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PUBLIC PROCUREMENT OF TIMBER

EU member state initiatives for sourcing legal and sustainable timber

by

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1 Introduction

1. The issue of illegal logging has been attracting increasing attention since the late 1990s. It featured as one component of the G8 Action Plan on Forests, and led to a series of Forest Law Enforcement and Governance (FLEG) conferences coordinated by the World Bank, including those in East Asia (Bali, September 2001) and Africa (Yaoundé, October 2003); others are planned for Russia and Latin America.
2. Each of these initiatives has included a focus on the role of consumers in world markets in fuelling the demand for timber and thereby potentially contributing to illegal logging. One of the actions agreed by the G8 countries was an assessment of their internal measures, including public procurement policies, aimed at controlling illegal logging and the international trade in illegally logged timber. Ministers at the Bali FLEG conference agreed to ‘explore ways in which the export and import of illegally harvested timber can be eliminated’.¹
3. Spurred by the Bali conference, in April 2002 the European Commission hosted a workshop in Brussels designed to identify options for the EU in helping to control illegal logging in general and the import of illegally logged timber into the EU in particular. Much of the discussion focused on means of identifying legal timber and excluding imports not identified as legal, but the topic of government procurement was also raised as an important way of guaranteeing markets for legal – and possibly sustainable – products. The topic was particularly relevant because a number of EU member states were already using procurement policy to encourage the use of sustainable and legal timber and wood products.
4. As long ago as the 1970s, Germany legislated to require sustainable tropical timber for federal building projects, and more recently, several German authorities, at federal, state and municipal levels, have brought in public procurement policies that allow the use of tropical timber products only if they are certified as originating from well-managed forests. In 1997, the UK government issued voluntary guidance advising government departments to purchase timber and timber products from sustainable and legal sources, and in July 2000 announced that this was to become a binding commitment. In 2003 Denmark published voluntary guidelines for public procurement of tropical timber.
5. The European Commission published its Action Plan on Forest Law Enforcement, Governance and Trade (FLEGT) in May 2003; Council conclusions were issued in October 2003, with an invitation to the Commission to undertake various follow-up steps. The heart of the Action Plan is the establishment of a licensing system to identify legal products in partner countries and license them for import to the EU; unlicensed products will be denied entry. However, the Action Plan also discusses the issue of government procurement and ‘draws the attention of Member State governments to the fact that illegal logging can be addressed through the adoption of procurement policies’.²
6. As indicated above, a number of EU member states were already beginning to use public procurement policies to purchase timber and wood products from legal and sustainable sources and,

¹ Forest Law Enforcement and Governance East Asia Ministerial Conference, Ministerial Declaration, page 2; available at http://www.illegal-logging.info/papers/Bali_ministerial_declaration.pdf

² Communication from the Commission to the Council and the European Parliament: Forest Law Enforcement, Governance and Trade (FLEGT) – Proposal for an EU Action Plan (available at <http://www.illegal-logging.info/papers/flegt.pdf>), Section 4.3

following the publication of the Action Plan, others began to consider adopting similar policies. At the same time, the EU's public procurement directives were under revision, and issues surrounding legal and sustainable timber were explicitly mentioned in the Commission's draft Handbook on Environmental Public Procurement.

7. Public procurement policy clearly has an important role to play in the EU's attempts to control imports of illegal timber. Spending by EU public authorities is estimated to account for 16–18 per cent of GDP, representing a very substantial source of demand for timber and wood products. Unlike the FLEGT licensing scheme, individual member states can adopt procurement policies without needing further EU legislation and without having to negotiate agreements with producer countries outside the EU. And since the eventual legality license may possibly also act as proof of legality for procurement purposes, procurement policy ought to provide a powerful incentive for producer countries to adopt the licensing system.

8. Precisely since procurement policies are being developed country by country, however, there is a danger that they will diverge so much in details and coverage that they will make it more rather than less difficult for producer countries to sell into European markets, even if the timber in question is actually produced both legally and sustainably. Accordingly, this paper provides a concise comparison of developing procurement policy in five EU member states: Denmark, France, Germany, Netherlands and UK, together with some preliminary conclusions about possible future developments. EU procurement legislation and WTO procurement agreements are also analysed.

9. It should be noted that this paper represents the author's views on and analysis of procurement policies, and is not necessarily endorsed by the governments concerned. It is hoped that the paper will be updated at regular intervals as procurement policies develop.

