was “at least equal to the fair trade mark”.

In its judgement, Alkmaar court stated that:
- the criteria ‘cost-effective minimum price’, ‘additional premium’ and ‘pre-financing’ were not technical specifications but performance clauses, and that they are legal. Indeed, they were characteristics of the production process of the product tendered, and therefore they were sufficiently linked to the subject matter of the contract. The court found support for its opinion in the Communication from the European Commission of 5 May 2009.

- the conditions set were not disproportionate. Fair Trade is considered as the most comprehensive and ambitious standards in terms of addressing a broad set of issues and conditions that impact the producers in developing countries, both in the EC Communication of 5 May 2009 and in the letter dated 16 October 2009, in which then Ministers Cramer, Donner and Koenders informed the President of the Lower House of the following, among other things, related to sustainable development and policy. The Municipalities are free to endeavor to achieve that same level of ambition.

- “the principle of equal treatment of tenderers does not prohibit applying criteria that strongly restrict the circle of eligible parties. Such criteria must be objectively justified and therefore may not be intended to tailor to a certain tenderer (...) To procure on the basis of Fair Trade standards is acceptable”. Moreover, in the Netherlands alone more than 20 suppliers can answer the call for tender, and Douwe Egberts itself could comply with the conditions set if it wished to do so. “Therefore there is no unequal treatment and/or obstruction of the free movement of goods and competition.”

- "At this stage of events, it cannot be sufficiently determined [...] whether the effects of the two marks are (at least) equivalent." "Moreover, the Dutch Government’s letter of 16 October 2009 states that the contracting authority may determine at its discretion whether to apply fair trading conditions (minimum salary as set in Fair Trade definition) or the concept of adequate wage/adequate income (as set in Utz certified scheme)."

**Conclusions on legal aspects of FTPP**

As a conclusion, we can see that the EU legislation on public procurement allows the inclusion of social criteria such as Fair Trade into tenders. Unfortunately, it is not very clear on the way to do so. Certain national legislations are more specific on the inclusion of social or Fair Trade criteria, and interpretative guidance exists at EU, national and regional level. However, the ECJ is the only EU law interpreter and has never ruled
specifically on the issue of Fair Trade criteria inclusion in public procurement. Nevertheless, our study of EU primary principles, secondary law and of primary EU law cases, as well as national legislation, guides and case law permits us to draw conclusions on the different legal ways to include Fair Trade in public procurement procedures, that will be exposed more in detail in the European Model on FTPP, presented in conclusion to this research.
III- Analysis of the existing FTPP practices

Apart from the political and legal context that frame FTPP, it is also essential to study the resulting practices: are there concrete results of the political commitments and legal dispositions and what are they?

During the past 3 years, the Public Affairs project partners have carried out research on Fair Trade public procurement practices. Tenders including Fair Trade criteria were collected and analysed, public authorities were met and interviewed. Questionnaires were sent all around Europe in order to collect information about how contracting authorities include Fair Trade criteria in their tenders, what kind of products they buy, what definition and criteria they use, the barriers and opportunities they see to FTPP.

a. Methodology and context

As explained in the introduction of the research, 2 tools were developed to collect this information:

- A questionnaire that has been distributed mainly by electronic means, e.g. through e-mailings and the Observatory’s website;
- A template for case study analysis and systemisation of the inclusion of Fair Trade criteria in tender documents.

Unfortunately, these tools have not permitted to collect as much information as expected, for the following reasons:

- The language barrier at national and local level has been a huge obstacle to collect information (in every concerned field).
- The spending of public money continues being a delicate topic for public administrations, which are not always willing to share their data.
- Due to a lack of resources, questionnaires and requests of information on other aspects were circulated either directly or through the project’s partners (when possible), or through our network of Fair Trade Organisations and contacts. The involvement of such a variety of actors, with such a different level of commitment towards the project and the topic of the study resulted in very different methods of data collection and very differentiated results.

As the method used to collect the data influences the results, it is delicate to incorporate, and makes it impossible to build proper statistics. Nevertheless, it permits us to get an overview of the FTPP practices in different countries and to benchmark them.

In the end, the collection of tendering documents was quite difficult. In the national partners’ countries, constant direct contact with public authorities permitted to collect calls for tenders, but at the EU level, this collection was made mainly through desk research. Unfortunately, most of the tenders including Fair Trade criteria do not mention “Fair Trade” in their title, which make them difficult to find through a desk research. Most of the documents collected were provided by public authorities through direct contact.

Tenders from France, the United Kingdom, Scandinavia, Germany and the Netherlands, were collected and permitted the development of case studies. They were also used in the frame of this analysis, together with the answers collected through questionnaires from local authorities in twelve European countries (in the EU and Switzerland) and from some EU institutions. A total of 72 relevant questionnaires were collected in European
countries with high Fair Trade awareness (Western EU). Most of the answers came from Germany, France, Scandinavia and the UK, which are countries where FTPP is fairly enough developed. Their practices are, therefore, quite interesting to study. The large majority of the answers (87.5%) were given by local authorities. These considerations are essential to clarify the fact that we will then benchmark the practices of local authorities from Western (EU 15) European countries.

In order to better apprehend the answers, it is important to precise that the large majority of authorities whose results are studied here have sustainable and Fair Trade practices.

Only 14% of the authorities that answered the questionnaire were not part of any sustainable initiative (such as Agenda 21, fight against climate change, Fair Trade Towns campaign, Eurocities, ICLEI etc.). As a result, around 87% of the local authorities who answer the survey usually include environmental criteria in their purchasing procedures. But social considerations are also important to those authorities, as 60% of them affirmed that they include decent working conditions as a criterion, and 55% the prohibition of child labour.

More than 55% of the authorities that answered the questionnaire include or plan to include Fair Trade in their tenders. Those results confirmed the already well known correlation between public sensitivity to sustainable development issues and commitment to Fair Trade.

Very few of the authorities already purchasing Fair Trade products began such procurement practices at the end of the 1990’s. The practice of Fair Trade public procurement started to really increase in the 2000’s, and more particularly after 2004 (90% of the answers). This could be explained by the evolution brought by the EU Directives that enforced the principles of best value for money, taking into consideration criteria other than the economic ones, in particular environmental and social criteria. This change in the legislation, implemented all across Europe, facilitates the inclusion of criteria such as Fair Trade.

Our benchmark will now focus on the type of contracts used to purchase Fair Trade and the type of products they correspond to. Then we will examine more closely where Fair Trade criteria are included in the tendering process and how. Finally, barriers and potential solutions will be identified.

b. Type of contracts used

Almost 25% of the authorities declared that they were buying Fair Trade through catering services contracts, and 12% through vending contracts. Our observations through the collection of tenders showed that Fair Trade products are often included in services or mixed contracts. They are also present in supply contracts.

Most of the time, the contracts do not concern Fair Trade products only, and Fair Trade products represent only one or more lots of products of a larger contract which includes other non Fair Trade lots (bolder approach).

