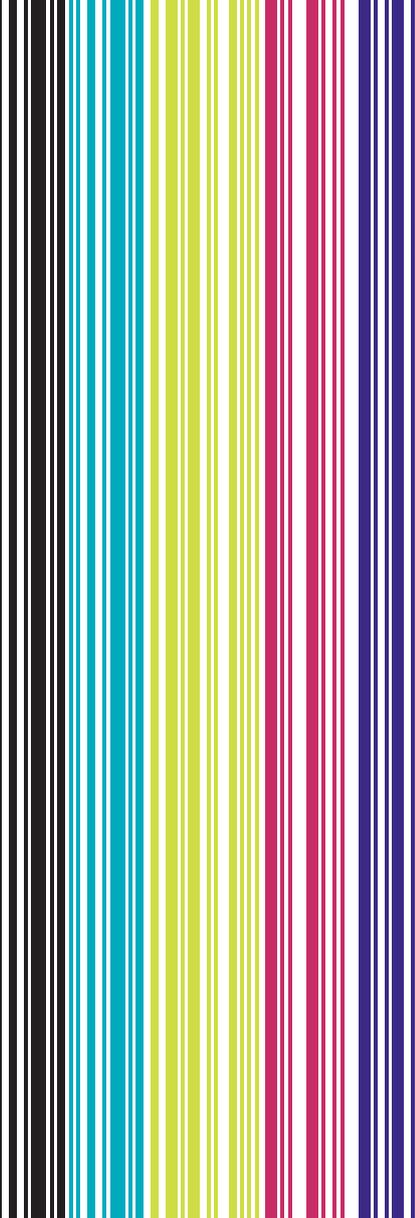


A primer on the use of **social clauses in Ireland**

Deirdre Halloran for
Community Action Network (CAN)



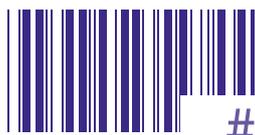
All efforts have been made to ensure the accuracy of this Primer. However, it is intended to be general advice only. It is not provided as legal advice. It would be advised that users seek professional legal advice, where appropriate, before implementing this material.

A primer on the use of social clauses in Ireland



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Introduction

Public Procurement accounts for 18% of Gross Domestic Product in Europe, and the Irish State spends €8.5bn every year on goods and services. There is a growing interest in finding ways for this expenditure to be used to deliver wider social, environmental and economic benefits.

The concept of “socially responsibly procurement” places social considerations at the heart of the procurement process. One aspect of this is the use of Social Clauses. These are clauses that can be integrated in the procurement process that allow social and environmental considerations to be included in the contract specification and used in the selection and award procedures. This Primer, written by Deirdre Halloran, IRC Scholar from the Law Department of NUI Galway, demonstrates the scope to incorporate Social Clauses in public procurement contracts in Ireland. The primer focuses on how wider community benefits such as targeted recruitment and training can be considered during public procurement processes. The new EU 2014 Directives¹, which will be transposed in Ireland at the end of 2015, will allow further progress of social and environmental considerations in procurement procedures.

Community Action Network is a small NGO with a social justice agenda. Over the years, we have been involved in major public investment projects designed to alleviate social disadvantage, particularly in the area of the regeneration of housing estates. In so doing, we have adopted a Human Rights Approach to bring the State to account as Duty Bearers, responsible for respecting, protecting and promoting Human Rights.

In this work we have collaborated with Deirdre Halloran and Dr. Padraic Kenna of the Law department of NUI Galway. Dr. Kenna worked with us to establish minimum core obligations for the State, under the “right to adequate housing” in the Dolphin House Complex and suggested that the subsequent regeneration could include Social Clauses.

Since then, Deirdre has supported CAN in advancing the inclusion of Social Clauses in the Regenerations of St Teresa’s Gardens and Dolphin House, and in the build and operation of the New Children’s Hospital (NCH) on the nearby St James’ Campus. As a result of this work, both regeneration boards have adopted Social Clauses as a goal in their regenerations, Dublin City Council has adopted a motion to include Social Clauses in all procurement and the St James’/NCH campus development authorities have also committed to the policy.



But much more needs to be done. Hearts and minds need to be won over to this opportunity within the government, statutory bodies, contractors and communities. More practically, those involved with procurement need to understand how to operate a socially responsible procurement programme.

Community Action Network and our collaborators believe that we have a duty to use every available opportunity to address social inequality in our society. Particularly in times of scarce resources, we need to maximise every opportunity to address disadvantages such as systemic unemployment, lower educational opportunities, living in degraded environments and inequalities in healthcare. The use of Social Clauses in public procurement is one such opportunity. It provides added value from investment by generating real social and economic benefit for disadvantaged communities. This opportunity has not been realised in Ireland as yet.

CAN believes that public procurement should be seen as a labour market intervention, assisting those struggling to find employment. However, this poses a challenge not only to procurers, but to everyone with a responsibility for supporting people into work. When a procurement opportunity presents, there needs to be a programme of work and career readiness in the communities that can support people, particularly the most disadvantaged, to access those opportunities.

CAN is pleased to offer this Primer as a resource for this work. The Primer is in two parts: Part One explains Social Clauses and deals comprehensively with their legitimacy and legality particularly in an Irish context. A lack of clarity in relation to their legal basis is the most common reason given for not using them in procurement given in Ireland. Part Two deals with the practical applications of Social Clauses. This section contains a step-by-step process for the use of Social Clauses in procurement and addresses questions about costs, monitoring and compliance.

Finally, we are deeply grateful to Padraic for his vision and support and to Deirdre for her tireless work in supporting us by explaining and promoting Social Clauses.



Peter Dorman
Community Action Network





Foreword

This Primer is very timely. The Government in the Republic of Ireland is currently piloting an approach and a number of other public sector developers in Dublin are interested in the Social Clause proposition that has been put forward by the Community Action Network and Deirdre Halloran of the Law Department of NUI Galway.

But these developers do not have to 'reinvent the wheel' for Ireland: there is good practice that can be adopted from the UK where Social Clauses, and especially 'targeted recruitment and training requirements', have been in use for many years. I drafted my first clauses in 1984 and drafted the first good practice guide in 1989! This experience is reflected in this Primer.

Having worked with over 100 public bodies to help them incorporate Social Clauses in their procurement I recognize that the first hurdle is always legal uncertainty about how to do this in a way that minimizes the risk of challenge under domestic or European legal frameworks. This uncertainty can remain even when this is encouraged within the EU policies and when - as in Northern Ireland and Wales - Government agencies published guidance setting out how this can be done. My conclusion is that the hurdle today is not so much how Social Clauses can be used in a manner that fits with legal frameworks, but why procurement should be used in this way. The answer is that the subject matter of procurement changes in response to changing contexts. A good example is environmental considerations - from improved insulation and increased recycling to lower emissions from vehicles - which over a period of years have become normal requirements within contracts. The same needs to be true of social requirements that help public bodies address the changing social context in which they work.

This focus on the legal and procurement processes tends to detract from the more important question of how to make Social Clauses work for the intended beneficiaries. Procurement teams assume this is easy, but where the requirements are inappropriate, it is significant, and failure - where the outputs are not achieved - can easily discredit the whole approach. What is needed is a systems approach where the legal and procurement issues are just one of several elements of a process that has to work in its entirety if the community benefits are to be achieved.² These elements are often delivered by different organizations using different funding sources, and the coordination of these resources is a key part of achieving success.

²The other parts of the process are ensuring that the requirements will actually deliver the intended social benefits; ensuring that the contractors understand what is required and why; ensuring that (for employment and training) there is a broker in place that will help contractors recruit from the target communities; and ensuring that there is a good system for monitoring and progress-chasing

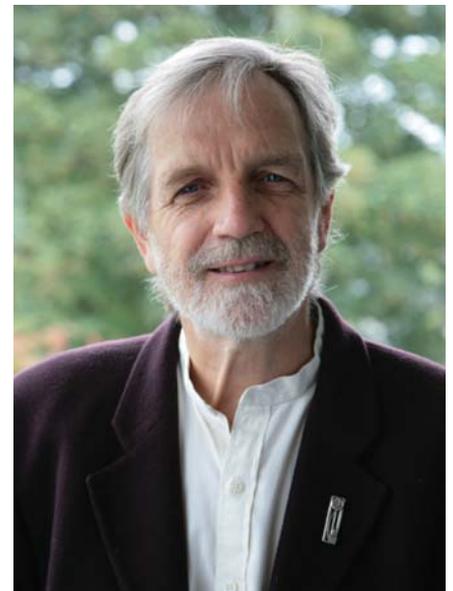
Richard Macfarlane is an independent researcher and consultant with 30 years' experience of community-based economic development work. He has been a leading practitioner in the use of public sector leverage to secure target recruitment and training and targeted supply-chain opportunities both through public procurement and through Planning Agreements on major developments, and has published numbers of authoritative guidance works, often in partnership with Anthony Collins Solicitors.

So, partnership working, with a shared - community-focused - approach and a 'can do' attitude is the key starting point. Including representatives of the target community in this partnership is critical - to communicate the needs of the target community to the procurement teams; to explain the limitations of Social Clauses to local communities; to transfer information about outcomes and successes to that community; and to keep the focus on outcomes.... especially if things don't go well at the first attempt.

At the heart of a Social Clause approach is clarity of social objectives. The Joseph Rowntree Foundation which has supported some of the key research on Social Clauses is currently promoting their use to provide 'first job opportunities' for young people that are leaving education and vocational training. Across Western Europe, there is a crisis in the provision of job-with-training opportunities that enable young people to progress from education to a stable career that will enable them to have the quality of life they deserve. This shortfall affects young people from a wide range of back-

grounds and abilities and measures to address the issue can therefore win support from a wide sector of the community: it is their daughters, sons, nephews, nieces and grandchildren whose quality of life and prospects are being threatened by the lack of opportunity.

My experience has been that procurement professionals fear being asked to address every social issue. Having a simple and clearly understood aim which is relevant for target communities but easily shared by the wider community can help win support from politicians and practitioners in a wide range of public bodies. The focus on jobs-with-training for young and marginalized people is a clear and manageable aim. I hope that public bodies and their procurement teams will adopt a 'can do' approach to this Primer and use the guidance and good practice developed here and elsewhere to quickly embrace the social clauses approach and therefore make a real difference in the communities they serve.



