

Mr. Michel Barnier
Commissioner for Internal Market and Services
European Commission
Rue de la Loi / Wetstraat 200
1049 - Brussels -Belgium

16 June 2010

Dear Commissioner Barnier,

The organizations signing this letter would like to commend the European Commission's Directorate-General for Internal Market and Services for having taken up the challenge of formulating a Guide on Social Considerations in public procurement at the request of the Directorate-General for Employment and Social Affairs, but at the same time would like to express their concerns regarding the restrictive interpretation that the current draft puts forward.

Particularly, we are concerned that this restrictive interpretation would have a negative impact on the work that the civil society-led Fair Trade movement has been carrying out on public procurement in spite of the permanent and continuous support that the European Parliament, the Committee of the Regions and the European Commission itself have given in general to Fair Trade and in particular to the encouragement of Fair Trade public procurement. The civil society work is daily supported by the numerous Procurement Authorities throughout Europe on a Regional and National Level that actively implement social and sustainable procurement practices through their Fair Trade purchases.

Encouraged by the political support you have personally shown so far to Fair Trade, we kindly request you to invite your services to consider the arguments and proposed changes exposed below and to adopt a more enabling guide that facilitates the introduction of social considerations in public procurement and, specifically, encourages Procurement Authorities to support Fair Trade.

Yours faithfully,

ANNEX

Fair Trade is an open system

First, we would like to clarify the confusion that may exist between Fair Trade as a concept and the existing certification schemes. Although rightly it is not possible for contracting authorities to ask in their tender for products certified against a particular scheme or label, yet Fair Trade is an objective concept, defined by the Charter of Fair Trade principles and endorsed by the European Parliament and the European Commission in different policy statements¹. The existing certification schemes or labels are only “ways of proof”.

Fair Trade is an alternative trading partnership in which all interested suppliers can participate. In the framework of public procurement, any interested economic operator can potentially supply Fair Trade products to public authorities. The Fair Trade movement is pleased to see mainstream companies adopting the principles of Fair Trade to benefit marginalised producers and workers in the South. As a matter of fact, the Fair Trade movement is aware of no less than 900 suppliers across the European Union that are already in the position to bid for such calls for tenders.

Further to earlier case-law, a very recent (18 March 2010) judgment in the Netherlands² has re-confirmed that tendering for Fair Trade products does not affect competition. *“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”*.

The clear distinction between certification schemes with the concept of Fair Trade is proven by the initiatives to define Fair Trade in certain pieces of legislation. For example, in France, the main law is Loi n° 2005-882³ which sets out a definition of Fair Trade and establishes a system recognising existing Fair Trade entities (legal or moral persons) which fulfils six key principles. Persons fulfilling the conditions for Fair Trade shall be recognised by a Commission (*Commission Nationale du Commerce Equitable, or “CNCE”*). The French semi-public Standards Body AFNOR also adopted in 2006 a reference document on Fair Trade. The principles laid down in the French legislation and the AFNOR document are in line with the Charter of Fair Trade principles. In Italy and Belgium there are also legislative proposals (on-going, legislative process not over yet) to define Fair Trade in the legislation. This proves that Fair Trade as a concept cannot be confused with certification scheme or label.

¹ European Parliament Resolution on Fair Trade and development, 6 July 2006 ([2005/2245\(INI\)](#)), Opinion of the Committee of the Regions “Contributing to sustainable development: The role of Fair Trade and non- governmental trade- related sustainability schemes, 11 February 2010”, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee “Contributing to Sustainable Development: The role of Fair Trade and non-governmental trade-related sustainability assurance schemes” 5th May 2009.

² *DISTRICT COURT OF ALKMAAR, THE NETHERLANDS. Civil-law section NB/HE.KG number 117231 / KG ZA 10-44 date 18 March 2010. Judgment available in English.*

³ *Loi n° 2005-882 du 2 août 2005 en faveur des petites et moyennes entreprises, Article 60.*

The ethical quality is a product characteristic: Social considerations (including Fair Trade) in the subject matter

The customers' perception of the products they buy and of the reasons why they buy it changed. When one is choosing to purchase a green, sustainable or ethical product, the main determinant aspect of its decision is the fact the product is green, sustainable or ethical, it is not the shape, the taste or the color. Analogously to competition law, public procurement law should also consider the fact that the determinant reason customers have to buy a product can be considered as important characteristics of the mentioned product. Therefore, if a public authority wishes to purchase a Fair Trade product, it should be authorized to mention "Fair Trade" or "fairly traded" in the subject matter of its tender.

For instance, if a public authority tenders for Fair Trade products (e.g. coffee) it aims to contribute to sustainable development, and not only to provide a service to its citizens or employee. The same logical process is involved in purchasing green goods or energy from renewable sources: the purchaser wants its money fully valued by the products it is tendering for.

The ethical quality of a product is also a characteristic of the product and should therefore, be treated, as far as the legal requirements are concerned, in the same way as other product characteristics.

Encouraging contracting authorities to use a "social" title (subject-matter) would allow transparency to the introduction of social elements in tenders and would otherwise make it extremely cumbersome for potential bidders to identify the tenders that include social considerations.