The use of this type of contract is very common, because the range of Fair Trade products can be too limited to answer certain needs. Therefore, including some Fair Trade products through other types of contracts is a way to meet these needs. The choice of using mixed contracts is often made because of the limited range of Fair Trade products available on the market.

49 The contracts that mix providing of a service and supplying of products: The way of qualifying mixed contracts is defined in the article 22 of the Directive 2004/18/EC

50 The bolder approach is used when a contracting authority wishes to cover varied and large needs with one call for tender. Therefore the tender is divided in different lots, and a company can submit an offer for all of the lots or for certain only.
Trade products (those available on the market) amongst the other products needed (for a canteen for example) is the ideal way to purchase Fair Trade products without bringing too much constraints to the contracting authority (that does not have to issue multiple tenders, putting at risk the coherency of its purchasing policy). Regarding the amount of the tenders in which contracting authorities include Fair Trade products, 40% of the local authorities who answered the question declared their purchase was inferior to EUR133 000, only 9% declared it was below EUR133 00051. This can be explained by the limited scope of Fair Trade products, but also by the fact that the authorities who responded to the questionnaires were local ones and might not have the resources to do very big contracts. We observed in our collection of tenders that contracts above that threshold always concern important services or mixed contracts (vending or catering) or large sized authorities.

c. Type of Fair Trade products purchased

More than 60% of the local authorities that answered the questionnaire purchase Fair Trade coffee, more than 45% buy Fair Trade tea, around 40% buy Fair Trade juices, 27% Fair Trade textiles, 23% Fair Trade bananas, 18% Fair Trade chocolate, 9% Fair Trade rice and snacks. 

These results correspond to what we could observe through the collection of tenders. Most of the authorities introduce Fair Trade in contracts for hot beverages, textiles, but also non alcoholic drinks, fruits, chocolate etc.

Fair Trade food, drinks and textiles are the most purchased products. They are the most commercialised at international level, and they are part of the range of products that wear carry the Fairtrade seal. Fair Trade certified products are the most known Fair Trade products. They are easy to provide in large quantities and they are simple products to start with when changing from regular to Fair Trade products.

We can identify slight differences in purchasing procedures depending on the type of products.

The large tenders for Fair Trade coffee or tea, as well as for drinks can be found in vending contracts. They generally tender for the machine and the products (mixing supply and service).

Food products can be purchased for specific occasions (e.g.to fill in Christmas baskets, in a supply contract), for the catering of an event, school or administration’s canteens catering contracts), or vending machines (vending contract). Most of the time, large tenders for food, as well as for cold drinks, include a certain range of Fair Trade products in a lot of a larger tender (“bolder approach”), as Fair Trade food products are limited and hardly permit to compose an entire meal for example. Eventually, textiles can also be purchased in large quantity, sometimes as a 100% Fair Trade cotton clothes tender, or sometimes as a lot in a larger tender for clothes (e.g. promotional t-shirts for an event, gardening clothes, uniforms for public service employees etc.).

d. Phases of the tendering process in which Fair Trade criteria are included

As explained in more detail in part II, a tendering procedure has different phases: the definition of the subject matter, the setting of technical specifications and of performance clause of the contract (requirements of the contract) and the awarding phase, where the

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51 These thresholds were the EU directives one when the questionnaire was established. They have been revised since then as explained earlier in part II.
best offer is chosen on the basis of criteria transparently displayed in the tendering documents.

Most local authorities that answered the questionnaire said that they include Fair Trade in technical specifications (38%). 34% of them include Fair Trade criteria in both technical specifications and awarding criteria (that serve as a basis to choose the best offer (the most economically advantageous) on the basis of the best value for money principle), 13% introduce it in performance clauses (also called condition of execution) and another 13% as a variant (of the technical specifications).

Observing tenders, we noticed that in practice it can be hard to differentiate technical specifications and performance clauses, as they can be similar in certain aspects, and as they are usually detailed in the same document which sets the requirements of the subject matter of the call for tender. Therefore, public authorities’ answers are difficult to comment. What we observe is that most of the time in tenders for Fair Trade products, there is a section in the requirements of the contract that describes Fair Trade requirements (whether they are considered as technical specifications or performance clauses).

More than one third of the local authorities that answered include Fair Trade in the awarding phase, which means that when they compare the offers received, they take Fair Trade criteria into account and these are part of the awarding decision. What we could observe in the tenders we collected is that when being part of the awarding phase, the respect of Fair Trade criteria gives some points under a sustainability heading, or is a heading as such. But sustainability or Fair Trade criteria have always much less importance and weight than criteria such as price or technical aspects.

Variants are also a common practice. As we could see in our previous legal analysis, certain countries recommend it as the only way to include Fair Trade. In that case Fair Trade products are proposed as an option, and Fair Trade criteria cannot be used to assess the offers in the awarding phase.

e. Definition and verification of Fair Trade in the tenders

- Fair Trade definition

After determining where to include Fair Trade criteria in a tender, it is important to identify which criteria best define Fair Trade and are suitable for use in a tender. Indeed, it is important that the criteria describing requirements of a contract are specific enough to allow bidders to prove compliance by any way of their choice. As explained with more details in the part dedicated to the legal framework of FTPP, according to EU rules, criteria must also be linked to the subject matter of the contract, or to the contract itself, in order to be considered as suitable.

In the questionnaires’ answers, it appears that 42% of the local authorities that answered the question on Fair Trade definition define Fair Trade according to the Fairtrade label criteria. 6% use the European Parliament resolution, and 10 % another definition (that can be the one given by a guide on Fair Trade public procurement, such as the one published by the “Plateforme Française du Commerce Equitable”, that is used by French local authorities.

The question was not precise enough to permit us to know if when saying they use the “Fair Trade label definition” authorities meant they were using the underlying criteria of

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the label (as recommended by the Communication on Fair Trade of the Commission) or if they just referred to the label without defining corresponding requirements. That second option would not permit to accept other means of proof, as it would be impossible to determine what was equivalent, as it was not transparently defined in the call for tender. The Fair Trade movement agrees with the EC in saying that referring to the Fairtrade label only (without adding the mention “or equivalent” and without defining criteria to be equivalent with) is restrictive of competition. In our tender collection, most of the time, Fair Trade criteria are defined, and it is not very common to see only Fairtrade label mentioned.

- Verification
In the tenders we observed, most of the time, Fairtrade label and organisations that are certified by WFTO are considered as complying with the requirements set for Fair Trade. Most of the time, in compliance with EC rules, any other way of proof is accepted. Nevertheless we could also observe certain practices that were not fully complying, as they mentioned “any other equivalent label will be accepted”. We think that “any other way of proof” should be prefer preferred to “equivalent label” as it is not fair for competitors to require a label (as there are costs of certification attached to it) and as organisations certified by WFTO are not labelled as such. Therefore we consider it is restrictive for competition, including within the Fair Trade movement.

f. Other complimentary measures in the tender (i.e., educational activities, etc.)