Richard Macfarlane

A primer on the use of
social clauses in Ireland



Part One

SOCIAL CLAUSES
THEIR LEGALITY IN THE EU
AND IRELAND





01

SOCIAL CLAUSES THEIR LEGALITY IN THE EU AND IRELAND

Executive Summary

Since 2008, Irish governments have prioritised fiscal consolidation in their budgetary policies, and have reduced national spending and funding for core public services such as health, welfare, and housing. Seven years of austerity have hit disadvantaged groups the hardest, making them more vulnerable to unemployment, lower incomes and poorer living standards.

However, there is a way for the State to support businesses and individuals without adjusting their budgetary policies. The people responsible for buying services and goods for the State can do so in a way that provides additional benefits for people and communities, especially those with the greatest needs. A report for the Joseph Rowntree Foundation clearly shows that even in times of austerity, public procurement can be used to drive forward improvements in economic, social and environmental well-being.³ This is called **Socially Responsible Public Procurement**. One way of doing this is by the use of **Social Clauses**.

Socially Responsible Public Procurement is not a radical notion, it has been tried and tested throughout Europe. In the UK, local authorities and other public bodies are particularly adept at incorporating social and economic benefits into procurement programmes, inspired by the work of Richard Macfarlane and his 2002 seminal report - *Achieving community benefits through contracts: Law, policy and practice*.

The ground-breaking work done in UK laid the foundation for this Primer. Our goal is to provide clear information on how public bodies can use Social Clauses in Ireland. Elements of the Primer are detailed and technical in nature, this is because the procurement process is complex and to achieve successful outcomes, it is vital to comply with legal and policy frameworks.

The Primer explains why Social Clauses are a legitimate step to take in the Public Procurement process. In Part One, Public Procurement is defined and the regulatory framework explained. We demonstrate how Social Clauses fit into this framework and clarify their justification and legality, both in an EU and an Irish context. Part Two is a guide as to how to include Social Clauses in the Public Procurement Process in Ireland, and Part Three contains answers to Frequently Asked Questions, and finally we look to what we can expect in the future for this important area of law.

³Richard Macfarlane, 'Tackling Poverty through Public Procurement: law, policy and practice in delivering community benefits and social value', a report for the Joseph Rowntree Foundation, 2014. ⁴Cambridge Dictionary. ⁵See Commission of the European Communities, The Cost of Non-Europe, Basic Findings, Vol.5, Part. A; The Cost of Non-Europe in Public Sector Procurement (Official Publications of the European Communities, Luxembourg, 1988).



1 PUBLIC PROCUREMENT- DEFINITION AND LEGAL FRAMEWORK

Public Procurement is the buying of goods and services by Public Bodies.⁴ In Ireland, this is regulated largely by rules emanating from the EU. Traditionally, Public Procurement law was understood to have two aims: to provide value for taxpayers' money and to promote and develop the Internal Market of the EU. In order to achieve these goals, the EU's public procurement market was made open to competition; preventing protectionist policies and promoting the free movement of goods and services throughout EU Member States.⁵ However,⁶ the implementation of shared EU policies, such as promoting objectives concerning the environment, consumers and society emerged as an additional goal.⁷ This is where **Socially Responsible Procurement** obtains its legal authority.

Primary Legislation

European Procurement Regulation is based on the **Treaties of the European Union**. The **fundamental principles** that underpin Procurement Regulation are set out in two core treaties: the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU).

The Fundamental Principles are:⁸

- **Freedom of movement of goods:** this prohibits "all quantitative restrictions on imports and all measures having equivalent effect"

between Member States. It therefore forbids measures that hinder or discourage free trade in goods.

- **Freedom of establishment:**⁹ this enables an economic operator (whether a person or a company) to carry out an economic activity in a stable and continuous way in one or more Member States. Measures that restrict access to public contracts for such firms may infringe this provision.
- **Freedom to provide services:** this enables an economic operator (whether natural or legal persons), providing services in one Member State, to offer services on a temporary basis in another Member State, without having to be established. The provision prohibits a Member State from preventing EU enterprises from other Member States from providing services within its territory. This includes restricting their participation in government contracts.
- **Free movement of workers:**¹⁰ secures the right of any EU citizen to live and work in other EU Member States. This means that insofar as the contract requires job or training opportunities to be made available to jobseekers from a defined area or registered with a named agency, residents from anywhere in the EU who are living in the defined area or register with the agency, must be treated equally with other people.

- **The principle of non-discrimination:**¹¹ This is a general prohibition on discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. It covers both direct discrimination and indirect discrimination. Article 34, 49 and 56 also implement this principle within their scope.

The rules in the Treaties, and amendments to them, are directly applicable. This means that they are legally binding on Member States, when they act within the scope of EU law. Unlike Directives, they do not require any further action by Member States.

⁴Arrowsmith and Kunzlik "Social and Environmental Policies in EC Procurement Law" (Cambridge 2004). ⁵See Commission Interpretative Communication on the Community law, Applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM(2001) 566, 15 October 2001. Also, Commission Interpretative Communication on the Community law Applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, COM(2001) 274, 4 July 2001. ⁶Article 34 TFEU. ⁷Article 49 TFEU. ⁸Article 45 TFEU. ⁹Art. 18 TFEU



Primary Legislation continued

Under EU law, a directly applicable provision of the TFEU will override any inconsistent constitutional or legislative provision. This is known as the principle of supremacy of EU law over national law.¹² Therefore, a national court must disregard any part of national legislation that conflicts with the TFEU. Similarly, the administrative authorities of Member States must apply the directly applicable EU rules above conflicting national rules, or they will be in violation of EU law. **This means that, when awarding their procurement contracts, Contracting Authorities in Member States must adhere to the TFEU rules relating to public procurement, even if national law specifies something different.**

However, these TFEU principles alone were considered insufficient to open up procurement markets. To eliminate discriminatory practices, it was considered necessary for contracts to be awarded via transparent procedures. To ensure this, the EU adopted **Directives** which regulate award procedures for major contracts - these require, for example, that Member States should advertise their contracts across Europe and should award them using only certain criteria. The Directives ensure that companies from across the EU have the opportunity to compete for public contracts (above defined thresholds).¹³ They also serve to enshrine principles derived from the TFEU, such as the principle of **equal treatment**, the principle of mutual recognition, the principle of **proportionality** and the principle of **transparency**.

- **Equal treatment:**
This requires that Contracting Authorities are obliged to treat each tenderer in the same way, without favour or prejudice on grounds of nationality or any other grounds, during the procurement process, giving each one an equal chance to participate in the competition and to win the contract.
- **Mutual recognition:**
A Member State must accept the products and services supplied by other Member States, on condition that the products or services are suitable for their intended purpose.
- **Proportionality:**
This requires that the demands placed upon suppliers should be both relevant and directly related to the contract being awarded.
- **Transparency:**
This requires that public contracts are awarded in accordance with clear rules the application of which can be objectively verified.



SECONDARY LEGISLATION

The main public procurement Directives are:

- i) Directive 2004/18/EC - the Public Sector Directive
- ii) Directive 2004/17/EC – the Utilities Directive
- iii) Directive 89/665/EEC – the Public Sector Remedies Directive

The European Parliament and the Council adopted three new Procurement Directives in spring of 2014. Ireland and all other Member States are required to implement/ transpose the new Directives into national legislation by 17 April 2016.¹⁴ On 26 February 2015, Regulations to implement the new EU procurement Directive (Directive 2014/24/EU) came into force in the UK.¹⁵

The New Directives

Public Procurement: Directive 2014/24/EU on public procurement, which repeals Directive 2004/18/EC

Utilities: Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, which repeals Directive 2004/17/EC;

Concessions: Directive 2014/23/EU on the award of Concession Contracts, which does not directly replace any previous Directive.

The Procurement Directives set out a framework of rules, regulating the procurement of certain types of public and utilities contracts. They apply to contracts by “**Contracting Authorities**” in the public sector and “**Contracting Entities**” in the utilities sectors, which are above certain financial thresholds. They include an obligation to award contracts following a call for competition which must be advertised in the Official Journal of the European Community (OJEU), and sets down minimum time limits for firms to respond to such calls, to ensure that firms from other Member States also have time to respond. Case law underlines that the Directives merely set out a framework of rules; Member States remain free to adopt additional national laws on public procurement provided that these laws are in accordance with the rules set out in the Directives and EU Treaty Provisions.

EU Directives have been implemented into Irish law by means of the following statutory instruments:

- The European Communities (Award of Public Sector Contracts) Regulations 2006, S.I.No. 329 of 2006

implementing Directive 2004/18/EC, the Public Contracts Directive;

- The European Communities (Award of Contracts by Utility Undertakings) Regulations 2007, SI No. 50 of 2007 implementing Directive 2004/17/EC, the Utilities Contracts Directive;
- The European Communities (Public Authorities’ Contracts) Regulations 2010, S.I. No. 130 of 2010 and the European Communities (Award of Contracts by Utility Undertakings) Regulations 2010 S.I. No. 131 of 2010, implementing Directive 2007/66/EC the Remedies Directive.

Fig 1: EU Law and the Irish Legal Framework



¹⁴From the Office of Government Procurement website: <http://www.procurement.ie/news/2095>

¹⁵Public Finance Scrutiny Unit (2015) A Comparative Perspective on Public Procurement Requirements: social, environmental and economic, (17 April 2015, Northern Ireland Assembly).



2 SOCIAL CLAUSES IN PROCUREMENT

Justification for Social Clauses

EU policy embraces the concept of **Sustainable Development**, which has been defined as: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”¹⁶

Derived from this concept of **Sustainable Development** is the idea of **Sustainable Procurement**. This is a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis by **generating benefits** not only to the organisation, but also to **society** and the economy, whilst minimising damage to the environment.

Generating benefits to society leads to the concept of **Socially Responsible Procurement**: procurement that take into account **Social Considerations** such as employment opportunities, decent work, compliance with social and labour rights, social inclusion, equal opportunities, accessibility design for all, sustainability, including ethical trade issues and wider voluntary compliance with corporate social responsibility (CSR).¹⁷

One concrete expression of Socially Responsible Procurement is the use of the Social Clause.

A Social Clause is a legal requirement within a procurement contract which stipulates that the contract must provide added social value (this can also be known as a **Community Benefit Clause**).

The most common form of **Social Clause** is Targeted Training and Recruitment. **Targeted Recruitment & Training (TRT)** is a type of **Social Clause** that allows Contracting Authorities to specify in the contract that labour used must be sourced from particular groups. TRT clauses are used to target the long term unemployed and young people but can also be used to target other vulnerable groups.

We can see from this that Social Clauses fit within broad EU policy promoting Sustainable Development and the goal of maximizing social gain wherever possible. Procurement is an opportunity to implement this policy through the inclusion of contract clauses that will benefit the community See Fig 2.