Following the work of the EC on its "Buy Green" guide (where the European Commission encouraged contracting authorities to allow potential bidders to indentify "green titles" - subject-matter-) and analogously to competition law, public procurement law should also take into consideration the fact that the determinant reason customers have to buy a product can be considered as important characteristics of the mentioned product. Therefore, if a public authority wishes to purchase a Fair Trade product, it should be authorized to mention "Fair Trade" or "fairly traded" in the subject matter of its tender. We encourage the Directorate to follow this example and encourage contracting authorities to describe the social considerations in the subject matter.⁴

Social considerations (including Fair Trade) in the technical specifications

⁴ If the omission is due to the uncertainty regarding the extent to which these requirements can be considered to be linked to the subject matter of the contract, it should be noted that the Court of Justice of the European Union (ECJ) has not narrowed in its rulings the scope of 'the subject matter of the contract' in a way which would exclude factors related to the production process. In EVN and Wienstrom (C-448/01) the ECJ explicitly left it open to the contracting authority to apply a criterion related to the production process, provided it met the requirements of not conferring an unrestricted freedom of choice on the authority, was clearly stated in the contract notice or documents and complied with the fundamental principles of Community law.

To our knowledge the EC guide restrictive interpretation rejects social criteria as technical specifications. However, the EC has adopted a much broader interpretation in its *Communication on Environmental Considerations*⁵

*“The production process covers all requirements and aspects related to the manufacturing of the product which contributes to the characterising of the products without the latter being necessarily visible in the end-product. This implies that the product differs from identical products in terms of its manufacture or appearance (whether the differences are visible or not) because an environmentally-sound production process has been used, e.g. organically grown foodstuffs, **or “green” electricity.**”⁶*

Thus, the EC has confirmed the use of renewable energy (‘green electricity’) to be a ‘technical specification’. However, a requirement for production from renewable sources does not have any effect whatsoever on the characteristics of the end product. ‘Green’ electricity which has been produced by eg. a wind-mill obviously is in no way different from electricity which has been produced by nuclear fuel.

If the fact that electricity has been produced from green energy is considered to be a ‘technical specification’ by the EC, it seems to be far from evident, and even illogical, that minimal social requirements (such as wages, banning of child labour etc.) should not be accepted as technical specifications.

Therefore, we would urge the EC to build on this previous communications and to adopt a less restrictive view on technical specification and endorse the inclusion social criteria in the technical specifications.

Social premium should not be ruled out as one of the criteria that public procurers may include in their tender

The Fair Trade movement is concerned that the EC draft guide rules out the inclusion of any social premium (of Fairtrade system or of another system) as a criteria for public procurement. This exclusion may be based on the wrong assumption that a social premium (be it of the Fairtrade or other systems) is a “development aid” or a “service” which is not linked to the production process.

The social premium is part of the price of the contract, but is to be invested in ‘projects’ which are *outside* the direct actual scope of the involved contract. In this context, it should be stressed that there should be no confusion between conditions related to the *subject matter* of the contract and conditions related to the *performance* of the contract. The condition that the ‘social premium’ should be invested in economic and social development, is probably not necessarily linked to the subject matter of the contract, but it can well be argued that it *is* linked to the performance of the contract.

⁵ Commission Interpretative Communication of 4 July 2001 on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement (COM (2001), 274.

⁶ See in the same sense the judgement of the European Court in the *Wienstrom* affair (case C-448/01) where the court has confirmed that the extent to which electricity is produced from renewable sources may serve as an award criterion (consideration 72: “[...] the Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, an award criterion with a weighting of 45% which requires that the electricity supplied be produced from renewable energy sources. The fact that that criterion does not necessarily serve to achieve the objective pursued is irrelevant in that regard.”)

The Fair Trade movement considers that a social premium tender criterion can be easily worded by contracting authorities in an objective and verifiable way, such that it can be used that would permit to distinguish between bidders and would be open for competition. For example, a criterion in a tender could be formulated in an objective using general wording like:

'social premium, which is part of the total contractual remuneration to producers and is paid on top of direct price for the products sold; linked to improvement of the production context and conditions for producers and workers'.

The premium is also a valuable tool that could be used by public authorities to measure the impact of their ethical purchase.

We see that public authorities throughout Europe on a regional and national level embrace both the Fair Trade principles and specifically the *Fairtrade* standards as a means of identifying and actively implementing social and sustainable procurement practices. Although this has led to challenges in not allowing the single choice of one label, the criteria which underlie the label and which lead to it being identified as a social procurement option are undisputed. Excluding the option to include social premium would therefore also narrow these attempts and whilst not increasing competition would lead to a decline in quality and sustainability of these social procurement practices.

As explained above, the social premium is integral part of the production context of the producers. It enables them to improve their livelihoods as well as their production system. Instead of being dependant on grants and subsidies it empowers producers through sale of their agricultural commodities to sustainably develop their organisations and thus their ability to compete and to secure their livelihoods. We are concerned that – maybe unintentionally – an important social consideration for consumers and end users certainly- is left outside of the procurement process.