Other complimentary measures, such as training of the contracting officers, awareness raising or educational activities can also be required in a tender for Fair Trade products. It is a practice the Fair Trade movement encourages, as it resulted from our observations that in a Fair Trade public procurement implementation strategy, awareness raising of staff (for understanding and good implementation of the new strategy), and communication with public (for transparency of public expenditures) were essential steps to have a successful implementation of FTPP. Only 16% of the local authorities that answered the questionnaire were including that sort of training courses in their tenders.

g. Problems and opportunities (barriers to FTPP, opportunities)

As our desk research showed that the FTPP situation was still not very clear sometimes, both on the political and legal aspects, and in order to identify where it could be enhanced, the authorities consulted through questionnaires were asked to identify barriers restraining them from switching to FT PPP, and the incentives they would value in priority. Almost 60% of the authorities that answered on the barriers they perceived declared that the concern for higher prices was a serious obstacle to FTPP. Almost 50% also listed the lack of information as a barrier. 43% see the lack of supply as a serious problem too. Only 25% were concerned about the legal uncertainties at EU level but 35% were at national level. 25% deplored the lack of incentives and only 17% were concerned by the quality and taste of the products.

In order to resolve these issues, the public authorities consulted expect more information on products and on products availability (20%). It is the first thing that would motivate
contracting authorities, just before a clearer guidance (15%), and more information in general (15%).

The perception of the situation by public authorities revealed by the questionnaire, and the practices benchmarked confirmed what the Fair Trade organisations learned through their continuous contact with contracting authorities.

Conclusion of this study will therefore aim at clarifying the legal context of Fair Trade public procurement. The conclusions drawn will permit to guide authorities more precisely than what has been done so far in official EU guidance on the way to include Fair Trade criteria in tenders. Nevertheless, it seems essential that the efforts in the promotion of Fair Trade public procurement continue to focus on information, especially in countries where Fair Trade awareness is still low. It was impossible to collect data on FTPP there, as FTPP practices do not exist.

Information on supply aspects should also be enhanced. Certain Fair Trade organisations have already developed initiatives at local level to address this issue. IDEAS in Spain or Ctm-Altromercato in Italy, as well as OWW in Belgium have catalogues of Fair Trade products. Equi’sol in France developed a website “Ofretic”, which is a database of companies that provide Fair Trade products. The website displays a lot of information about the products these companies make available, which permit contracting authorities to get complete, updated and easy of access information about the existing supply of Fair Trade products on the market, where to procure it and at what price.

The lessons learned from this study will be more developed in the conclusion.

54 Downloadable here: http://dl.dropbox.com/u/6030471/CPE/Gu%C3%ADas/Catalogo%20Adm%20comprimido.pdf
55 http://www.altromercato.it/en/products
56 http://www.oxfanwereldwinkels.be/producten
57 http://www.ofretic38.com/index.php
Conclusions and recommendations

In this research, we have tried to put together the information collected during three years at EU level and in certain Member States, as well as at regional and local level, in order to have a complete overview of the Fair Trade public procurement situation in the EU: from a political, practical and legal point of view.

At political level, we could observe that local authorities have a more and more important role in the EU. Closer to citizens and sharing their concern, they try to implement sustainable and development policies at local level, and want to play an increased role in addressing these global challenges. The success of the Fair Trade Towns campaign, or the hundreds of local authorities that attended the last ICLEI conference58 and the political declarations on sustainable development and climate change they adopted are indicators amongst many others of this reality. More and more authorities across Europe are committed to Fair Trade and choose to include it in their procurement policies. This growth has accelerated after 2004 and is starting to extend to new Member States. But the commitments to FTPP could have more impact if they were binding. Many authorities, particularly at a higher level are including Fair Trade and FTPP in non binding declarations or strategies, which undermine the concrete impact of such a commitment. Nevertheless, these increasing commitments still result concretely in a growth of Fair Trade public procurement practices. These practices seem to be still restrained by a lack of knowledge of Fair Trade supply and FTPP possibilities by public authorities.

On a practical level, the research showed that certain prejudices and a general lack of information about Fair Trade persist in spite of years of awareness raising campaigns. It is therefore necessary to address this issue in countries where FTPP is already developed, but even more so in the new Member States where our research showed that Fair Trade awareness is still low, green procurement is taking its first steps and FTPP still does not exist.

Particular attention should also be given to the supply. The purchasers need to be certain that they will be provided with what they need and cannot spend too much resources looking for this information.

The research also revealed that public authorities are in demand of continuous support on all the aspects that facilitate Fair Trade public procurement.

On the legal level, the research highlighted that there is a lack of clarity concerning how to include Fair Trade in public procurement procedures. It was reflected on the practical level, as legal uncertainties at national and EU level are amongst the main barriers to FTPP identified by contracting authorities.

The evolution of law, especially at EU level is generally slow. Indeed, an evolution has to be voted both by the Parliament that represents varied political streams, as well as by a qualified majority of Member States, that represent national interests. The EU law is a result of a compromise of three bodies, and therefore, often suffers from a lack of clarity or can have gaps. The actual EU procurement Directives affirm that social procurement is possible and encouraged, but they failed in explaining how. Therefore, interpretations and guides are developed by the EC, the Member States, the regions and the courts, as well as by civil society.

58 More information about the conference and the declarations adopted are available on: http://www.dunkerque2010.org
Clarification of the legal possibilities to include Fair Trade is carried out by interpreting the existing law, whether by EU, national, and regional authorities or by non-governmental entities. Nevertheless, the existing gaps in the current legislation should be filled in, or a binding common interpretation should be given, because at the moment, as we could see in our research, the legal uncertainty at EU level results in the existence of several different interpretations on how to include Fair Trade criteria in procurement procedures.

These conclusions on the state of play of Fair Trade public procurement bring up several recommendations on what should be done in order to facilitate and increase the use of Fair Trade public procurement as a tool for sustainable development support. These are not addressed only to policy makers and contracting authorities but also to Fair Trade organisations:

**Fair Trade Organisations should:**

- Continue and increase advocacy work at regional, national and EU level in order to:
  - promote the adoption of a legal framework of how to include ethical and Fair Trade criteria into tenders
  - adopt a procurement policy which is friendly for social, ethical and Fair Trade issues, similar to the one existing for green and climate change concerns. Climate change is not a more valuable policy than social aspects of sustainable development.
- Pursue the work of awareness raising and information on FTPP, in particular in countries where Fair Trade awareness is still low, to stimulate the demand
- Develop more supporting tools for local authorities, with a focus on the legal constraints of public procurement
- Develop a better information regarding the supply of Fair Trade products
- Work with the current supplying companies in order to enhance their supply of Fair Trade products

**Policy makers at local, regional, national and EU level should:**

- Adopt stronger binding commitments and sharply monitor their implementation
- Have a harmonised interpretation of the legal framework of Fair Trade public procurement at EU level
- Adopt clearer legal dispositions with regards to the status of Fair Trade criteria in procurement procedures. It will be necessary to be particularly vigilant of the inclusion of clear dispositions to govern social and ethical procurement when the current Directives will be revised.
Contracting authorities should:

- Increase the share of Fair Trade products in their procurement policy, as a tool for sustainable development

These recommendations should permit at mid and long term to resolve the problems and to overcome the barriers that this research identified. Nevertheless, until the EU Directives on public procurement are clarified or revised, many contracting authorities still wish to continue purchasing Fair Trade products.