Fig 1: Social Clauses in Context

3 LEGAL BASIS FOR SOCIAL CLAUSES AT EU LEVEL

We have seen that Social Clauses fit within the broad policy of EU Treaties and so can be included in public contracts, provided that they comply with the requirements of EU procurement rules and general EU law. The EC Treaty Principles of equal treatment and proportionality have particular relevance to these clauses.

The legal and policy instruments which allow Social Clauses are outlined below:

1. **The EU Directives** clearly provide a legal basis for socially responsible public procurement. Although, social and environmental considerations are not obligatory, all EU Member States must transpose the respective provisions into national law and this gives Contracting Authorities the possibility to include social and environmental considerations.¹⁸

This is made clear by the Directive, which allows for Contracting Authorities to set down "special conditions relating to the performance of a contract" which "may, in particular, concern social and environmental considerations".¹⁹

The consideration of environmental and social characteristics is also allowed when determining the most economically advantageous tender ("MEAT").²⁰

Award criteria relating to social value may be used if they:²¹

a. are linked to the subject matter of the contract;

- b. do not confer an unrestricted freedom of choice on a contracting authority;
- c. comply with EU Treaty obligations, and specifically are not directly or indirectly discriminatory;
- d. are generally compatible with EU law;
- e. can be compared and / or assessed objectively; and
- f. are properly advertised in the contract notice and / or contract documents.

2. **EU Guidance:** In 2010, the European Commission published, 'Buying social: A guide to taking account of social considerations in public procurement' which covers the promotion of employment opportunities, social and labour rights, social inclusion, ethical trade issues, corporate social responsibility and promoting SMEs. It states that, "Sustainability criteria (including social criteria) may also be incorporated in the contract performance condition, provided they are linked to performance of the contract in question (e.g. minimum salary and decent labour conditions for the workers involved in the performance of the contract)".²² It goes on to state that the contract performance clauses must be linked to performance of the contract; consistent with achieving the best value for money; included in the tender documentation; and compatible with EU law (including the fundamental principles of the TFEU). This highlights the importance the European Commission places on public spending that achieves social, economic or environmental goals.
3. **EU Strategy:** Europe 2020: The EU's ten-year growth strategy, 'Europe 2020', identifies social inclusion as one of the main objectives of the

European cohesion policy. It also supports the idea of the Social Economy as a well-balanced solution to the current and future economic crisis.

4. **Case Law:** Judgements have shown that non-economic criteria can be used as award criteria insofar as they are objective, linked to the subject-matter of the contract, expressly referenced in the tender documents and compliant with the fundamental principles of the Treaty. See *Appendix 1*.²³



¹⁹Article 26, the Public Sector Directive. ²⁰Recital 46, the Public Sector Directive. ²¹Recital 1, Recital 5, Recital 46 and Article 53 of the Public Sector Directive; Recital 1, Recital 12, Recital 55 and Article 55 of the Utilities Directive. ²²Commission, Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement (2012)43-44. ²³A number of conditions to be satisfied by non-economic criteria applied in the award of a public contract were laid down by the Commission and the Court of Justice see Case C-513/99 at para. 53, 59, 64, 69 and Case C-448/01 at para. 33 and 37.



4 LEGAL BASIS FOR SOCIAL CLAUSES IN IRELAND

The EU Directives are transposed into Irish Law through the Public Procurement Directives.
(See: Tables 1 and 2)

Our research shows that there is a mistaken belief in Ireland that our Public Procurement Regulations are less favourable to the inclusion of Social Clauses compared to the UK. As can be seen from Tables 1 and 2, Irish Regulations are in fact very similar in wording to UK Regulations.

One notable difference is in the transposition of Article 53 of the Directive 2004/18/EC - the Public Sector Directive. This concerns the criteria on which the Contracting Authorities shall base the award of public contracts. Regulations in the UK and Ireland allow Contracting Authorities to assess which bid is the "most economically advantageous". According to the Regulations the criteria can include *inter alia*: quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, and delivery date and delivery period or period of completion. In the UK, these criteria are preceded by the word "including"; in Ireland the phrase used is: "not limited to". While both allow for more than the listed criteria to be considered (e.g. social considerations) the Irish wording is much clearer in this regard.

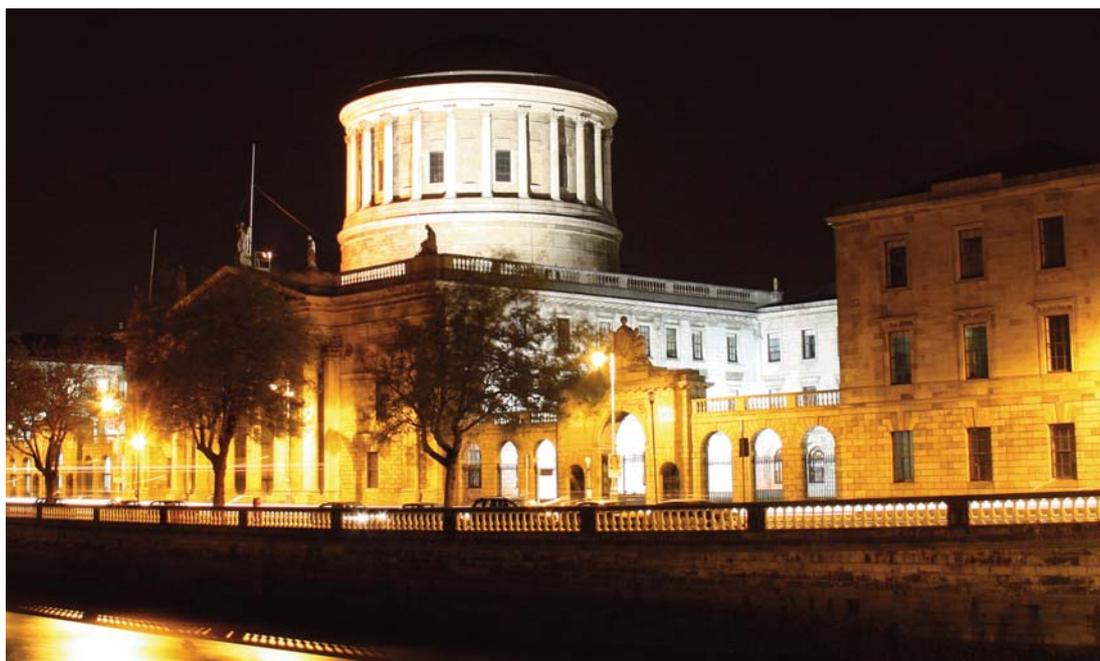


Table 1: Article 26 of the Public Sector Directive;

Directive 2004/18/EC - the Public Sector Directive	Irish Regulation :the European Communities (Award of Public Sector Contracts) Regulations 2006, S.I.No. 329 of 2006	UK Regulation :The Public Contracts Regulations 2006
<p>Article 26</p> <p>Conditions for performance of contracts</p> <p>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.</p> <p>The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.</p>	<p>Conditions for performance of contracts</p> <p>26. A contracting authority may prescribe special conditions relating to the performance of a public contract that is to be awarded by the authority, provided the conditions</p> <p>(a) are compatible with European Community law, and</p> <p>(b) are specified in the relevant contract notice or contract specifications.</p> <p>In particular, those conditions may deal with social and environmental matters.</p>	<p>Conditions for performance of contracts</p> <p>391) A contracting authority may stipulate conditions relating to the performance of a public contract, provided that those conditions are compatible with Community law and are indicated in—</p> <p>(a) the contract notice and the contract documents; or</p> <p>(b) the contract documents.</p> <p>(2) The conditions referred to in paragraph (1) may, in particular, include social and environmental considerations.</p>

Table 2 Article 53 of the Public Sector Directive re: Criteria for the award of a public contract

Directive 2004/18/EC - the Public Sector Directive	Irish Regulation the European Communities (Award of Public Sector Contracts) Regulations 2006, S.I.No. 329 of 2006	UK Regulation The Public Contracts Regulations 2006
<p>The criteria on which the Contracting Authorities shall base the award of public contracts shall be either:</p> <p>(a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, 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, or</p> <p>(b) the lowest price only.</p>	<p>A contracting authority shall, in awarding a public contract on the basis of the tender that is most economically advantageous to it, adopt criteria linked to the subject matter of the contract.</p> <p>(2), a contracting authority shall award a public contract on the basis of the lowest price.</p> <p>(3) For the purpose of paragraph (1), the criteria may include (but are not limited to) quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, and delivery date and delivery period or period of completion.</p>	<p>A contracting authority shall use criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous including quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period and period of completion.</p>



5 LEGAL PARAMETERS OF IRISH PUBLIC BODIES

The extent to which Irish public bodies and Contracting Authorities can include Social Clauses into their contracts depends on:

1. Whether or not they have the legal powers to do so and
2. Whether or not there are sufficient policy grounds for them to do so.

1. Legal Powers

Contracting Authorities (CAs) - such as local authorities and other public bodies have their powers set out in legislation.

Local Authorities

Under the Local Government Act of Ireland 2001, local authorities have general powers of competence and specifically the power to enter contracts.²⁴ The general functions of local authorities specified in section 62 of the Act include taking such action as they consider necessary or desirable **to promote the community interest**. Section 63 (3) specifically provides that, "subject to law, a local authority is independent in the performance of its functions", a principle endorsed in the European Charter on Local Self Government which Ireland has ratified.

Section 66 (3) (a) and (b) further extends the power of local authorities to "take such measures, engage in such activities or do such things in accordance with law (including the incurring of expenditure) as it considers necessary or desirable **to promote the interests of the local community**." Its definition of the promotion of local community interest includes: "**promoting, directly or indirectly, social inclusion or the social, economic, environmental, recreational, cultural, community or general development of the administrative area of the local authority concerned or of the local community.**"

This is the equivalent to the "well-being power" found in UK local government legislation and relied on by Macfarlane, facilitating the inclusion by local authorities in the UK of social considerations in public procurement contracts.²⁵

Government Departments and Other Public Bodies

The scope for other public bodies to promote environmental and social requirements will depend on their particular frameworks, statutory powers and the basis on which funding is provided. Many public bodies have broadly framed ancillary or subsidiary powers in addition to their main functions. The policies they adopt will therefore be of critical importance in setting the scope for procuring sustainability in its widest context.

²⁴Local Government Act 2001, S.63 and S.65. ²⁵Macfarlane, R., and Cook, M., Achieving Community Benefits through Contracts Law, Policy and Practice (The Policy Press, 2002) 15 -16. ²⁶From the Website of the Office of Government Procurement at <http://www.procurement.ie/about-us/our-mission>.