2 Comparison of member state procurement policies

10. Timber procurement policies in all of the five states analysed here have either only recently been introduced or are still under development:

- In Denmark, the parliament agreed in June 2001 that central government should adjust public procurement policies in order to ensure that purchases of tropical timber would be based only on legal and sustainable sources. Guidelines for purchasers were published in June 2003, and will be reviewed within the next one to two years.
- In France, the government decided in 2002 to develop timber procurement policy to favour FSC or equivalent systems, originally for tropical timber but now for all timber; preparation of guidelines is currently under way and almost complete.
- In Germany, the federal government introduced legislation in the 1970s requiring tropical timber used in federal building projects to be certified as sustainable. Work on revising and extending this approach began in 2003, and new regulations are expected to be ready in 2005.
- Netherlands has possessed criteria for what qualifies as ‘sustainable’ timber for some time and has targets for the proportion of timber in the Dutch market which should be sustainable. Work is currently under way on the definition of ‘sustainable’.
- In the UK, voluntary guidance advising government departments to purchase timber and timber products from sustainable and legal sources was issued in 1997. In 2000 this became a binding commitment, and in September 2004 the UK’s ‘Central Point of Expertise on Timber’ (see below) was due to complete the first phase of its work.

11. What follows is therefore a comparative snapshot of policies as at September 2004; it is likely that some details will change, perhaps significantly, over the coming months and years. It is also difficult or impossible to measure the effects of these policies precisely, though some indications of impacts are beginning to emerge.

Criteria: legal, sustainable and social

12. France, Germany and Netherlands possess or are developing policies aimed primarily at sourcing sustainable timber (for definitions, see below); such timber should of course be legal, but this is a side-effect rather than the main aim.

13. Denmark and the UK have both adopted systems to procure legal *and* sustainable timber, recognising that while sustainable timber is desirable, it may not always be available in sufficient quantities, and therefore a minimum standard of proof of legality should be required for all purchases. Both systems use a step-wise approach, with three levels: legal, legal and progressing towards sustainable, and legal and sustainable.

14. The question of including social criteria over and above those legislated for in the producer country itself – for example, international health and safety standards amongst the logging workforce, or land tenure rights of indigenous communities – is controversial. Some of these criteria are reflected in the FSC certification scheme, widely accepted as proof of sustainable production, and Denmark, Germany and Netherlands all encourage or allow the use of social criteria in some way. Denmark, for

example, recommends that some social criteria should be included as an integral element of – and precondition for – sustainable forest management (equivalent to ‘sustainably produced’).

15. UK public procurement policy, however, does not allow timber purchasers to specify criteria that are not directly related to the subject matter of the contract. Permitted criteria include the production and process methods of the timber and timber products, but not social or ethical issues which, with rare exceptions, have no discernible effect on product quality or performance. Unless such issues are covered by law, therefore – which would include health and safety legislation in the country of production – they cannot be included in contract specification, selection of suppliers or award of contracts. This is also the UK’s interpretation of EU procurement directives (see further below), indicating a slight difference compared to the interpretation in other member states. France has not adopted any position on social criteria.

Coverage: sources and products

16. Danish and German procurement policy applies only to tropical timber, though the next version of German policy will apply to all sources. French policy originated in an action plan on tropical forests, but the procurement policy, when implemented, will apply to all sources. British and Dutch policy applies to all sources.

17. Both WTO and EU procurement rules rest on principles of non-discrimination (against parties to the WTO Government Procurement Agreement, and other EU member states, respectively). This may give rise to a challenge under the WTO to policies specifically addressing tropical timber, which includes members that could be deemed tropical countries. Where such a focus has been used, such as in Denmark, however, a voluntary policy may be found to be legally acceptable.

18. Existing German policy applies to all tropical timber and timber products, and the new German legislation seems likely to apply to all timber and paper products, as does British policy. French policy covers all categories, but with slightly stricter criteria for logs and sawnwood than for other timber products, paper and engineered wood. Danish policy excludes paper. The coverage of the developing Dutch policy has not yet been decided, but may be those categories specified in the EU FLEGT draft regulation, i.e. raw timber, sawnwood and plywood but not processed products (such as furniture) or paper.

Implementation: definitions and verification

19. The problem of defining what exactly is meant by ‘legal’, ‘sustainable’ and ‘progressing to sustainable’ – and how to prove it – is probably the most difficult task facing those drawing up timber procurement policies and guidance.

20. As noted above, only the British and Danish policies need to define ‘legal’, which in both cases essentially means compliance with laws in the country of origin of the products. The Danish guidelines consider bilateral agreements with the producer country in question as the best base for definitions of legality. Where this is not available, it suggests including the following requirements at

a minimum: possession of the necessary rights and permits, fulfilment of all relevant national legislation in the producer country, and payment of all taxes and dues.