There are indeed ways to include Fair Trade criteria in tenders without legal risks. The EU model on Fair Trade public procurement that was developed through the Public Affairs project advises contracting authorities on the way to implement a FTPP strategy, as well as on the different legal possibilities to include Fair Trade into procurement procedures.

**BUYING FAIR TRADE**

**A European Model on Fair Trade Public Procurement**

This model has been developed within the Public Affairs – Mobilising action for Fair Trade Public Procurement project, funded by the European Commission. The contents are the sole responsibility of the European Fair Trade Association (EFTA) and may under no circumstances be regarded as the position of the European Commission. The legal information in this document is accurate to the best of our knowledge and based on current best practices. Guidance provided in this model is based on the European Union (EU) legal framework, but does not constitute an official interpretation of EU law. Contracting authorities wishing to purchase Fair Trade products are advised to take into account specific national or regional laws or guidance documents on how to introduce Fair Trade in public procurement. EFTA does not assume liability for misinterpretations or implementation.

**What is Fair Trade?**

Fair Trade is a concept that was recognized by the European Parliament (EP) in 2006, and confirmed in 2009 and 2010 by the European Commission (EC), the European Economic and Social Committee (EESC), the European Committee of the Regions (CoR) and the EP report on new developments in public procurement.

It is defined at International level as:

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59 Resolution of the European Parliament of 6 July 2006 on Fair Trade and development (2005/2245(INI)), paragraph 2
60 Communication from the Commission of the European Communities of the 5 May 2009: Contributing to Sustainable Development: The role of Fair Trade and nongovernmental trade-related sustainability assurance schemes (com (2009) 215 final)
64 By the main Fair Trade networks Fairtrade Labelling Organizations International (FLO), World Fair Trade Organization (WFTO, formerly IFAT), European Fair Trade Association (EFTA) and Network of European Workshops (NEWS!) in 2001. More detailed information on the Fair Trade principles can be found in the Charter of Fair Trade principles, agreed in 2009 by the two International Fair Trade standards-setters, FLO and WFTO, available on:
“(...) a trading partnership, based on dialogue, transparency and respect, that seeks greater equity in international trade. It contributes to sustainable development by offering better trading conditions to, and securing the rights of, marginalized producers and workers – especially in the South. Fair Trade Organizations, backed by consumers, are engaged actively in supporting producers, awareness raising and in campaigning for changes in the rules and practice of conventional international trade.”

A list of Fair Trade criteria to be used in procurement procedures is also available on page 6.

Why Fair Trade Public Procurement?
Contracting authorities have a significant role in stimulating socially-conscious markets demonstrating socially responsible governance and set the example for citizens. By supporting marginalised producers and workers in the South through Fair Trade, contracting authorities can also show EU citizens their commitment to the three pillars of sustainable development (social, environmental and economic). Fair Trade is an effective way of contributing to contracting authorities’ efforts in reaching the UN Millennium Development Goals. It is also a way to guarantee the ILO core conventions are being respected and the products purchased are not produced with recourse to child labour. In fact, a recent study by the University of Rome “Tor Vergata”65 shows the positive impact of public procurement policies that include Fair Trade by local authorities, not only for disadvantaged producers, but also to raise the awareness of citizens as involved stakeholders.

It is legally possible for contracting authorities that wish to put in practice their commitment to social, economic and environmental sustainability to purchase Fair Trade products, both for procedures within the scope of the EU Directives on Public Procurement66 and those that do not fall under their scope67.

The objective of this document is to give contracting authorities practical guidance on the different legal ways to include Fair Trade criteria in their procurement practices.

I. Where to begin? - Setting up an organizational strategy

1. Market Analysis
This step allows public authorities to look at the current availability of Fair Trade products as well as the possible future availability. Before initiating actual purchasing procedures for Fair Trade products, the contracting authority should be confident the market can supply the product it is looking to purchase. The most common Fair Trade products, in particular food ones, are easily available. Some authorities develop purchasing catalogues as a result which can greatly contribute to eliminating additional steps when opening new procedures. Contracting authorities


65 Becchetti, Leonardo and Bustamante, Juana Paola, The insertion of Fair Trade products in schools in Rome: an evaluation of the effects of the project, 2008, University of Rome Tor Vergata, study requested by CTM Altromercato and ResPect - Centre for ethic and responsible enterprise


67 These procedures must abide by the fundamental rules of the Treaty on the Functioning of the European Union (TFEU) and the principle of non-discrimination on the ground of nationality in particular.
would benefit from contacting local or regional Fair Trade Organisations and other Fair Trade suppliers in order to develop such catalogues. These catalogues should, of course, be constantly updated.

2. Needs Assessment
This should include an analysis of the current situation and the desired outcome. What products are currently purchased that could be switched to Fair Trade? Are there other products that will be foreseeably purchased in the future that can be available through Fair Trade? Where could there be a beneficial combination of Fair Trade products with organic products? How many products would the contracting authority aim to convert in the next 5-10 years? What products would be prioritized?

<table>
<thead>
<tr>
<th>In this step, benchmarks can also be set, e.g. over 5 years:</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Year 1</strong> – Set up organizational strategy.</td>
</tr>
<tr>
<td><strong>Year 2</strong> – Purchase of first Fair Trade product (e.g. 100% of all coffee purchased).</td>
</tr>
<tr>
<td><strong>Year 3</strong> – Expansion of pilot contract (if one year contract) and conversion to 2 additional Fair Trade products.</td>
</tr>
<tr>
<td><strong>Year 4</strong> – Purchase of additional Fair Trade products on all purchases where option is available as previous contracts expire.</td>
</tr>
<tr>
<td><strong>Year 5</strong> – Re-issue purchase procedure for first Fair Trade product and continue as in year 4.</td>
</tr>
</tbody>
</table>

3. Political commitment
A key element when purchasing Fair Trade is to have top level political commitment. This can take on various forms, from a general strategy on sustainability to a simple declaration, exclusively regarding purchasing policies or throughout its other policies too. These documents provide transparency to the greater public as well as within the organization. Such a commitment should indicate clear targets and the objectives of the purchasing policy. Ideally, it should also clearly state what Fair Trade is and who is responsible for the implementation of the purchasing procedures, as well as some general guidelines on how these procedures should be implemented.