²⁷"Our Sustainable Future, A Framework For Sustainable Development For Ireland" (2012) Department of Environment, Community and Local Government.



2. Policy Grounds

Irish Policy also supports Social Clauses. The key frameworks are as follows:

Sustainable Development

The mission of the Office of Government Procurement in Ireland is: "To integrate the whole-of-Government policies into procurement practice, e.g. sustainable procurement and encouraging participation by SMEs in public procurement."²⁶ "Sustainable development is a key element of Ireland's economic recovery strategy policy as laid out in the 2012, *"Our Sustainable Future, a Framework for Sustainable Development for Ireland"* and is defined as "a continuous, guided process of economic, environmental and social change aimed at promoting well-being of citizens now and in the future. To realise this requires creating a sustainable and resource-efficient economy founded on a fair and just society, which respects the ecological limits and carrying capacity of the natural environment."²⁷

Public Procurement Reform

Reform of Public Procurement is one of the key priorities set out in the 2014-2016 Public Service Reform Plan.²⁸

This plan advocates the use of procurement policy "to support other Government policy considerations such as sustainability, social inclusion, disability, and e-enabling the economy. In the long term, procurement will be expected to develop as a key strategic lever for Government in the delivery of efficiency but also as a mechanism to influence socio-economic development"²⁹

The Government plans to accelerate measures from the new Procurement Directives in conjunction with the Department of Jobs, Enterprise and Innovation, Enterprise Ireland and InterTrade Ireland and to implement them accordingly.³⁰

Regeneration

The Irish Government's aim for regeneration schemes is to build sustainable communities through a combination of social, educational and economic initiatives and also by rejuvenating the built environment by demolition, construction and refurbishment of dwellings having regard to urban design guidelines. In December 2005, the Government published its Housing Policy Framework, *Building Sustainable Communities*, to provide a "21st Century vision for housing aimed at building sustainable communities". *Delivering Homes, Sustaining Communities* published in 2007 provides greater detail on the actions required to build sustainable communities and to contribute overall social and economic well-being. In addition, the onus is placed on Local Authorities to address these issues.³¹ The Government "Planning Policy Statement 2015" states that the Irish planning process will facilitate sustainable job creation and enable urban regeneration and strengthen the continued vitality of existing communities.³²

²⁸ "Public Service Reform Plan 2014-2016" (January 2014, Department of Public Expenditure and Reform). ²⁹ *Ibid* 25. ³⁰ *Ibid* 68. ³¹ www.environ.ie Website of Environment, Community and Local Government. ³² "Planning Policy Statement 2015" (Environment, Community and Local Government) <http://www.environ.ie/en/PublicationsDocuments/FileDownload,39991,en.pdf> accessed 2 March 2015.



Employment

The Government's Action Plan for Jobs refers to maximising Procurement Opportunities,³³ In its Fourth Progress Report, on the development of the Social Enterprise sector, one of its goals is: "the inclusion of social impact clauses in public procurement"³⁴ The Devolved Schools Programme, administered by the National Development Finance Agency (NDA) is being used as a pilot programme to trial the use of a Social Clause. This programme requires a certain percentage of the *person weeks* necessary to complete a project to be undertaken by apprentices and by individuals recruited from the long-term unemployed.³⁵

In its companion document "Pathways to Work"³⁶ one of the key milestones is to evaluate the pilot of the use of Social Employment Clauses in public sector procurement under the Devolved Schools Programme with a view to full rollout across all public sector procurement.



Value for Money

Value for money in obtaining the goods, works and services required for governmental activities is an important objective of the Irish State and it generally seeks to achieve this by requiring a publicly-advertised competitive award process.³⁷ 'The National Public Procurement Policy Framework', a report published by the National Public Procurement Policy Unit in 2010, states that the main aim of national public procurement policy is to achieve value for money.³⁸ However, the report indicates that value for money can be interpreted broadly:

"While price is very important in determining value for money outcomes in procurement..., it is not the only variable that needs to be considered. **Value for money also encompasses non-cost factors...** Value for money in procurement is, therefore, the optimum combination of whole-life costs and/or price, where appropriate, and quality (or fitness for purpose) to meet the user's requirements."

The document states that responsibility for ensuring value for money outcomes rests with individual departments and offices.³⁹ This allows local authorities some flexibility in their definition of Value for Money.

A note has been published on 'Environmental Considerations in Public Procurement' by the Governments Contracts Committee in February 2004 which states that:

³³See para. 7.2 Maximising Procurement Opportunities in "Action Plan for Jobs 2014" (2014, Department of Jobs, Enterprise and Innovation) <http://www.djei.ie/publications/2014APJ.pdf>. ³⁴"Pathways to Work 2015" (Interro) 122. <http://www.welfare.ie/en/downloads/pathways-to-work-2015.pdf> accessed 15 February 2015. ³⁵Ibid 173-174. ³⁶Pathways to Work 2015" (Interro) <http://www.welfare.ie/en/downloads/pathways-to-work-2015.pdf> accessed 15 February 2015. ³⁷See S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (London, Kluwer Law International, 2000) at Chapters 2 and 3. In the case of Ireland see National Public Procurement Policy Unit National Public Procurement Policy Framework (2010) 1.2 at 3 states that the aims of Ireland's national public procurement policy is to achieve value for money. ³⁸National Public Procurement Policy Unit, National Public Procurement Policy Framework (2010) 5 para. 2.2. ³⁹"Under section 4(f) and (g) of the Public Service Management Act (PSMA), 1997 departments and scheduled offices are required to provide cost effective public services, achieve better use of resources and comply with the requirements of the Comptroller and Auditor General (Amendment) Act, 1993"

“Value for money requires taking into account whole life costs to the greatest extent possible. That includes all aspects of cost, such as running and maintenance costs, disposal costs and other indirect costs as well as the initial purchase price. The concepts of promoting and maintaining an acceptable level of environmental standards and achieving value for money in public procurement are not incompatible”

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Part Two

HOW TO INCLUDE SOCIAL
CLAUSES IN PROCUREMENT
STEP BY STEP



02 HOW TO INCLUDE SOCIAL CLAUSES IN PROCUREMENT STEP BY STEP

Part ONE of this Primer demonstrated that it is legally possible to use Social Clauses in the Procurement Process. Part TWO will explain the methodology involved.

Step 1: Policies and Commitment

The first step is to identify the policy justifications. In “Buy Social”, a guide to socially responsible public procurement published by the Northern Ireland Investment Board, public bodies are advised to develop and formally adopt what they call a ‘Buy Social’ policy, either as a part of a sustainable procurement policy or as a separate policy. This can ensure a proper decision-making process and helps embed the approach in the purchasing organisation.⁴⁰

A commitment from all the Contracting Authorities Procurement staff to the use of Social Clauses is also an important requirement to achieve successful outcomes. One way of doing this is to ensure that Contracting Authorities have in place a Corporate Procurement Strategy that reflects this commitment. Further ways to ensure this include training and capacity building for procurement and service delivery staff.

Local political cultures and elected members are also crucial to making organisational and strategic provisions for community benefits. Elected members should be strongly involved in developing the ethos of sustainable social procurement practice and in scrutinising their application and progress. It is important for politicians to remember that procurement is not just a technical process, but one which is related to a variety of policy agendas particularly in relation to the economy and environment

⁴⁰“Buy Social, A practical guide to socially responsible public procurement” (The Strategic Investment Board, 2015)

Policy Example

During community consultation on plans for a new £842 million hospital complex in South Glasgow, NHS Greater Glasgow and Clyde identified work for local people and businesses as a key concern. It commissioned a Social and Economic Impact Study and subsequently adopted an Employability and Health Strategy. On the basis of this it sought to include 'community benefits' in the procurement process and contract.

Source: *NHS Greater Glasgow and Clyde case study from Richard Macfarlane, 'Tackling Poverty through Public Procurement: law, policy and practice in delivering community benefits and social value', a report for the Joseph Rowntree Foundation, 2014*

Step 2: Decide on Contract Options

At this stage the decision must be made as to whether the Community Benefit that is sought will be a 'core' benefits (measurable + comparable), or a non-core benefits negotiated after tender selection.

Core: To be included as part of the awarding considerations of a procurement contract, the Community Benefit requirements must be part of the core purpose of the contract and must provide a benefit to the Contracting Authority at award stage.

Non-Core: For the 'non core' approach, the social requirements may be included as contract conditions but do not form part of the specification and must not be assessed either at selection or award stage.

The CORE approach

If an organisation wants to achieve community benefit from, for example, a housing renovation project, they should advertise it as a 'housing works and community benefit project'. As a core requirement, any bids can then be assessed at the Pre-Qualification Questionnaire (PQQ) and the award stage, and the implementation of the Social Clause can be monitored as part of the contract and is enforceable as a contract term. The inclusion of the community benefit must be stated clearly in the contract notice and the tender documents and it can be assessed as part of the award criteria. It should be capable of being measured and scored objectively and should be in proportion to the other tender criteria. It will be enforceable as part of the contract.

The NON-CORE approach

If the community benefit cannot be linked to the subject matter of the contract, then as an alternative, the benefit can become a contract condition, similar to Health and Safety requirements. It will not be assessed at either the Pre-Qualification Questionnaire (PQQ) or award stage, but it must still be non-discriminatory and proportionate to the contract. Acceptance of the contract conditions can be made a Pass/Fail requirement. It is often favoured by those new to the process. It will be enforceable as part of the contract.





Step 3: Create a “Business Case”

A business case needs to be made for including Social Clauses. It needs to show that:

- The requirement is appropriate and meets a legitimate and reasonable need. When designing contracts it is important to ask: what is the specific community need that these Social Clauses will meet? This avoids the danger of a template approach, where standardised clauses are dropped in to every procurement contract without reference to the particular social need in that community.
- It is essential that resources are available to set up a sustainable framework for supervising the process and to enable the social requirements to be met (e.g. there are trainees and training provisions that can be engaged), and properly managed (i.e. through monitoring facilities).

It is important to consider the following:

1. Employing a Community Benefits champion to project plan from the earliest stage. Experience has shown that, particularly for major projects or for procurers who will be using Social Clauses in multiple projects, it is desirable to have a person or team of persons to plan, manage and monitor a community benefits programme.
2. Getting the local community involved in the procurement process, by helping determine what are priority community benefits, or by being involved in the Pre-Qualification Questionnaire (PQQ) and the Invitation to Tender (ITT) assessment panels.
3. Clearly define target beneficiaries e.g. tenants; young people; long-term unemployed.
4. Identifying resources that could offer facilitation, advice, and monitoring.
5. Is there a budget for Community Benefits, or will the contractor deliver on a cost neutral* basis? ⁴¹

‘Cost neutral’ means that any costs associated with the project are absorbed into the general overheads of the contractor/firm. Client and contractors should discuss how the contract can be delivered on a cost neutral basis.