21. Definitions of sustainability vary substantially. The Danish approach is the simplest, deriving from the Forest Principles agreed at the 'Earth Summit' in Rio in 1992 and requiring that management standards have been developed for seven specified sustainability criteria. A key requirement in the Danish approach is that the specific standards have been developed in a consultative process, open to participation by all affected parties, including financial, environmental and social stakeholders. FSC certification is considered a credible guarantee for sustainable forest management (and MTCC certification for legal and progressing to sustainable). It is recommended that alternative documentation should be 'submitted for assessment to an impartial third party' but recognises that 'there are, as yet, no established systems for doing this'.³

22. The Dutch policy will rest on its own certification system, probably similar in principle to FSC (FSC itself is regarded as not sufficiently independent from NGOs and some companies).

23. German and French approaches are rather looser. Existing German policy simply specifies that the certification proving sustainability must be credible, and in practice a wide range of certificates and eco-labels have been accepted by purchasers. The criteria for the new regulations are not yet available, but one report states that they will use the FSC certificate as a benchmark.⁴ The proposed French scheme simply requires some form of certificate or label for logs and sawnwood; there is an expectation, however, that the requirements will become more stringent over time.

24. UK policy to date has used FSC, or equivalent, as an example of sustainability, but the UK is in the process of establishing a comprehensive means of defining and verifying sustainability and legality – aimed partly at assessing existing certification schemes, but also at meeting the problem identified by the Danish guidelines, that of verifying alternative documentation. A Central Point of Expertise on Timber (CPET) was established in June 2004, and its work will proceed in phases.

25. Phase One will establish robust contract definitions for legal and sustainable timber, assess how well five of the major certification schemes provide assurance to customers, and revise current guidance. Results of this work, currently under way, should be published in September 2004. Successive phases will expand the Phase One work, establish an interactive helpline service, facilitate consultations with stakeholders, develop education and training and help set targets for implementation. It is envisaged that in due course CPET will be used by the entire UK public sector and its suppliers. CPET is currently being run by two consultancies, ERM and ProForest; a steering group will be established to ensure that the group is credibly independent.

26. Both the Danish and British approaches envisage the possibility of so-called 'variant bids', in which different levels of bid could be invited, and/or made, for the same contract – for example, bids providing baseline legal timber, and higher quality bids providing sustainable timber. UK policy clearly states that bids of higher quality will be preferred provided that they offer clear value for money.

³ Ministry of the Environment (Denmark), *Purchasing Tropical Timber: Environmental Guidelines* (2003).

⁴ FERN, *To Buy or Not to Buy: Timber Procurement Policies in the EU* (FERN, January 2004).

27. As noted above, both approaches also envisage the possibility of a middle category, of ‘legal and progressing to sustainable’, though some doubts have been expressed in the UK about the feasibility of measuring it, so this step may not be implemented in Britain, at least initially. As detailed above, the Danish guidelines suggest the Malaysian Timber Council Certificate (MTCC) as proof of ‘legal and progressing to sustainable’.

Implementation: the broader framework

28. As noted above, the Danish policy is voluntary and applies equally to all public institutions. In contrast, all the other four countries’ policies are, or will be, mandatory at central (federal) level. None of them are mandatory for regional or local governments, but in all countries at least some authorities at these levels have adopted similar policies, and in some cases have based their approaches explicitly on those of central government. (In other cases the policies vary, for example in acceptable certification; no comprehensive survey is available.)

29. In general environment ministries have taken the lead in developing and overseeing these timber procurement policies (the exception being Germany, where the lead has been taken by the Ministry of Consumer Protection, Food and Agriculture, though with considerable input from the Environment Ministry).

30. In Denmark, Netherlands and UK the development of timber procurement policy has taken place against a background of a general ‘greening’ of procurement policy more broadly, but in each case there has been a much sharper focus on timber – due to the rapid development of the wider debate around illegal logging, described above. NGO activities and parliamentary interest seem to have been important drivers in all five countries. They have also fed off each other; the initial proposal to the Danish parliament seems to have been modelled on the British approach announced a year earlier (which may explain the several similarities between them).

31. Two countries have adopted specific targets. The French aim to meet the objectives of 50 per cent of publicly purchased timber being legal and sustainable in 2007 and 100 per cent in 2010 (though it should be noted that they use a fairly loose definition). The Dutch aspiration is 25 per cent by 2005, believed to be unlikely to be met.

Impacts

32. As noted above, it is in general too soon to judge the impacts of these policies. All of them apart from the Danish policy are in the middle of evolving, or have not even been implemented yet, or have applied only to a relatively small proportion of the market (for example, Germany, where tropical timber is not extensively used in building projects).

33. The UK, however, which has been implementing at least voluntary guidance since 1997, believes it has observed a major shift in suppliers’ attitudes, with most suppliers now fully understanding and appreciating the objectives of the policy. It is difficult to disentangle the impacts on corporate behaviour of the many initiatives now under way in the general area of illegal logging and the control of trade in illegally logged timber – including a wide range of conferences and consultation meetings,

targeted direct action by NGOs, the EU FLEGT action plan, and so on – but procurement policy is commonly cited by industry in Britain as a major driver for change in its own behaviour.