4. Communicating with staff
Once there is a political commitment to purchasing Fair Trade products, it is important to communicate this to relevant purchasing staff and even to develop some training sessions on how to purchase Fair Trade. Engaged staff allows for a more effective implementation. Fair Trade organizations on the national, regional and local level can be of great assistance in this step and it is always useful to contact them.68

5. Awareness-raising towards the general public
Awareness-raising of Fair Trade purchasing has a two-fold reasoning behind it; it both provides transparency and clear explanation of how tax-payers’ money is being spent and why, and it sets an example for the general public on a more sustainable way to

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68 Lists of European Fair Trade organisations and European Fairtrade labelling initiatives can be found on WFTO and FLO websites: [www.wfto.com](http://www.wfto.com) and [www.fairtrade.net](http://www.fairtrade.net)
purchase. This can be achieved through dedicated leaflets, posters, articles in media, interviews, special awareness-raising events on Fair Trade, joining Fair Trade towns campaign, etc.

6. Choosing a suitable pilot contract
Contracting authorities should choose a first contract suitable for testing their approach and lesson learning. Such a contract should take all aspects of purchasing that product into consideration, such as recurrence, volume, delivery, etc. This will permit future contracts to be improved through the lessons learned.

II. Purchasing Fair Trade - one concept, various possibilities

Recommended definition of Fair Trade criteria
When referring to Fair Trade in purchasing procedures, we advise using the wording of any national or regional law on Fair Trade that may exist in your region or country\(^69\). Where such a law does not exist, we recommend using the relevant Fair Trade criteria laid down by the European Parliament Resolution on “Fair Trade and development”\(^70\) and later confirmed by numerous other EU Institutions\(^71\), listed below with necessary formal adaptations\(^72\):

**Economic Pillar**
- a) A fair producer price, guaranteeing a fair wage and covering the costs of sustainable production and living. This price needs to be at least as high as the Fair Trade minimum price and premium, where they have been defined by international Fair Trade associations;
- b) part payments to be made in advance, if so requested by the producer;
- c) support for production and market access for producer organisations;
- d) monitoring and verification of compliance with these criteria, in which Southern organisations must play a greater role, leading to reduced costs and increased local participation in the certification process;
- e) regular impact assessments of Fair Trade activities;
- f) long-term, stable relations with producers and involvement on the part of producers in Fair Trade standard-setting;

**Social Pillar**
- g) transparency and traceability throughout the supply chain to guarantee appropriate consumer information;
- h) conditions of production which respect the eight International Labour Organization (ILO) Core Conventions;

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\(^69\) You can find non-exhaustive information about regional and national laws mentioning Fair Trade in the study “State of play of Fair Trade Public Procurement in Europe”, and in “Fair Trade Public Procurement legal framework in the EU and the Member States” on the cd-rom enclosed.

\(^70\) European Parliament Resolution of 6 July 2006 on Fair Trade and development (2005/2245(INI))

\(^71\) See footnotes 1 to 5 for the references to the EU Institutions documents supporting Fair Trade

\(^72\) The list and some criteria were split between the three pillars of sustainable development, and certain criteria were clarified in order to adapt them to the necessity of tendering procedures
i) protection of human rights and in particular women's and children's rights and respect for traditional production methods which promote economic and social development;

j) capacity building and empowerment for producers, particularly small-scale and marginalised producers and workers in developing countries, and their organisations, as well as for the respective communities, in order to ensure the sustainability of Fair Trade;

k) awareness-raising activities about Fair Trade production and trading relationships, the mission and aims of Fair Trade and the prevailing injustice of international trade rules;

Environmental Pillar

l) respect for the environment: All parties to Fair Trade relationships collaborate on continual improvement on the environmental impact of production and trade through efficient use of raw materials from sustainable sources, reducing use of energy from non-renewable sources, and improving waste management. Adoption of organic production processes in agriculture (over time and subject to local conditions) is encouraged.

This definition of Fair Trade criteria by the above three Pillars is the one that is referred to later in the document when recommending to “List Fair Trade criteria here”.

These Fair Trade criteria, that are recognized at International and EU level, must be included by contracting authorities to be able to give preference to Fair Trade products. There are different legal ways for authorities to purchase Fair Trade items, depending on the contracting authority’s organizational strategy and the corresponding procedure, as schematized and detailed below:

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73 General EU principles of transparency, objectivity and non-discrimination must be respected in all cases, also below the EU thresholds.
A. Fair Trade in national procedures

In principle, EU Directives only apply to contracts which have a total estimated value exceeding the pre-established thresholds set by the Directive. Below EU Directives’ thresholds, Member States have national purchasing procedures that vary from country to country, yet there are, however, some very similar standard processes across the EU, on which we will focus on in this manual. Fundamental rules of EU law including without limitation the free movement of goods, the freedom of establishment and the freedom to provide services in the EU as well as the principles of transparency, objectivity and non-discrimination must be respected in all cases also below the EU thresholds.

In some circumstances, for purchases of very low value, Member States may authorize purchasing without tendering procedure.

1. Direct purchase

Through this procedure, the contracting authority is free to purchase from any supplier without seeking a minimum number of quotes or conducting a tender procedure. A negotiated procedure takes place and in many cases a simple invoice is sufficient (without a formal contract). The contracting authority is free to purchase any supply or service by choice.

Direct purchase is intended for:

- De-minimis (extremely low value) purchases, where the cost of a formal tender procedure is not in proportion to the value of the contract, and
- a single purchase of a supply or service which is not regularly used, and which does not derive from a framework agreement (e.g., the supply of promotional Fair Trade T-shirts or bags for one single event only). The “direct purchase” procedure is intended for single purchases. If repeated purchases are intended during a certain time frame, a framework agreement being in accordance with the EU procurement Directives, once the aggregated value exceeds the EU Directives thresholds, should be signed. Splitting purchases in lots with the only purpose of avoiding a formal procedure is not allowed.

2. “Quotation” procedure

Some Member States laws provide for a “quotation procedure” for contracts of low value. The contracting authority seeks a minimum number (usually 3-5) of quotes from market participants. No national-wide publication or formal procedures are required, and no complex drafting of technical specifications. Usually some kind of paper trail is required to demonstrate that several quotes had been sought.

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74 We call here “national” procedures the procedures that are determined by national law and do not fall under EU Directives’ scope. These procedures apply to contracts which estimated value is below the threshold set by EU Directives.