The contractor, if there is a cost neutral or ‘nil cost’ requirement, cannot charge the client for any community benefit. It might be argued that a contractor could just increase the cost of the tender to fund the community benefit, however there is a risk that they could price themselves out of winning the contract. For this to succeed, contractors need to buy into community benefits and commit to delivering them. Forward-thinking contractors already accept that community benefits are now an integral part of procurement in the public sector and recognise the benefit to their company in being able to demonstrate their capability in delivering community benefit and their commitment to doing so.

⁴¹“The Can Do toolkit” Community benefits in Procurement (2012 i2l)

6. Define project requirements, including the minimum size of contracts that will use community benefit, what community benefit can reasonably and realistically be achieved and what weighting it should carry during the tender evaluation stage.
7. Outputs must be clearly defined to ensure effective measuring and monitoring.
8. Engaging with contractors far in advance of the procurement process to inform them that Social Clauses are to be included.

Step 4: OJEU Contract Notice

The use of social considerations in contract conditions by a Contracting Authority must be mentioned in any OJEU Contract Notice. It is recommended that any community benefit requirement should be stated in the Notice, even if it is non-core.

Example of OJEU Contract Notice Glasgow Housing Association

The successful economic operator and its supply chain will be required to assist in the achievement of the contracting authority's social and environmental objectives. Accordingly, economic operators should be aware that contract performance conditions and evaluation criteria may include social and environmental considerations. Details will be set out in the contract documents.

Wording from OJEU section III.1.4 'Other particular conditions'.

Source: *Tackling Poverty Through Public Procurement. Richard Macfarlane with Anthony Collins Solicitors. The Joseph Rowntree Foundation. 2014. Case Study 1.*

The most useful tip to follow is, if using TR&T as a core requirement, it needs to be stated within the main title of what you are procuring. For example, if you are procuring 500 new kitchens and would like to include TR&T, the title for the contract will be '500 new kitchens and targeted recruitment and training'.

The following model wording is included, typically under the section in the OJEU Contract Notice headed "Additional Information":

"Under this [procurement / project] the [contractor/ developer] is required to participate actively in the economic and social regeneration of the locality of and surrounding the place of delivery for the [procurement/ project]. Accordingly contract performance conditions may relate in particular to social and environmental considerations."

Based on text in Community Benefits in Public Procurement. The Scottish Government. 2008





Step 5: Prequalification Questionnaire (PQQ)

A Pre-Qualification Questionnaire (PQQ) is used by purchasers to identify suitable suppliers to invite to tender for contracts. It is commonly used in procurement and enables the buyer to shortlist potential providers by obtaining information regarding technical knowledge and experience, capability/capacity, organisational and financial standing. It is not information relating to how they propose to deliver the current contract.

Example of a PQQ Question on Targeted recruitment and Training

Please give examples of your involvement in each of the following:

- generating employment and training for long-term unemployed people;
- providing training opportunities;
- the development of trade skills in your existing workforce;
- equal opportunities recruitment processes.

What was your exact involvement in each of the above activities? Which of the examples you cited have been most successful and which have been less successful, and why?

Source: *Community Benefits in Public Procurement. The Scottish Government. 2008. Page 19.*

Step 6: Invitation to Tender

Detailed requirements of the Community Benefits (ideally based on the business case) need to be included at this stage. Outputs are required to be:

1. Clearly defined
2. Measurable
3. Relevant to the subject matter of the contract
4. Achievable
5. Proportionate to the size of contract

An Information Sheet or a dedicated website with information on local conditions should be made available e.g. it could include the client’s priority groups for targeting opportunities, contact details for supply-side agencies for recruitment and business support agencies.



Step 7: Specifications

Suggested Wording

In pursuance of the information provided in the OJEU Contract Notice that the Contractor is required to actively participate in the economic and social regeneration of the locality the Contractor shall deliver the TR&T and supply chain requirements as set out below.

or

It is the Employer's intention that the delivery of the contract assists in the achievement of their policies on sustainable development/social inclusion/economic and social regeneration/equal opportunities (select as appropriate) as set out in [the relevant policy documents]. Accordingly, and in pursuance of the information provided in the OJEU Contract Notice, the Contractor is required to deliver the TR&T and supply-chain requirements as set out below.

The specification sets out the detailed requirements for the contract, including the social/community benefits (ideally based on the business case).

While the details will vary from contract to contract there are a number of common elements that are included in 'Community Benefit' specifications. These include:

- Reference to the policy or legal underpinning for the requirements;
- Measurable performance indicators either within the specification or

in an addendum, relating to:

- the required outputs, and/or
- a mandatory recruitment process that has to be followed (e.g. for site vacancies);
- monitoring and performance review requirements.

As with all other elements of the specification, care will need to be taken in determining what training and employment (or wider community benefit) requirements are appropriate and deliverable. These need to be drafted into clauses that are unambiguous and provide a 'level playing field' in the tendering process for contractors.

A key factor in achieving this 'level playing field' may be the availability of supply-side agencies that can ensure equal access to appropriate trainees, employees and small firms for contractors.

Step 8: Award Process

The award process for Community Benefit, needs to be fair and transparent. The process depends on whether the clause is Core or Non-Core.

The Procurer should ask bidders to submit a method statement in conjunction with their tender, detailing how they will achieve the social requirements.

If it is a core requirement, the method statement can be scored and used in the award. The weighting given to that statement needs to be agreed early on

in the process. Where the social/TR&T elements are to be scored a scoring framework should be used to ensure a robust and fair evaluation of the TR&T Method.

If community benefit is a non-core requirement, and as such is part of contract conditions, the method statement should not be scored but used as a basis for post-award discussions.

A scoring framework:

- lists the subjects where a response from the bidder was expected, with each subject given a weighting (number of points); and
- lists the types of actions that were expected to be offered under each subject, with each action then being given a weighting – a breakdown of the points available for that 'subject'. The scoring framework should be tested by the evaluation team and then used to score each tender submitted. The resulting scores are then incorporated into e.g. a 30% 'quality' element of the evaluation. A pro-forma method statements should be issued to ensure that all bidders answer the same questions and provide the same core information. This helps ensure a level playing field is put in place between bidders and reinforces the message that these are not voluntary or "best endeavours" elements of the contract, but contractual requirements.



Step 9: Contract Conditions

Specific contract conditions can be developed on a project by project basis. In procurement processes that allow scope for negotiation (for example on the basis of a service delivery plan or method statement) specific clauses can be incorporated into contract documentation to tie the contractor/developer to specific targets and outcomes.

Step 10: Implementation and Monitoring the Performance of the Contractor.

Monitoring and verification are critical issues when TR&T requirements are included as contract conditions. Monitoring is defined as the supply of performance information, while verification aims to provide the Contracting Authority with a method of auditing this performance information.

Reporting should be undertaken early and often to ensure that the contract keeps focus on community benefit requirements. It is advised to put the community benefits into the monitoring process as Key Performance Indicators (KPIs). Payments can be linked to these as further incentives to pay attention to them.

It is important to be able to verify KPIs, e.g. weeks of employment for new entrants. Notify the contractor from the outset if you require information on ethnicity, gender, area of residence etc. For a large number of trainees the recording and analysis could require a database system.

The client should not request information that they are not in a position to analyse. This risks diverting the effort of the client team and the contractor for little measurable, and probably little actual, gain. It is preferable to include few requirements and know that these are being delivered than to be over-ambitious in setting targets and be unable to monitor and verify the outcomes.

Appropriate legal advice should be sought on the collection, storage and communication of personal information under the Irish Data Protection Act.

Procurement Step by Step: A Summary

Step 1: Policies and Commitments

Step 2: Decide on Contract Options

Step 3: Create a “Business Plan”

Step 4: Publish in the OJEU Contract Notice

Step 5: Prepare the PQQ

Step 6: Send out Invitation to Tender

Step 7: Write the Specifications

Step 8: Set up the Award Process

Step 9: Develop the Contract Conditions

Step 10: Monitor and Verify

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Part Three

FREQUENTLY ASKED
QUESTIONS



Frequently Asked Questions

Research has highlighted some concerns with regard to Social Clauses.⁴² In this section we will attempt to answer these questions.



Q1. Is it Legal?

Yes, it is entirely lawful, provided key principles are followed to include “social considerations” within a procurement process under the EU procurement rules, and it has been lawful for many years. The current procurement Directives and Regulations expressly allow this.

The circumstances in which social considerations/community benefits can be taken into account have been the subject of case law. Based on the judgements in such cases, the key principles outlined in this primer emerge. If these are followed, social considerations ought to end up being taken into account on a wholly compliant basis. See *Appendix 1* for the case law in this area.

Q2. Are there risks of litigation?

Yes, there are always risks of litigation in public procurement! However, these risks are significantly diminished if you clearly describe the social benefits you are buying as part of the contract. All bidders must understand clearly what they are tendering for. Best practice is to be as explicit as possible at the very outset. To further mitigate any risk, you should also consider 'meet the buyer' events to fully explain the process and requirements. To date, most problems have arisen because of neglecting to prepare.

Q3. Does it cost more?

No. It is also commonly assumed that the inclusion of TR&T requirements will incur additional costs and therefore not provide value for money. However, the findings of the Targeted Recruitment and Training in Procurement project, undertaken by the Scottish Government during the Summer of 2012, showed that TRT clauses did not increase the cost of procurement to the procurer. In fact, the incorporation of TRT clauses helped the local authority to secure social benefits which they could not have obtained otherwise. Indeed the Glasgow Housing Association Pilot Study⁴³ showed that:

- the inclusion of TR&T requirements at all stages of the procurement process did not deter bidders;
- the bidders with the highest scores overall – at both PQQ and tender stage – were those that also scored highest on the TR&T requirements. In each case the community benefits requirements helped the Contracting Authorities to achieve their policy objectives without additional cost to the contracts.

It is important to note that the incorporation of TRT clauses ensures gained social benefits which they would not otherwise have obtained

Q4. Is it prohibited to specify a local geographic area as the beneficiary of a procurement?

Yes. But EU Treaty requirements on the freedom of movement of labour do not prohibit public bodies from legally targeting their recruitment activity at selected groups, such as “New Entrants to the labour market”, “ethnic minority groups” or “Long Term Unemployed” or from asking their contractors to do likewise, though what is meant by any such group should be defined.