3 Constraints: EU and WTO public procurement frameworks

34. Public procurement policies in EU member states are governed by the general principles established by EU and, to a lesser extent, WTO rules. The two frameworks are described below, but the key principles they establish are that procurement policies should:

- Be non-discriminatory (e.g. between products of different countries).
- Ensure value for money for taxpayers and consumers of public services.
- Ensure equal treatment of suppliers.
- Operate in a transparent way.

EU procurement rules

35. Until early this year, EU legislation in the field of public procurement was covered by four different Directives dealing with services, supplies, works and utilities; some of it dated back to the early 1970s. On 31 March 2004, these four Directives were replaced by two new ones: Directive 2004/18, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (the ‘classical’ directive) and Directive 2004/17, on the coordination of procurement procedures of entities operating in the water, energy, transport and postal services sector (the ‘special sectors’ directive).

36. The application of the old Directives to ‘green procurement’ was disputed. It was always clear that some environmental criteria could be included in the technical specifications of a tender when it was drawn up, but the Commission argued that such criteria could not be considered at the award stage, as they did not necessarily bring an economic advantage that directly benefited the public authority. However, in September 2002, in the Concordia bus case (which covered the purchase of low-emission buses by the City of Helsinki), the European Court of Justice ruled that non-economic factors (such as noise levels or pollution) *could* be taken into account at the award stage, so long as they satisfied a number of criteria, such as being linked to the subject matter of the contract, and being applied transparently and in a manner that did not amount to discrimination against any other member of the EU.

37. The effect of this ruling has made its way into the new directives, but their exact application is of course as yet unknown. However, the Commission’s website⁵ summarises the position as follows:

- Technical specifications: both environmental product characteristics and production methods can be specified, though the methods must be relevant to the product being purchased.
- Variants: the contracting authority may specify a base set of technical specifications, and a (specific) green variant; companies can submit bids for either.
- Selection criteria: may be included in the contract; covers issues like exclusion criteria (e.g. convictions for an environmental offence, non-payment of taxes, etc.) and technical capacity criteria (does the bidder have the necessary capacity and experience for the contract?).

⁵ <http://europa.eu.int/comm/environment/gpp/index.htm>

- Award: environmental factors, such as emission levels, or energy consumption levels, can be used in the award of the contract, and they do not have to bring a direct advantage to the contracting authority itself.
- Contract performance: specifications such as delivery of products in bulk rather than separate containers can be included, but must always be clearly specified and related to the execution of the contract.

38. The Commission's publication *Buying green! A handbook on environmental public procurement*, published in August 2004,⁶ recognises the current debate around legal and sustainable timber and contains a section specifically on the topic. It concludes:

Some useful technical specifications for timber purchase

For example, the following criteria can be used in the technical specifications of a contract that is sustainable in environmental terms:

- *The assurance that the rate of harvesting of timber does not exceed levels that can be permanently sustained.*
- *Use of environmentally friendly non-chemical methods of pest control, and the avoidance of use of chemical pesticides.*

As with all technical specifications, you can only include those specifications which are related to the subject matter of the contract. So you cannot include specifications of a scheme on, for example, the protection of forest-dependent people.

However, you can, as a purchasing authority, indicate in the contract notice or tender documents that a forest certification scheme will be accepted as a possible means of proof of fulfilment of these requirements. You must, of course, accept equivalent means of proof too.

Since such forest certification schemes often also include other requirements concerning the legality of the harvesting of the timber not linked to the tender in question, the promotion of such schemes will indirectly also increase the chances of the wood being harvested from legal sources.⁷

The WTO Agreement on Government Procurement

39. Government procurement measures are also subject to the WTO Government Procurement Agreement (GPA). Unlike most WTO agreement, this is a plurilateral agreement, to which not all WTO members are parties – in fact, only the EU (and all its member states) and twelve other countries are parties. Its basis rests on the core WTO principles of non-discrimination between like products from foreign and domestic suppliers.

40. The GPA's definition of technical specifications are very similar to that of the EU, stressing 'performance' rather than 'design or descriptive characteristics', though its definition of award criteria is rather looser. In addition, Article XXIII of the GPA includes exceptions to its obligations for

⁶ SEC(2004)1050, available at <http://europa.eu.int/comm/environment/gpp/>

⁷ Ibid., section 3.4.5, pp. 24–25.

reasons of public morals or protection of human, animal and plant life. Given these wordings, it seems highly unlikely that the GPA is of much relevance to EU member states in this area – EU procurement directives are much more detailed and in key respects more restrictive, and are therefore the key determinant of member state legislation.