75 Directive 2004/18/EC is applicable to public works contracts, public supply contracts and public service contracts which have a value excluding VAT estimated to be no less than the pre-established thresholds set by the directive. The thresholds are recalculated by the Commission every two years. Their updated value is currently of EUR 125 000 for public supply and service contracts awarded by central government authorities; EUR 193 000 for public supply and service contracts awarded by contracting authorities which are not central government authorities, EUR 387 000 for public supply and service contracts awarded by entities operating in the water, energy, transport and postal services sectors, and EUR 4 845 000 in the case of works contracts, pursuant to Commission Regulation (EC) No 1177/2009, OJ L 314, 1.12.2009, p. 64

76 See footnote 77

77 More information on national procedures in EU countries is available on the cd-rom in “Fair Trade Public Procurement legal framework in the EU and the Member States”
3. “Adapted” procedure
Other Member States give a broad margin of discretion as to the type of procedure to be followed. Adapted procedures are the procedures with specific or exceptional regimes that can exist in national procurement laws in certain Member States.

4. Tendering procedures\(^78\)
In some Member States, an additional intermediary national threshold is introduced. Purchases above this national threshold (but below the EU Directives threshold) may need to follow a “national” tendering procedure, different from the tendering procedure as defined by the EU Directives. As the “national” tendering procedures vary (if any) from country to country, they are not described in this document.

Furthermore, in some Member States, national legislation may require tenders below the EU Directives thresholds to follow a tendering procedure similar or identical to the ones defined by the EU Directives. In such case, the three models described below generally apply. However, depending on the concerned Member State, there may be some differences in the details and procedures.

It is therefore important to check the applicable national and regional procurement legislation before proceeding.

B. Fair Trade in procedures under the EU Directives’ scope
For large purchases with values\(^79\) above the EU Directives’ thresholds\(^80\), it is necessary to follow a tendering procedure in accordance with the EU Directives.

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Key phases of tendering procedure

The ‘subject matter’ of a contract is about what product, service or work you want to procure. This process of determination will generally result in a basic description of the product, service or work. When defining the subject matter of a contract, contracting authorities have great freedom to choose what they wish to procure.

The ‘technical specifications’ describe the contract to the market so that companies can decide whether it is of interest to them. They provide measurable requirements against which tenders can be evaluated such as quality levels, environmental performance levels, use of the product, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures. They constitute minimum compliance criteria. They must be linked to the subject matter of the contract. Offers not complying with the technical specifications need to be rejected unless the contracting authority has, in an explicit way, accepted variants diverging from the required concept.

“Contract performance conditions” are used to specify how a contract must be carried out. They need to be related to performance of the contract, transparent and non-discriminatory.

“Awarding” the contract is the last stage in the procurement procedure. At that stage, the contracting authority evaluates the quality of the tenders (the offers) that complies

\(^78\) That do not fall under EU Directives’ scope and are defined by the different EU Member States procurement laws

\(^79\) The different legal methods to determine the value of a tender are set by the Article 9 of Directive 2004/18/EC

\(^80\) See footnote 77
with the minimum requirements set out in the technical specifications and contract performance conditions in the contract documentation. Among such offers that each fulfill the requirements of the procurement procedure, contracting authorities shall base the award of public contracts either on:
- various criteria linked to the subject-matter of the public contract in question when the award is made to the most economically advantageous tender;
or on
-the lowest price only.

Below you will find three general models we can suggest to include Fair Trade in tendering procedures abiding by the EU Directives’ rules.

1. **Basic model - The Use of Variants**

If contracting authorities wish to buy Fair Trade products but have concerns such as availability or additional cost of Fair Trade products, an option is to ask the potential bidders to submit variants. This is only possible when the award is done on the basis of the most economically advantageous tender (not on the lowest price only)\(^{81}\). In this situation, the contracting authority develops a set of minimal technical specifications which will apply to all offers. Additional Fair Trade criteria will be added to the technical specification for the Fair Trade variant offer only. When the bids are received, the authority can easily compare all offers. Nevertheless, it is the less efficient approach when the aim of the contracting authority is to give preference to Fair Trade, as Fair Trade criteria will not be a minimum requirement, and will not be part of the criteria taken into account to compare the offers.

In order to be able to accept variants, the contracting authority needs to indicate in advance in the tender documents (indication in the contract notice is mandatory) that variants will be accepted, the minimum specifications that have to be met, as well as specific requirements for presenting variants in bids (e.g. requiring a separate envelope indicating variant).

**Example:**

**Subject matter/title:** Contract for supply of product, with possibility of Fair Trade product, or equivalent as a variant

**Specifications:** (List of minimum requirements) In addition to the minimum requirements to be met with any tender, variant bids must as well fulfill the following Fair Trade requirements:

(List Fair Trade criteria here)

The presentation of this bid must be submitted in a separate envelope.

**Verification: (regarding Fair Trade requirements)** Products carrying a Fairtrade label (Fairtrade Labelling Organizations International), or imported and distributed by Fair Trade Organizations (World Fair Trade Organization accreditation system) will be presumed to comply (or “will be considered valid ways of proof”). Compliance may also be proved by any other appropriate means.\(^{82}\)

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\(^{81}\) As stated in Article 24 of Directive 2004/18/EC

\(^{82}\) A concrete example of such a verification for Fair Trade criteria can be found in the point 7 of the “Circulaire relative aux achats publics durables dans les communes” of 15 April 2008 of the Gouvernement of the Region Bruxelles-Capitale, available on: http://www.ejustice.just.fgov.be/cgi/api2.pl?lg=fr&pd=2008-04-15&numac=2008031166
Sanctions: (regarding Fair Trade requirements) If non-compliance becomes apparent during the duration of the contract, the contracting authority reserves the right to impose a penalty (state percentage) and/or to withdraw from the contract.

2. Conservative model (as recommended by the European Commission) – The inclusion of social criteria in contract performance clauses

To complement the European Commission guide “Buying Green”\textsuperscript{83}, the European Commission will issue by the end of 2010 the guide “Buying social: A guide to taking account of social considerations in public procurement” with the goal to give guidance to contracting authorities in Europe on how to introduce social considerations in public procurement. It is a non-binding document and it does not constitute an official interpretation of EU law (this is only prerogative of the courts, and ultimately the Court of Justice of the European Union).

The “Buying social” guide will include a section on the use of social labels and its implication for ethical trade, where the EC will first remind that the requirement of a label as a criterion is prohibited, as it is regarded as an unfair restriction of competition.

The European Commission also elaborates on the rather theoretical distinction between technical specifications (that should be linked to the characteristics of the product or its production process) and the performance clauses (that should be related to the execution of the contract). The EC guide lays down that certain ethical criteria, because they are not directly linked to the characteristics of the products or the production process, cannot be included in the technical specifications. In the case of Fair Trade, the EC interpretation would imply that the social and economic criteria of Fair Trade would fit in the contract performance clauses and the environmental criteria of Fair Trade would fit in the technical specifications.

Many contracting authorities refer in the contract performance clauses to the core conventions of the International Labour Organisation (ILO). Fair Trade certification systems are one of the ways to prove compliance with these ILO conventions.

