

DOs and DON'Ts on Fair Trade Public Procurement (FTPP)

Dortmund,
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Legal framework

**EU
level**

**Directive 2004/18
« classical sectors »**

**Directive 2004/18
« special sectors »**
(water, energy, transport and postal services)

Thresholds

€ 193 000 (Public services
and supply contracts) and
€ 4 845 000 € (Public works
contracts)

**National
level**

National regimes, with possibly exemptions

BUT : respect of the
fundamental principles



Philosophy of the EU legislation

- ▼ **Respect of the principles of the Treaty, in particular**
 - ▼ principle of **freedom of movement of goods**
 - ▼ principle of **freedom to provide services**
 - ▼ and principles deriving therefrom, such as
 - ▼ principle of **equal treatment**
 - ▼ principle of **non-discrimination**
 - ▼ principle of **mutual recognition**
 - ▼ principle of **proportionality**
 - ▼ principle of **transparency**
 - ▼ **competition**

- ▼ **Primary aim is economical : integration of the EU market**

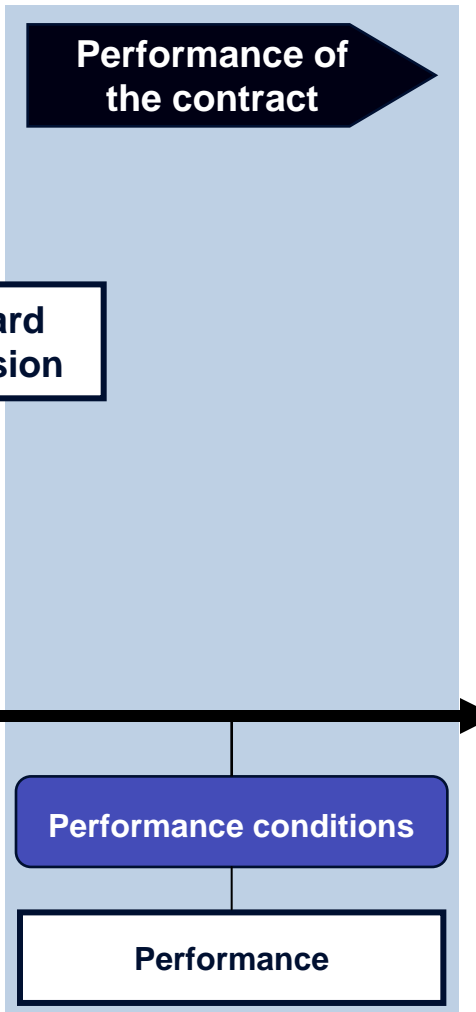
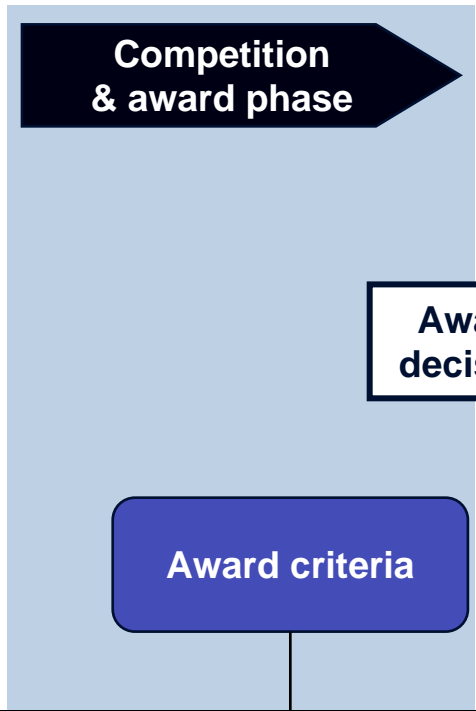
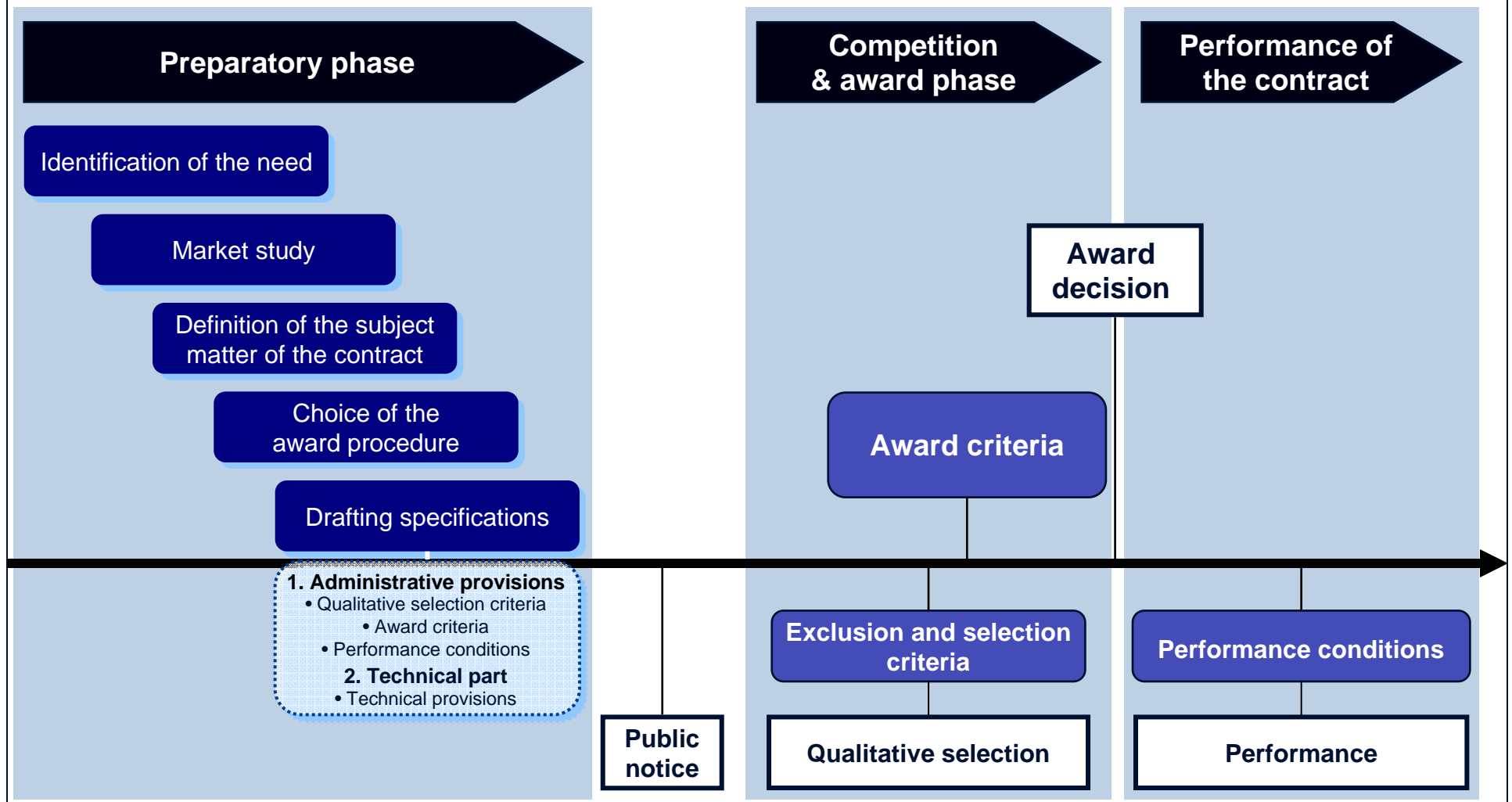


Key concepts of PP

- ▼ Concept of « **contracting authority** »
- ▼ **Thresholds**
 - ▼ € 193 000 (Public services and supply contracts)
 - ▼ € 4 845 000 € (Public works contracts)
- ▼ **Various PP procedures**
 - ▼ Open/restricted
 - ▼ Competitive dialogue, negotiated procedures, ...