Public Bodies can also name agencies that work in a target area, such as the local Intreo Center, as long as it is open to nationals of other EU countries and receive equal treatment to Irish nationals. This agency can be proactive about getting registrations from a target geographical community.

Therefore the key is to work with local agencies to ensure that they are committed to developing ‘employability’ within the target community and supporting employers in recruiting from this population.

⁴³“Community Benefits in Public Procurement” (The Scottish Government, Edinburgh, 2008) 22



Q5. How have contractors in the UK responded to the inclusion of Social Clauses?

Glasgow Housing Association (GHA) case study indicates that there is a growing understanding and support for the community benefits approach from contractors. Many have found imaginative ways to meet the targets even where the nature of the work makes this difficult. In part this is because they have seen the business benefits. They have a better and more committed workforce and they are better able to compete for other contracts. It is now common throughout the UK for public contracts to include employment and training requirements.⁴⁴

Q6. Can Social Clauses be used outside the context of construction contracts?

Yes. Richard Macfarlane in *Tackling Poverty Through Public Procurement* found it surprising that Social Clauses have seldom been utilised outside of the construction sector. However, this is beginning to change. There are two ways of ‘extending’ the application of Social Clauses:

- Include targeted recruitment and training requirements in contracts in new sectors, e.g. health and social care; environmental services; education and employment services; defence, catering and hospitality etc.;
- Use Social Clauses to tackle other social issues, e.g. address equal opportunities matters.

Q7. Are Social Clauses limited to training and recruitment application?

No. Although Training and Recruitment has traditionally been its main application in the UK, Social Clauses are now being extended to other areas. Some examples are:

- Supply chain initiatives for SMEs: for example: "the successful provider will be expected to work with the commissioner to open up opportunities for SMEs, including social enterprises, to bid for 2nd & 3rd tier supply chain opportunities arising from this contract."
- Environmental clauses: There are a range of environmental community benefit clauses which Contracting Authorities can utilise:
- Clauses in tendering and contracting related to environmental efficiency. These include stipulating that:
 - Suppliers must use: green energy; recycled materials in construction projects; and local or ethical products;
 - Environmentally focused community benefit clauses can also ban the use of environmentally damaging or unethical products and processes. Similarly, local authorities may wish to include the cost of carbon emissions when carrying out cost-benefit analyses.⁴⁵
- Employment and training opportunities specifically for the persons with disabilities: By indicating in the Contract Notice that a particular contract is "reserved for sheltered workshops under Article 19 of the Directive" only organisations with more than 50% disabled employees (not just within Ireland) can bid for that contract or framework agreement. This effectively allows a public body to reserve contracts for established Social Firms, (under the new Directive this will change to 30% socially disadvantaged and/or disabled).

⁴⁴Richard Macfarlane, 'Tackling Poverty through Public Procurement: law, policy and practice in delivering community benefits and social value', a report for the Joseph Rowntree Foundation, 2014. ⁴⁵ASPE "More bang for the public buck: A guide to using procurement to achieve community benefits" February 2010. ⁴⁶Macfarlane, R., 'Using local labour in construction' (The Policy Press 2000) 9.

Q 8. What is the difference between a Social Clause and a Voluntary Agreement?

In Ireland, there is sometimes a view that non-contractual agreements with developers to add social value are examples of Social Clauses e.g. when a developer may agree, having won the bid, to support a local community by taking on some local unemployed people in the work-force. This however is outside the procurement process and does not fall within the definition of Social Clauses in this Primer.

These are voluntary agreements and while useful as a step in the right direction to the more formal use of Social Clauses, they have proven difficult to monitor and evaluate, resulting in less clarity and less “equality in the tendering process.”

A voluntary agreement must be negotiated with a contractor after they have been awarded the contract, to ensure that any inferred offer from bidders does not influence any part of the award process

It is important to note that where a contractor is being asked to deliver added benefits, the advantage of using a Social Clause in a contract is that it fits more easily within commercial procedures and gives contractual weight to the monitoring, verification and achievement of the desired community benefit.

Q.9 How do you ensure Compliance?

It is important to remember the purpose of the exercise: to deliver real social benefit to communities through procurement. To enforce the Social Clause, monitor the outcomes and routinely discuss progress at contract review meetings. Monitoring the delivery of the benefits is as important as creating the clauses in the first place. Reporting should be undertaken early and often to ensure that the contract maintains focus on the Social Clause requirements. Consideration should be given to put these requirements into the monitoring process as Key Performance Indicators (KPIs), and linking them to stage payments.

Non-compliance can be penalised by contractual remedies i.e. a right to terminate the contract, an order to compel performance and/or a right to compensation for violations. However general contractual remedies may be difficult to exercise (e.g. a damages remedy requires an example of a specific and quantifiable damage to the government) and terminating the contract due to non compliance with a Social Clause is unrealistic.

A Case Study by Comhairle nan Siar in Scotland in July 2013 indicated two ways to mitigate the risk of the contractor failing to comply:

1. Councils withheld a percentage of the payment from the contractor and awarded this as a bonus on completion of the contract, provided the Social Benefit Clause had been fulfilled.
2. A ‘Liquidated Damages Clause’ was built into the contract to ensure that the purchaser was reimbursed if the contractor fails to meet the Social Clause requirements. A contractor is paid per the contract but a purchaser has a ‘right’ to contest a percentage refund if the condition is not met.⁴⁸

However, experts⁴⁹ have concluded that financial sanctions may not lead to the desired outcomes and contractors may discount the sanction from their anticipated profits. It has been found that enforcement will largely come through the building of positive relationships with the contractor’s team and delivery-support organisations. One potentially useful approach is to make it a requirement for the contractor to display at the entrance of the project, a large board that both employees and the local community can read, stating the Social Clauses targets and achievements to date.

One potentially useful approach is to make it a requirement for the contractor to display at the entrance of the project, a large board that both employees and the local community can read, stating the Social Clauses targets and achievements to date.



⁴⁷“Buy Social, A practical guide to socially responsible public procurement” (The Strategic Investment Board, 2015). ⁴⁸“Community Benefit Clauses, Case Study: Comhairle nan Eilean Siar” (Improvement Service, July 2013). ⁴⁹Richard Macfarlane in Richard Macfarlane, ‘Tackling Poverty through Public Procurement: law, policy and practice in delivering community benefits and social value’, a report for the Joseph Rowntree Foundation, 2014



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Part Four

THE FUTURE FOR SOCIALLY
SUSTAINABLE PROCUREMENT





The Future for Socially Sustainable Procurement

The 2014 EU Directive

The European Parliament and the Council adopted three new procurement Directives in spring of 2014. Ireland and all other Member States are required to implement/ transpose the new Directives into national legislation by 17 April 2016.

On 26 February 2015, Regulations to implement the new EU procurement Directive (Directive 2014/24/EU) came into force in the UK. This is over a year in advance of the EU's deadline for transposition of the new Directive (April 2016).

In Ireland, the Office of Government Procurement (OGP) carried out a consultation process seeking the views of public sector users, private sector tenderers, relevant representative bodies and other interested parties in relation to the key policy choices for Ireland. It is anticipated that the OGP will publish draft Regulations later this year.

The Irish Government intends to transpose the 2014 Directive by the end of 2015.⁵⁰

Through the New Directives, the EU has strengthened the ability of Contracting Authorities to provide social value through procurement processes and have reinforced the legitimacy and importance of doing so.

The Recital to the 2014 Directive states that the EU seeks "a better integration of social and environmental consideration in the procurement procedures." Furthermore, buyers "should be allowed to use award criteria or contract performance conditions relating to the works, supplies or services, in all aspects and at any stage of their life cycle, even where such factors do not form part of their material substance."⁵¹ It also notes that "award criteria are intended to assess the value of the tender from the point of view of the Contracting Authority, which emphasises that it is the procurer who is to choose what it identifies as being of value."⁵²

The 2014 Directives contains these changes related to Social Considerations:

- The actual listing of “Social Characteristics” in the wording of the Directive as one of the characteristics that can be considered as award criteria, when making a MEAT assessment (environmental characteristics were already listed in the 2004 Directive).⁵³
- Contracting Authorities are encouraged to divide large contracts into lots to encourage the involvement of SMEs.⁵⁴
- Contracting Authorities may not award a contract to the otherwise “best” tender where that tender does not comply with certain social and environmental laws.⁵⁵
- The 2014 Directive codifies the Dutch Coffee Case which means that Contracting Authorities should not require a tenderer to hold a particular label, but should define the technical specifications for the contract that they require.⁵⁶
- Buyers may not require tenderers to have CSR [Corporate Social responsibility] policies in place as this is not linked with the subject matter of the contract,⁵⁷ following existing case law.⁵⁸
- The 2014 Directives introduces the concept of **life cycle costing (LCC)**.⁵⁹ Article 68 is dedicated entirely to this new concept.
- **Article 20 of Directive 2014/24** on “Reserved contracts”: Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons. Under the old Directive⁶⁰ this possibility was limited to workshops employing disabled people, and it was required that at least 50 percent of the employees of those workshops were disabled. Today, this figure is 30 percent and has been extended to include workers who are socially disadvantaged.



⁵⁸The Dutch Coffee Case. ⁵⁹Under Directive 2014/24, Article 2(1)(20) “life cycle” means all consecutive and/or interlinked stages, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilization. ⁶⁰Article 19 of Directive 2004/18/EC and Article 28 of Directive 2004/17/EC.



Social Clauses Bill in Ireland

Private member legislation is currently progressing through the Oireachtas sponsored by Deputy Mary Lou McDonald of Sinn Fein, titled the “Social Clauses in Public Bill 2013”

The Social Clauses in Public Procurement Bill includes the following requirement:

2. *Public procurement contracts, in which the overall project value of the contract is in excess of € 1,000,000, shall hereby include the following Social Clauses—*

(a) a requirement that the main contractor comply with a local labour employment scheme to be determined by the Minister upon the enactment of this Act,

(b) a requirement that the main contractor recruit one long term unemployed person, directly or through the supply chain, for each € 1,000,000 of project value while retaining all current employees of the company,

(c) a requirement that the main contractor recruit one apprentice, directly or through the supply chain, for each € 2,000,000 of project value,

and

(h) any other Social Clause which the Minister or public authority sees fit to be included in the contract.⁶¹

The Irish Government’s position on the Bill was set out in a written answer to a question about local authority housing contracts:

Minister for Public Expenditure and Reform:

“[O]n 17 October 2014, the Government supported in principle the Second Stage of the Private Member’s Social Clauses in Public Procurement Bill 2013 [...] and sees significant merit in developing a Social Clause framework where such clauses are applied in a targeted manner. The Government did not oppose the Bill.