Contract performance clauses have to comply with the rules set out in Article 26 and in Recital 33 of Directive 2004/18/EC. According to those rules, contract performance conditions can set social and environmental requirements provided that these are compatible with Community law, are non-discriminatory, and are indicated in the contract notice or in the specifications. Tenderers must still be able to prove by any other means deemed appropriate that their products comply with the required specifications.

Example:

\textbf{Technical specifications:}
“Fair Trade environmental pillar” to be listed here

\textbf{Performance clauses:}
“Fair Trade economic and social pillars” to be listed here

\textbf{Verification:} Products carrying a Fairtrade label (Fairtrade Labelling Organizations International), or imported and distributed by Fair Trade Organizations (World Fair Trade

Organisation accreditation system) will be presumed to comply (or “will be considered valid ways of proof”). Compliance may also be proved by any other appropriate means. **Sanctions:** If non-compliance becomes apparent during the duration of the contract, the contracting authority reserves the right to impose a penalty (state percentage) or to withdraw from the contract.

3. Progressive model – A comprehensive and practical approach to Fair Trade tendering

Many contracting authorities across Europe refer to Fair Trade in several phases of the tendering process, in a comprehensive approach to Fair Trade tendering.

   a. **The subject matter of the contract**
   Many contracting authorities directly mention Fair Trade in the subject matter of the tender. It enhances the transparency on what is expected for bidders. A possible wording could be “purchase of Fair Trade product or equivalent”, with further description of Fair Trade criteria and verification in the requirements of the contract (see below). We believe this to be a sound tendering procedure similar to what is done in green procurement\(^8^4\). It is accepted by certain public authorities and courts across the European Union but it cannot be excluded that other authorities, courts or the European Commission might reject such an approach.

   b. **The requirements of the contract**
   In practice, technical specifications and performance clauses are most often merged together in the same document laying down the requirements of the contract. This document often includes several subdivisions (such as article, sections, points etc.) that describe the different requirements of the contracting authorities. For more clarity towards the bidders, contracting authorities often define their requirements regarding Fair Trade in the same point, regardless of whether those expectations concern the characteristics of the products and production process or the execution of the contract. The differences between the former and the latter can be sometimes difficult to make at a practical level.
   Both the subject matter and requirements of the contract concerning Fair Trade should be clear, objective, and transparent referring the criteria relating to the products as well as the evaluation scheme whether or not and to what extent the criteria have been met. We would advise at this stage to avoid referring to specific Fair Trade labels as a criterion, as this could be seen as restrictive of market access. It is important to clearly define Fair Trade in accordance with EU rules on transparency and non-discrimination. Instead, we advise to describe in detail, the social, economic and environmental requirements expected by the contracting authority to be fulfilled by the tendered product.

\(^8^4\) European Commission, *Buying Green: A handbook on environmental public procurement*, 2004
Examples (Corresponding case studies can be found in the attached cd-rom):

i. Supply contract

Subject matter/title: Supply of Fair Trade product, or equivalent
Requirements of the contract: All Fair Trade products supplied must be produced according to the following parameters:
(List Fair Trade criteria here)
Verification: Products carrying a Fairtrade label (Fairtrade Labeling Organizations International), or imported and distributed by Fair Trade Organizations (World Fair Trade Organisation accreditation system) will be presumed to comply (or “will be considered valid ways of proof”). Compliance may also be proved by any other appropriate means.
Sanctions: If non-compliance becomes apparent during the duration of the contract, the contracting authority reserves the right to impose a penalty (state percentage) or to withdraw from the contract.
Note: If contracting authority wishes to purchase only a percentage of the Fair Trade product, it should be clearly stated in the subject matter what percentage will be Fair Trade and the technical specifications, verification and sanctions for the Fair Trade product should be as mentioned above for the Fair Trade product.

ii. Mixed Contract - Service Contract including supplies

Subject matter/title: Contract for catering services including the provision of Fair Trade products, or equivalent
Requirements of the contract: All of the following Fair Trade products (e.g., coffee, tea, chocolate, tropical fruit, etc.) must be produced according to the following parameters:
(List Fair Trade criteria here)
Verification: Products carrying a Fairtrade label (Fairtrade Labelling Organizations International), or imported and distributed by Fair Trade Organizations (World Fair Trade Organization accreditation system) will be presumed to comply (or “will be considered valid ways of proof”). Compliance may also be proved by any other appropriate means.
Sanction: If non-compliance becomes apparent during the duration of the contract, the contracting authority reserves the right to impose a penalty (state percentage) or to withdraw from the contract.

iii. Mixed contract including supplies and service of awareness-raising activities

Another way to procure Fair Trade products is to link them with awareness raising activities on Fair Trade and the issues it tries to address. As we referred in the organizational strategy above, it is also a good idea to include awareness-raising activities in order to impact on changing consumer behaviour.

Subject matter/title: Contract for Fair Trade products, or equivalent, with awareness-raising activities on Fair Trade.
Requirements of the contract: All Fair Trade product supplied must be produced according to the following parameters:
(List Fair Trade criteria here)
In addition, the supplier must also provide for x awareness-raising sessions on Fair Trade as follows:

85 The way of qualifying mixed contracts is defined in the article 22 of the Directive 2004/18/EC
• x 2 hour sessions for staff
• x 2 hour sessions for the general public

**Verification:** Products carrying a *Fairtrade* label (Fairtrade Labelling Organizations International), or imported and distributed by Fair Trade Organizations (World Fair Trade Organization accreditation system) will be presumed to comply (or “will be considered valid ways of proof”). Compliance may also be proved by any other appropriate means.

**Sanctions:** If non-compliance becomes apparent during the duration of the contract, the contracting authority reserves the right to impose a penalty (state percentage) or to withdraw from the contract.

c. The awarding phase of the contract

The EU Directives allow contracting authorities to take into account either the lowest price only, or the most economically advantageous tender including without limitation the product price and other criteria directly linked to the subject-matter of the procurement in the award phase. Article 53 of Directive 2004/18/EC makes a non-exhaustive list of the possible award criteria, that mixes characteristics of the products as well as aspects related to the execution of the contract. It includes social characteristics, and we believe this to be a sound way to give preference to Fair Trade products, when Fair Trade criteria have not already been set as minimum requirements. This can be accepted by certain public authorities and courts across the European Union but it cannot be excluded that other authorities or courts or the European Commission might reject such an approach. There are different ways to include award criteria (other than the price only) into a tendering procedure. A very common one is to use an evaluation scheme attributing “points” to different criteria found relevant.