Public procurement timeline (call for tender – MEAT)



Public notice

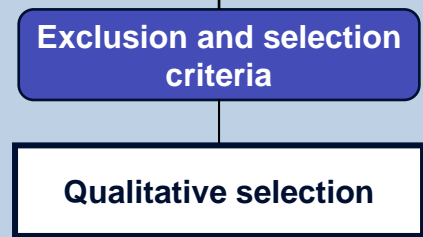


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FT considerations

- ▼ Reminder : « Fair Trade » is based on the three pillars of sustainable development :
 - ▼ **Economy**
 - ▼ Minimal prices covering costs + social incentive + stable commercial relationships + prefinancing
 - ▼ **Social considerations**
 - ▼ Democratic and transparent management + ILO conventions (prohibition of forced labour, right of association, equality of treatment (e.g. non discrimination as to employment, salary and minimum age)
 - ▼ **Ecology**
 - ▼ Extensive criteria concerning waste, water, buffer zone, no GMOs
- ▼ See also resolutions of the European Parliament of 6 July 2006 and 18 May 2010



FT considerations in PP and ECJ case law

- ▼ The **original conception** of the subject matter of public contracts was limited to the satisfaction of the **concrete need** of the contracting authority
 - ▼ Intention of the EU legislator : avoid that through the public contracts, the contracting authorities pursue other purposes than the sole satisfaction of that concrete need. The subject matter of the public contracts was therefore simple
 - ▼ The insertion of social, environmental, and now ethical criteria, different political considerations are taken into account in public contracts
 - ▼ The subject matter of the contracts becomes more and more complex
 - ▼ The points of view as to these new considerations in public contracts vary
- ▼ A look at the evolution of the ECJ case law shows how the legislative framework evolves



Evolution of the ECJ case law

- ▼ 4 major cases :
 - ▼ Case C-31/87, ***Gebroeders Beentjes***, 20 September 1988
 - ▼ Case C-225/98, ***Commission v French Republic***, 26 September 2000
 - ▼ Case C-513/99, ***Concordia Bus Finland***, 17 December 2002
 - ▼ Case C-448/01, ***EVN AG & Wienstrom v Republic of Austria***, 4 December 2003

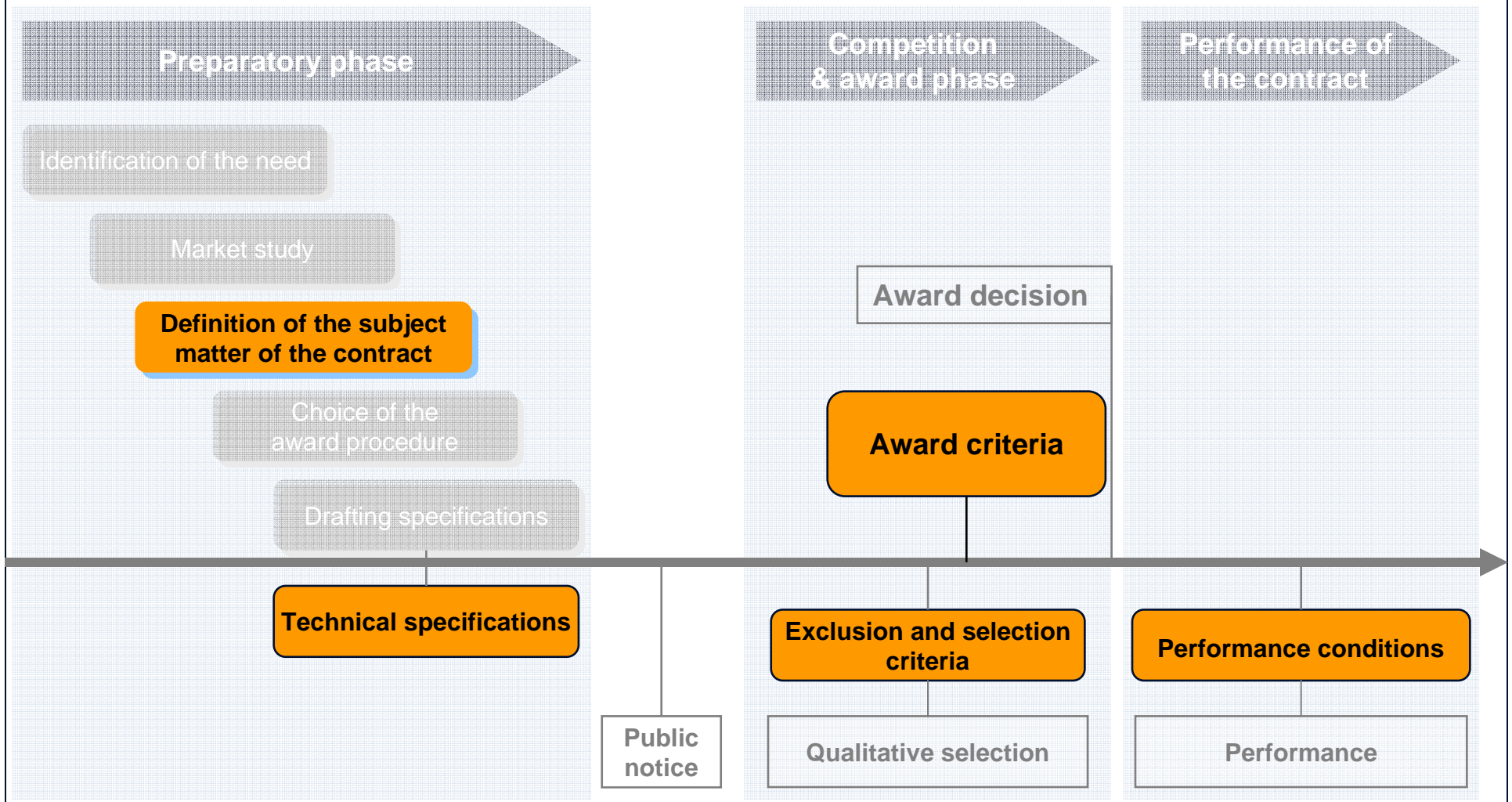
- ▼ Consequences
 - ▼ The « new » PP directives of 2004 incorporated the evolution in **ECJ case law**