Whilst Government sees the merit in using Social Clauses in particular circumstances, *it is important that Contracting Authorities are not compelled to use them on every contract particularly where their deployment may disproportionately impact on SMEs bidding for public contracts.* It is for this reason that an interdepartmental group has been set –up by the Office of Government Procurement which is considering the sectors where such clauses might be implemented. The deliberations of this group will therefore be important in forming the Government’s response to [the] Bill.”⁶²

This indicates that the Government does not wish to compel Contracting Authorities to use Social Clauses in every contract.

⁶¹<http://www.oireachtas.ie/documents/bills28/bills/2013/13413/b13413d.pdf>.⁶²Written answer 240, 16 December 2014: <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2014121600071?opendocument#WRH00100>.⁶³Press release: <http://www.per.gov.ie/minister-for-public-expenditure-and-reform-mr-brendan-howlin-td-announces-establishment-of-social-clauses-project-group/>



In the meantime, a Government pilot using Social Clauses is underway.⁶³ Announced in 2013, the Devolved Schools Programme requires that at least 10% of those working on the sites are recruited from the live register having been unemployed for longer than 12 months; and at least 2.5% of workers on the sites are engaged in an approved registered apprenticeship, training or educational work placement scheme.

In total, three contracts cover fourteen sites, comprising stand-alone, new build, extensions and refurbishment works. The aggregate capital value of the contracts is approximately €70 million. The most recent monthly progress reports (dated December 2014) provided by each main contractor indicate that they are on target to achieve the cumulative percentages set out in the pilot clause.⁶⁴

At the time of writing, the Inter-Departmental Group on Social Enterprise has not made a formal submission to the Office of Government Procurement regarding the inclusion of social impact clauses in public procurement contracts.⁶⁵

National Legislative Position of the UK

The Public Services (Social Value) Act 2012 which extends to England and Wales, requires public bodies in England and Wales to consider how the services (i.e. not works or goods) they commission and procure might improve the economic, social and environmental well-being of their area. Its application to Wales is limited in that the provisions of the 2012 Act do not apply to procurement by authorities who exercise functions that are wholly or mainly devolved in Wales.

Contracting Authorities in Wales and Northern Ireland do not have a statutory duty to consider use of public contracts to address social, environmental or economic considerations. Instead, there are policy and guidance to encourage and mandate such activity.⁶⁶

The Procurement Reform (Scotland) Act 2014 empowers Scottish Ministers with powers to make Regulations and issue statutory guidance on a number of specified issues. Amongst other things, the 2014 Act provides that for qualifying procurements over a value of £4 million “a contracting authority must consider whether to impose social benefit requirements as part of the contract delivery before carrying out the procurement.” In other words, after commencement by Order, the Act will impose a statutory duty on Contracting Authorities to consider community benefits. Where no social benefit clause is to be used, the Contracting Authority must provide an explanation.

Richard Macfarlane’s Social Value and Public Procurement: A Legal Guide recommends that the Scottish statutory duty approach should be applied throughout the UK and as such, would also be a good approach for Ireland.

⁶⁴Written Answer 293 by Minister Brendan Howlin TD 3rd February 2015 <https://www.kildarestreet.com/wrans/?id=2015-02-03a.428>.

⁶⁵<https://www.kildarestreet.com/wrans/?id=2015-02-10a.343>. ⁶⁶ <http://www.anthonycollins.com/sites/default/files/Social%20Value%20and%20Public%20Procurement%20-%20a%20Legal%20Guide%20-%20January%202014.pdf> (page 17).

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A primer on the use of
social clauses in Ireland



Part Five

Appendices



05 Appendix 1: Social Procurement in Case Law

There have been some significant pieces of case law both in the domestic courts and the ECJ that provide significant guidance to the Public Procurement legal framework.

Case Reference

**Gebroeders Beentjes B.V. v
The State (Netherlands)**
(C31/87) [1990] 1 CMLR 287

Summary

A contract condition that the contractor must employ long-term unemployed persons can be compatible with the rules if it has no direct or indirect discriminatory effect on tenderers from other Member States as long as procedural rules are adhered to, specifically that it must be mentioned in the contract notice.

**Commission of the European
Communities v French
Republic (C225/98)**
[2000] ECR I- 07445
("Nord-pas-de-Calais")

Rejecting an earlier assessment by the Commission, the ECJ ruled that an award criterion "linked to the campaign against unemployment" can be applied as an "additional" criterion where the MEAT assessment of bids on a purely economic basis has revealed "two or more economically equivalent tenders". Any such criterion must still be consistent with the fundamental principles of community law.

NB: This case should be treated with caution, as the ECJ did not consider whether the use of local labour was consistent with EU fundamental principles, particularly whether it could be said to discriminate against contractors from other Member States.

**Concordia Bus Finland
Oy Ab (formerly Stagecoach
Finland Oy Ab) v (1) Helsingin
Kaupunki (2) HKL-Bussiliikenne**
(C513/99) [2003] 3 CMLR 20
(known as "Concordia
Bus Finland")

In response to a question relating to an environmental award criterion as part of a MEAT assessment, the ECJ set out a number of important considerations in its ruling as follows:

- 1 The contracting authority was entitled to include an environmental consideration in its award criteria.
- 2 Award criteria need not be purely economic in nature [and so by implication could include social criteria as well as environmental].
- 3 BUT the award criterion does need to:
 - I. be linked to the subject matter of the contract;
 - II. not confer an unrestricted freedom of choice on the authority;
 - III. be expressly mentioned in the contract documents or tender notice; and
 - IV. comply with all the fundamental principles of community law, in particular the principle of non-discrimination.

²Written answer 240, 16 December 2014.



<p>EVN AG and Another v Austria (Stadtwerke Klagenfurt AG and Another, intervening) (C448/01) [2004] 1 CMLR 22 (known as “EVN”</p>	<p>The ECJ agreed with the judgment in the Finnish Buses case in that Contracting Authorities are entitled to use award criteria that are not purely economic in nature. In addition, the court confirmed Contracting Authorities are similarly entitled to determine the weighting of such criteria. In this case, the court found a weighting of 45% in favour of meeting environmental criteria acceptable. The court found the award criterion in question breached EU law because:</p> <ul style="list-style-type: none"> i. it did not relate to the subject matter of the contract(it related to the amount of renewable energy supplied to consumers outside of the contract and only to consumption it was not expected the contracting authority would ever require; and ii. it unjustly discriminated against smaller suppliers tendering who were able to meet the subject matter of the contract.
<p>Contse SA v Insalud (Now Ingesa) (2005) (C-234/03)</p>	<p>A pre-qualification requirement for a contractor to have premises within a particular geographical area was held to be discriminatory and unjustified.</p>
<p>Du Pont de Nemours Italiana SpA v Unità Sanitaria Locale No. 2 Di Carrara C-21/88 [1991] 3 CMLR 25</p>	<p>It was discriminatory to require bidders to obtain a set portion of their supplies from a specified region.</p>
<p>Laboratori Bruneau Srl v Unità Sanitaria Locale RM/24 De Monterotondo [1994] 1 CMLR 707 (known as “Laboratori Bruneau”}</p>	
<p>EC Commission v Italy [1991] 2 CMLR 115 It</p>	<p>It was discriminatory to require contractors be chosen from only companies in which all or a majority share of share capital was in public ownership.</p>



<p>Frigerio Luige & C. Snc v Comune di Triuggio;</p> <p>Azienda Servizi Multisetoriali Lombarda ASML SpA (intervening party) (2007) (C-357/06)</p>	<p>National provisions cannot permit Contracting Authorities to preclude bidders solely on the grounds that they do not have a specified legal form (such as a company limited by shares).</p>
<p>European Commission v Netherlands C-368/10</p> <p>[2013] All ER (EC) 804 (known as “the Dutch Coffee Case”</p>	<p>The ECJ provided clarification and guidance on the extent to which a Contracting Authority can require a supplier to provide products bearing specific labels relating to those products’ environmental and / or fair trade credentials. The ECJ held that:</p> <ul style="list-style-type: none"> • environmental characteristics can be used in specifications, but must be set out in full • fair trade cannot be included in technical specifications but can be in a contract condition • evaluation criteria can reflect fair trade or eco-requirements, provided they are linked to the subject matter of the contract and observe the principles of equality, non-discrimination and transparency such that well-informed bidders can know their exact scope • general requirements on bidders to demonstrate sustainable purchasing/socially responsible business cannot be used as pre-qualification factors • equal treatment, non-discrimination and transparency require clarity and precision.
<p>Commission of the European Communities v Denmark (also known as Storebaelt) C- 243/89 [1993] ECR I-3353</p>	<p>A requirement that, to the greatest possible extent, Danish materials, consumer goods, labour and equipment were used by contractors in the construction of a bridge was in breach of the fundamental Treaty principle of equal treatment.</p>
<p>Commission of the European Communities v Federal Republic of Germany C-20/01 and C-28/01</p>	<p>It is possible that a technical reason relating to the environment may be taken into account in an assessment in an award process. However, here, insufficient evidence was put to the court to establish that the choice of thermal waste treatment could be regarded as a technical reason. Furthermore, there was insufficient evidence to suggest that the proximity of the plant was a sufficient technical reason.</p>



<p>Ruffert v Land Niedersachsen C-346/06 [2008] 2 CMLR 39</p>	<p>The ECJ reviewed Directive 96/71 (particularly Article 3) in relation to a requirement as part of a Framework Agreement that contractors pay their employees a certain minimum wage.</p> <p>The court found the minimum-wage requirement in question was in breach of EU law and that Article 3 of Directive 96/71 did not apply because the wage requirement was not universally applicable (the requirement was site-specific and related to public contracts only).</p>
<p>Commission v Netherlands (C-368/10): environmental and fair trade considerations in the context of a contract award procedure</p>	<p>The case deals with an action by the European Commission against the Netherlands for breach of obligations under Directive 2004/18. The case provides further clarification on the manner and extent it is possible to use environmental and fair trade considerations, including labels that denote compliance with certain minimum standards in the award of regulated contracts.</p> <p>More generally, the case confirms that compliance with the principles of equality of treatment, non-discrimination and transparency involves an obligation for clarity and precision.</p> <p>Here the ECJ held that award criteria could be qualitative as well as economic. Qualitative award criteria can include environmental characteristics and also, “ criteria based on considerations of a social nature, which may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons”</p>
<p>C-226/09 Commission v Ireland</p>	<p>This case related to the tender process used by the Irish Department of Justice, Equality and Law Reform concerning a contract for translation services. Translation services are Annex II B (non-priority) services and are therefore regulated by the Directive to a very small degree. In this case, the principles of equal treatment were violated. This violation was not due to the failure to disclose weightings in advance, as such disclosure was not a requirement for Annex II B (non-priority) services. It was due to the change in weightings after the evaluation process had begun.</p>



UK CASES

Federal Security Services Limited (plaintiff) v Northern Ireland Court Service (defendant) & Resource (NI) Limited (intervening party) [2009] NIQB 15

Tendering instructions and award criteria should be certain and unambiguous.