**Example:**

**Award criteria:** The tender will be awarded to the most economically advantageous offer, evaluated as follows\(^{86}\):

*Compliance with Fair Trade criteria:* (List Fair Trade criteria here) 30 pts (out of 100)

*Price and other relevant criteria:* 70 pts (out of 100)

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\(^{86}\) This is only an example. Illustrations of the use of Fair Trade as awarding criteria can be found on the attached Cd-rom in "Fair Trade Public Procurement: case studies in Europe"
List of Annexes

Annex 1 – Public procurement procedures in the EU Member States – Table of thresholds

Annex 2 – Fair Trade Public Procurement legal framework in the EU and the Member States

Annex 3 – Questionnaire on Fair Trade Public Procurement

Annex 4 – Template used to analyse the tenders collected

Annex 5 – Fair Trade Public Procurement: case studies in Europe

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87 Annexes 1, 2 and 5 are available in separate files on the cd-rom on which this research is published, as well as on the website of the project: www.eftafairtrade.org/observatory
Annex 3 - Questionnaire on Fair Trade Public Procurement

Questionnaire for Public Authorities
On Fair Trade Public Procurement

A - About your Organisation

A.1. Name of Contracting Authority _______________________________________________
Department _______________________________________________________________
City/Town _______________________________________________________________
Region ___________________________________________________________________
Country ___________________________________________________________________

Type of Contracting Authority:  □ National/Central Government
□ Regional Government
□ Local Authority
□ Other (please specify _______________

Name of person(s) completing questionnaire _________________________________
Tel. ________________________________   Fax _______________________________
E-mail __________________________________________________________________

B - Fair Trade and Sustainability

B.1. What sustainability or Fair Trade initiatives, if any, is your organisation involved in (e.g. Fair Trade Towns, Local Agenda 21, etc.)?
______________________________________________________________________________________
______________________________________________________________________________________
______________________________________________________________________________________

B.2. Which of the following considerations does your organisation take into account during tendering procedures (select as many as relevant):

a.  Environmental  □   b.  Decent working conditions  □

c.  Child labour  □   d.  Gender equality  □

e.  Other  □
(please specify)____________________________________________________

B.3. Are Fair Trade products available in your area??
Yes  □   No  □
C - Fair Trade and Public Procurement

C.1. Does your organisation include Fair Trade criteria in its tenders or does it expect to start introducing Fair Trade criteria into its tenders? (please select only one)

a. We currently include Fair Trade criteria in our tenders. □

b. We expect to include Fair Trade criteria in the near future. Please state when: ________________________________ □

c. We previously included Fair Trade criteria in our tenders but don't anymore. Please state why: __________________________________________________________ □

d. We considered introducing Fair Trade criteria into our tenders, but rejected the idea. Please state why: ____________________________ (you may advance to section D) □

e. We do not intend to include Fair Trade criteria in our tenders (you may advance to section D) □

C.2. When did your organisation begin introducing Fair Trade criteria into its tenders?
_______________________________________________________________

C.3. For which products/services does/did your organisation include Fair Trade criteria? (For each product, insert the number of tenders in which it is foreseen)

<p>| | |</p>
<table>
<thead>
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<th></th>
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<tbody>
<tr>
<td>a. Coffee</td>
<td>□</td>
</tr>
<tr>
<td>b. Tea</td>
<td>□</td>
</tr>
<tr>
<td>c. Bananas</td>
<td>□</td>
</tr>
<tr>
<td>d. Chocolate</td>
<td>□</td>
</tr>
<tr>
<td>e. Rice</td>
<td>□</td>
</tr>
<tr>
<td>f. Snacks</td>
<td>□</td>
</tr>
<tr>
<td>g. Vending machines</td>
<td>□</td>
</tr>
<tr>
<td>h. Catering services</td>
<td>□</td>
</tr>
<tr>
<td>i. Textiles</td>
<td>□</td>
</tr>
<tr>
<td>j. Juice</td>
<td>□</td>
</tr>
<tr>
<td>k. Other (please specify)</td>
<td>□</td>
</tr>
</tbody>
</table>

C.4. Would your organisation consider introducing other Fair Trade products?
Yes □ No □
If yes, please specify which products: __________________________________________________________
_____________________________________________________________
C.5. In what phase does/did your organisation include Fair Trade criteria in its tenders? (You may select as many options as relevant)

a. In the technical specifications (i.e. when setting out the minimum requirements the product must meet) □
b. In the award phase (i.e. as one of the criteria for deciding which offer to accept, together with criteria such as price) □
c. In both the technical specifications and the award phase □
d. As a variant (i.e. all bids must comply with minimum technical specifications, but extra Fair Trade criteria is added for the variants, allowing for comparison) □
e. As a contract performance clause (i.e. how the contract must be carried out) □

C.6. How does/did your organisation define Fair Trade in its tenders? (You may select as many options as relevant)

b. Through a specific label (a FLO label such as Fairtrade, Max Havelaar, Transfair) □
c. In reference to the definition and principles set out by FINE (FLO, IFAT, NEWS! and EFTA) □
d. Other (please specify) ____________________________________________ □

C.7. Have you ever requested training courses and awareness-raising activities on Fair Trade in your tender?
Yes □ No □
If yes, please specify ______________________________________________________

C.8. Have you ever re-issued a tender that included Fair Trade criteria?
Yes □ No □
If no, please specify why not _______________________________________________

C.9. Does your organisation tender for Fair Trade products or services in contracts estimated to be: (please select only one)

a. below €133 000 □
b. above €133 000 □
c. value not relevant □

C.10. Is your organisation currently using any “Guide”, “Handbook” or “Code of Practice” for the inclusion of Fair Trade criteria into tenders?
Yes □ No □
If yes, please indicate title and author. ______________________________________
D - Obstacles to Fair Trade and Public Procurement

D.1. What do you consider are the main obstacles to including Fair Trade criteria in your organisation's tenders? (you may select as many options as relevant)

a. Legal uncertainty on the European level □

b. Legal uncertainty on the national level □

c. Lack of information □

d. Lack of sufficient offer □

e. No/little incentive to take Fair Trade Public Procurement into account □

f. Concern over higher price □

g. Concern regarding quality or taste □

h. Other __________________________________________________________ □

D.2. What do you think would motivate your organisation to purchase Fair Trade products?

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
__________

Thank you for your time!

This questionnaire has been developed within the "Public Affairs: Mobilising Action for Fair Trade Public Procurement" project with the financial assistance of the European Union. Its contents are the sole responsibility of EFTA and can under no circumstances be regarded as reflecting the position of the European Union.
Annex 4 – Template used to analyse the tenders collected

Template for Good Practices / Tenders Collection

**Key actors involved**

**Identification of public authority/ies or semi-public body/ies**

Name:
Contact person:
Tel. / Fax.
Mailing address:
Street
Postal code
City/Town:
Region
Country:
Website:

**Context** (Status of Fair Trade in country, relevant background information)

**Subject-matter:**

**Fair Trade products involved**

**Contract period** From (dd/mm/yyyy) to (dd/mm/yyyy)

**Value of tender (EUR)**

**Type of contract**

**Technical specifications**

**Verification**

**Award/evaluation criteria** (if applicable)

**Additional/complimentary measures** (educational activities, etc.)

**Problems encountered**

**Results achieved**

**Lessons learned**
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