- ▼ Case law is an important source – ECJ is independent and often shows a more progressist approach.
 - ▼ **However, European Commission** has a rather **conservative approach**

- ▼ Matter is in **constant evolution**
 - ▼ A recent EP resolution is interesting in this respect



Where to insert FT considerations in PP ?



Subject matter and FT considerations

- ▼ **Insofar** the FT criteria are **sufficiently described**, in a **transparent** way, **in the tender specifications**, a reference to them could possibly made to them in the subject matter of the contract. A same contract can pursue multiple objectives

- ▼ **No ECJ case law** exists in this respect

- ▼ “Fair Trade” criteria can be developed in the subject matter of a contract
 - ▼ Examples
 - ▼ ‘Food and drinks produced in accordance with FT principles’
 - ▼ In school meals : “once a week, propose a Fair Trade apple as a dessert”



Technical specifications and FT considerations

- ▼ **Technical specifications are formulated :**
 - ▼ either by reference to European, national or international technical standards relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words 'or equivalent'
 - ▼ in terms of performance or functional requirements, possibly with reference to the aforementioned specifications as a means of presuming conformity with such performance or functional requirements
- ▼ **The Technical specifications must be related to the subject matter of the PP**
- ▼ **A reference to a specific label is not permitted without a mention “or equivalent”**
 - ▼ The important subcriteria that serve as a ground to the FT label can however be repeated (e.g. ecological criteria such as “non GMO”)
- ▼ **Example**
 - ▼ *‘The product must bear a FT label, recognized by the FLO, e.g. Max Havelaar; the criteria of this label are xxx, yyy, zzz, labels A, B and C are deemed equivalent to that label, but other labels could be accepted, provided evidence of the equivalence with the aforementioned label is provided.*



« Douwe Egberts » case law in The Netherlands

Case Douwe Egberts v. Municipality of Den Helder (Court of Alkmaar, 18 March 2010)

Facts : call for tender for the supply of tea and coffee, with criteria related to Fair Trade inserted into technical specifications *and* performance conditions

Douwe Egberts' offer is rejected because it does not comply with FT requirements

However, D.E. is « UZT Certified »

D.E.'s claim is rejected in summary proceedings : the « UTZ Certified » label does not meet the requirements of the contract specifications



« Douwe Egberts » case law in Belgium

Case Douwe Egberts v Provincie Vlaams Brabant (TFI Leuven, summary proceedings, 19 November 2009)