Henry Brothers (Magherafelt) Limited & Ors v Department of Education for Northern Ireland [2008] NIQB 105

At least at the primary consideration stage, it is not possible to omit criteria relating to price.

Unless the cost of the relevant goods or services was fixed, it would be very difficult to reach any objective determination of what was the “most economically advantageous tender”, without an indication of price.

McLaughlin & Harvey Limited v Department of Finance and Personnel [2008] NIQB 91

Where sub-criteria are used as part of the assessment of tenders, these must be disclosed to bidders.

Letting International Limited v Newham London Borough Council [2008] EWHC 1583 (QB)

The duty on a Contracting Authority to act in a transparent way include the need to sufficiently disclose contract award criteria and weightings in advance, including setting out detailed criteria and sub-criteria where these are used.

Traffic Signs, Equipment Limited v Department for Regional Development, Department of Finance and Personnel [2010] NIQB 138

It may not be sufficient to meet the requirements for transparency and objectivity in procurement to simply list the weighting criteria. Whilst determining weighting criteria was a decision for the Contracting Authority, should that decision go beyond usual practice it may require justification and explanation in order to be transparent and objective.

⁶⁷Laboratori Bruneau Srl v Unità Sanitaria Locale RM/24 De Monterotondo [1994] 1 CMLR 707 (“Laboratori Bruneau”). ⁶⁸Concordia Bus Finland Oy Ab (formerly Stagecoach Finland Oy Ab) v (1) Helsingin Kaupunki (2) HKL-Bussiliikenne (C513/99) (2003) 3 CMLR 20 (“Finnish Buses”).

Taken together, the outcomes of these cases have established important principles:

- It is possible to include social and environmental requirements in public procurement, provided that neither the procurement documents nor the process, disadvantage non-local bidders, for example by requiring them to have local labour market knowledge, or a local base, or to use local materials (see *Laboratori Bruneau*);⁶⁷
- Environmental and (by implication) social requirements that address a policy objective of the purchaser are permissible: they do not need to provide an economic benefit to the purchaser (see *Finnish Buses*);⁶⁸
- All requirements must be capable of measurement and verification (see *EVN*);⁶⁹
- Where there is a requirement for a contractor to use environmentally friendly sourced or fair trade produce the contracting authority can ask for this but not require specific labels or brands (see the *Dutch Coffee Case*).⁷⁰



⁶⁹*EVN AG and Another v Austria (Stadtwerke Klagenfurt AG and Another, intervening)* (C448/01) [2004] 1 CMLR 22 (“EVN”).

⁷⁰*European Commission v Netherlands* C-368/1 [2013] All ER (EC) 804 (“the Dutch Coffee Case”).



Appendix 2: Explaining the Terminology

The terminology around “Socially Responsible Procurement” is still evolving and can be confusing. The term itself originates from a European Commission guidance publication in 2010.⁷¹

This describes ‘*socially responsible public procurement*’ as promoting ‘employment opportunities, decent work, social inclusion, accessibility, design for all, ethical trade, and...wider compliance with social standards’. The latter might typically include health and safety, workers rights, minimum wages, disabled access, equalities etc., where the standard is set out in legislation and Regulations. All of these elements could help deliver the social justice and equality as components of **sustainable development**.

The term ‘**Buying Social**’ was also coined by the European Commission⁷² and is used by the Strategic Investment Board in their 2014 guide: “**Buy Social: A practical guide to socially responsible public procurement.**”⁷³

The term ‘**community benefits**’ and ‘**community benefit clauses**’ was used by Richard Macfarlane in his seminal publication “*Achieving community benefits through contracts: Law, policy and practice*”, and is now widely used in Scotland and Wales. The UK government uses the term **Social Clauses**, so this is utilised in Wales, England and Northern Ireland.

In 2012 the UK government used the term ‘**Social Value**’⁷⁴ to describe economic, environmental and social benefits to the area of operation of the procuring authority.

The term ‘Buy Social’ is derived from a European Commission guidance publication in 2010.

⁷¹Buying Social, A Guide to Taking Account of Social Considerations in Public Procurement. (European Commission October 2010.). ⁷²Ibid.

⁷⁴The Public Services (Social Value) Act 2012

A Glossary of Terms

Term	Defined as:
Business Case/Plan	The document prepared to enable a decision to be made on whether to proceed with a commissioning/ procurement process or not. It includes information on the proposed subject of the contract and the proposed method of procurement.
Community /Social Benefit	The term 'social/community benefits' is used to refer to contract requirements that are innovative and aim to achieve social, economic or environmental benefits for a target community. ⁷⁵
Community Benefit Clause	A clause in a tender or contract that aims to achieve a community benefit or social consideration, as part of the procurement of the specific good, works, services or utilities that are required to deliver a public service.
Core Requirements	These are 'the subject matter of the contract' that which must be delivered by the contract.
Social Clause	Requirement within contracts or the procurement process which allows the contract to provide added social value through fulfilling a particular social aim. For example, a Social Clause in a public contract could prioritise the need to train or give jobs to the long term unemployed in the community as part of the contracting workforce. Often used interchangeably with the term Community Benefit Clause.
Socially Responsible Public Procurement	Refers to procurement operations that take into consideration, <i>inter alia</i> , the promotion of employment opportunities and build-in safeguards with respect to the standards of working conditions, strive to support social inclusion (including persons with disabilities), social economy and SMEs, promote equal opportunities and "accessibility and design for all", take into account Fair and Ethical Trade issues as well as human and labour rights and seek to achieve wider voluntary adherence to CSR while observing the principles of the EU treaty and the EU Procurement Directives.
Official Journal of the European Union (OJEU)	This is the publication in which all tenders from the public sector which are valued above a certain financial threshold according to EU legislation, must be published. This publication contains all tenders from the public sector in the EU valued above a certain threshold. This is a requirement under EU law.

⁷⁵Richard Macfarlane, 'Tackling Poverty through Public Procurement: law, policy and practice in delivering community benefits and social value', a report for the Joseph Rowntree Foundation, 2014.



Term	Defined as:
Social Considerations	Requirements included in a commissioning/procurement process that aim to deliver social benefits. Some organisations extend the term to include environmental benefits.
Small to medium size enterprises	<p>An SME is a micro, small or medium sized enterprise. Under the standard EU definition of an SME, businesses are classified as an SME if they employ fewer than 250 persons and have an annual turnover not exceeding 50 million Euro, and/or an annual balance sheet total not exceeding 43 million Euro.</p> <p>Micro Enterprises employ less than ten persons, have an annual turnover of less than €2m and an annual balance sheet total of less than €2m.</p> <p>Small Enterprises employ between ten and fifty persons, have an annual turnover of less than €10m and an annual balance sheet total of less than €10m.</p>
Sustainable Public Procurement	This means that public authorities seek to achieve the appropriate balance between the three pillars of sustainable development - economic, social and environmental - when procuring goods, services or works at all stages of the project. ⁷⁶
Targeted Recruitment and Training (TRT)	TRT clauses are a particular form of Social Clause which allow organisations procuring works or services to specify in the contract that labour used must be sourced from particular groups. TRT clauses are most commonly used to target the long term unemployed and young people but can also be used to target employment opportunities at other vulnerable groups. ⁷⁷

⁷⁶From the website of ISME, the Irish Small and Medium Enterprises Association: <http://isme.ie/advice/sme-facts-faq>. ⁷⁷Markie K, (2012) Targeted Recruitment and Training Clauses in Procurement (The Improvement Service on behalf of SLAED Employability Theme Group December 2012).

Appendix 3:

Further Resources

UK

Macfarlane, R. and Cook, M. (2002) Achieving community benefits through contracts: Law, policy and practice. York: Joseph Rowntree Foundation
<http://www.jrf.org.uk/publications/achieving-community-benefits-through-contracts-law-policy-and-practice>

ACS (Anthony Collins Solicitors) (2014) Social value and public procurement: A legal guide. Birmingham: ACS. Available at:
<https://newsroom.anthonycollins.com/ebriefings/social-value-and-public-procurement-a-legal-guide-2/>

Scotland

Scottish Government (no date) Monitoring the impact of community benefit clauses in procurement contracts – guidance notes and definitions. Edinburgh: Scottish Government. Available at:
www.Scotland.gov.uk/Resource/Doc/116601/0124887.pdf

Scottish Government (2005) Choosing our future: Scotland's sustainable development strategy. Edinburgh: Scottish Government. Available at: www.scotland.gov.uk/Publications/2005/12/1493902/39032

Scottish Government (2008) Community benefits in public procurement, Edinburgh: Scottish Government. Available at: www.scotland.gov.uk/Publications/2008/02/13140629/20

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Scottish Government (2009) Scottish Sustainable Procurement Action Plan. Available at: www.Scotland.gov.uk/Publications/2009/10/sspap#a1

Scottish Government (2013) Scottish Sustainable Procurement Action Plan. Edinburgh: Scottish Government. Available at: www.scotland.gov.uk/Topics/Government/Procurement/policy
 Social Value Lab and Ready for Business (no date) Social value case studies: The New South Glasgow hospitals. Available at:
<http://readyforbusiness.org/wp-content/uploads/2013/03/South-Glasgow-Hospitals-CBC-Case-Study.pdf>

Wales

Welsh Government (2011) Community benefits buyer guidance. Cardiff: Welsh Government. Available at: www.prp.wales.gov.uk/docs/prp/generalgoodsservices/1306/cbbuyeng.pdf

The Can Do Toolkit - Targeted Recruitment and Training for social landlords
 All toolkits available at: www.cih.org/i2i/publications

Northern Ireland

Northern Ireland : Buying Social <http://www.buysocialni.org/>

Europe

European Commission (2010) Buying social: A guide to taking account of social considerations in public procurement. Brussels: European Commission

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A primer on the use of
social clauses in Ireland



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