Facts : call for tender for the supply of, a.o., coffee with criteria related to FT in the technical specifications (« Max Havelaar or equivalent »)

D.E.'s offer is considered irregular, and therefore rejected, because it does not comply with the chosen FT criteria

However, D.E. is « UZT Certified », and the equivalence of that label has not been verified by the contracting authority

D.E.'s claim is therefore considered as grounded by the judge in summary proceedings



Qualitative selection and FT considerations

- ▼ **Exclusion criteria** : based on the personal situation of the candidate or tenderer (no conviction by final judgment for participation in a criminal organisation, corruption, etc.)
 - ▼ Potential issue: what about a tenderer that has been convicted abroad, and submits a tender through an affiliate company in another country than that in which he was convicted ?
- ▼ **Qualitative selection** aims at verifying
 - ▼ Suitability to pursue the professional activity
 - ▼ Economic and financial standing
 - ▼ Technical and/or professional ability
- ▼ This phase is not particularly adapted to Fair Trade considerations
 - ▼ Exceptionally, e.g. conviction of infringement of workers' fundamental rights (carefulness recommended)



Award criteria and FT considerations

- ▼ **Purpose** of the award criteria : **comparison of the bids** (in MEAT cases)
- ▼ **Various criteria** linked to the subject-matter of the public contract in question, can be used :
 - ▼ quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion
- ▼ **Conditions for admissibility of award criteria according to case law** :
 - ▼ Linked to the subject matter of the contract
 - ▼ No infinite margin of discretion for the contracting authority
 - ▼ Explicitly mentioned in the contract specifications or contract notice
 - ▼ Compliant with all principles of community law, especially the principle of non-discrimination
- ▼ According to the Commission and numerous authors, **ethical and social criteria may currently not validly be used as award criteria**, because ethical and social criteria are considered as being more related to the **behaviour of the economic operator** rather than being linked to the subject matter of the contract
- ▼ Limits of the theory of **internalization of external costs** ?



Performance conditions and FT considerations

- ▼ According to the Directive, contracting authorities may lay down special conditions relating to the performance of a 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**
- ▼ **Performance conditions are the most appropriate place to insert FT considerations**
- ▼ The contract specifications may contain ethical clauses and mention that the products proposed must comply with specifications related to Fair Trade
 - ▼ To this end, reference can be made
 - ▼ to ILO conventions
 - ▼ to EU or national Fair Trade labels granted by a public body, an independent, recognized organization such as the IFAT or the FLO
 - ▼ As the case may be, to ethical prescriptions published by public bodies (e.g. in Belgium : <http://www.guidedesachatsdurables.be>)
 - ▼ The tenderers must have the possibility to prove that their products comply with the required specifications in any other way they deem useful
- ▼ **Example**
 - ▼ *'Minimum wage for the workers that will be appointed to the performance of the contract'*



What are currently the most appropriate phases in which FT considerations can be inserted ?

Phase	Possibility to insert FT considerations?
Definition/description of the subject matter	+/- YES
Technical specifications	YES
Qualitative selection	NO
Award criteria	NO
Performance criteria	YES



Perspectives

- ▼ Diverging approaches between Community bodies (EC, EP, ECJ), as well as between national bodies
 - ▼ Possibility of arbitration by the ECJ case law
- ▼ EP tends to show a more progressist approach : see e.g. resolution of 18 May 2010 on new developments in public procurement, where the EP
 - ▼ 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 **definition of Fair Trade** set out in the European Parliament resolution of 6 July 2006 on fair trade and development and the recent Commission communication of 5 May 2009;
 - ▼ reiterates its earlier call for the Commission to promote the use of such criteria by, for example, producing constructive **guidelines on Fair Trade procurement**;
 - ▼ welcomes the unanimous adoption of the opinion of the Committee of the Regions of 11 February 2010 calling for a common European Fair Trade strategy for local and regional authorities.
- ▼ In practice, it is advisable for contracting authorities to start inserting more and more FT considerations in *small-scale* PP



Marc Martens

Bird & Bird
Avenue Louise 235 / 1
1050 Brussels
T +32 (0)2 282 6000
F +32 (0)2 282 6011

www.twobirds.com

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