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REVIEW

- REACH and the safe use of chemicals
- Risk management under REACH
- Key priorities of NGOs on REACH
- Definitions of waste, recycling and recovery
- The UK Government's Ship Recycling Strategy
- Legislating e-waste management
- Exemptions under Article 5 (1) (b) RoHS Directive
- The new strategy of the CEN Environmental Helpdesk
- The power of green public procurement

CONTENTS

Editorial	1
elni forum	2
Articles	3
REACH and the safe use of chemicals: definition and development of exposure scenarios <i>Dirk Bunke</i>	3
Risk management under REACH - requirements of technical and organisational guidance for producers, importers and downstream users <i>Martin Führ and Natalie Krieger</i>	7
The Second Reading of REACH: key priorities of Environmental, Health, Consumer and Women's NGOs	16
If it ain't broke, don't fix it? Commission efforts to manage the definitions of waste, recycling and recovery, and to switch from a waste streams to a materials approach <i>Gert van Calster</i>	18
The UK Government's Ship Recycling Strategy <i>Roy Watkinson and Susan Wingfield</i>	23
Legislating e-waste management: progress from various countries <i>Deepali Sinha-Khetriwal, Rolf Widmer, Mathias Schlupe, Martin Eugster, Xuejun Wang, Ray Lombard, Lene Ecoignar</i>	27
Challenges for eco-design, energy efficiency and waste treatment of electrical and electronic products against the background of requests for exemptions following requirements of Article 5 (1) (b) RoHS Directive <i>Stéphanie Zang and Carl-Otto Gensch</i>	36
The new strategy of the CEN Environmental Helpdesk <i>Nina Klemola</i>	42
EcoTopTen – innovations for sustainable consumption <i>Kathrin Graulich</i>	46
Promoting eco-innovations: the Environmental Technologies Action Plan (ETAP) of the EU Commission <i>Miriam Dross and Wiebke Hederich</i>	52
The power of green public procurement <i>Jill Michielssen</i>	55
Buying Green – a European Commission handbook <i>Jill Michielssen</i>	59
Imprint	61
Authors of this issue	61
elni Membership	62

Buying Green – a European Commission handbook

The European Commission has published a Handbook entitled "Buying Green" which explains in clear non-legal terms how to include environmental criteria in the different stages of a public procurement procedure.

Step 1: What do we need? The "subject matter" and the technical specifications

The first question should be: What do we need? In some cases this may lead to the conclusion that there is no need to spend money at all, or that it is cheaper and more environmentally friendly to buy a service rather than a good. For example, instead of buying expensive cars, it might be cheaper and better for a public administration (and the environment) to conclude service contracts with companies offering transport services.

But let us assume that there is a clear need for a product, service or work. The best and most transparent way of introducing environmental considerations into a public procurement procedure is right at the beginning, when the "subject matter" - the subject of the purchase - is defined. For example, a contracting authority may state in the contract notice that it seeks to buy office furniture made from sustainably harvested woods. Public procurement legislation is concerned not so much with what is bought, but with how it is bought. So, as long as some provisions are respected, for example that bidders from across the EU can compete for the contract and that the technical specifications are not discriminatory, contracting authorities are free to choose what to buy.

The next step is to define the technical specifications, which describe in detail what is required of the product, service or work. In doing so, contracting authorities can include environmental performance standards and ask for environmental friendly production methods. This is the best way for including environmental considerations into public procurement procedures, because technical specifications are minimum specifications that need to be complied with: offers which are not conforming with the specifications are excluded from the award procedure. For example, the purchaser can ask that the electricity to be supplied comes, in part or in full, from renewable energy sources or that the food to be provided under a catering contract has been organically grown.

When technical specifications are defined, it is important to consider the environmental impacts throughout the life-cycle of a product or service. For certain product groups, for instance for paper, the biggest environmental impact takes place during the production phase, through emissions to air and water, whilst for other product groups, the environmental impact lies in

the material used (recycled material or not) or the characteristics of the product during its life cycle (for instance energy use for energy efficient light bulbs).

The Handbook promotes the idea of defining technical specifications in terms of performance or functional requirements. This allows tenderers to come up with new and innovative solutions. For instance, if a contract is to be awarded for an environmentally friendly heating system for a building, it may make more sense to specify that offices must have a constant day-time temperature of 20° C instead of setting detailed and complex specifications. This allows suppliers to come up with different options.

In this regard, the new Public Procurement Directives have brought an important clarification: they explicitly state that performance or functional requirements can be taken from specifications for European, international and national eco-labels, provided that these labels meet some quality requirements and are relevant for defining the purchased product. The quality requirements mainly relate to the non-discriminatory character of the scheme, which should be open to all applicants, the use of scientifically based information and the involvement of all stakeholders when establishing eco-labelling criteria. This means, for example, that a purchasing authority that needs to buy copying paper can make use of the technical specifications for copying paper established for the European eco-labelling scheme "EU Flower"¹.

The purchasing authority can also decide and announce that it will recognise the corresponding eco-label as proof of compliance with the specifications set forth. However, in this case, it also has to accept other equivalent types of proof demonstrating compliance with the specifications. Authorities can therefore never require tenderers to be registered under a certain eco-label scheme because that would be discriminatory.

The Commission services have developed guidance on how to make use of eco-labelling criteria in green public procurement, which can be found on the Green public procurement website².

Step 2: How do we select suitable offers? The selection criteria

The Handbook then moves on to the next step of a public procurement procedure: establishment of appropriate selection criteria to check the capability of the bidders to execute the contract.

Some of the selection criteria are in fact "exclusion" criteria, since they aim to check a series of conditions

¹ More information on the European eco-labelling scheme can be found at: http://ec.europa.eu/environment/ecolabel/index_en.htm

² For more information, see: <http://ec.europa.eu/environment/gpp/guidelines.htm>

concerning compliance by the bidder with legal requirements, for example that they pay social security contributions and taxes, that they have no criminal record, etc. In cases of non-compliance, such bidders can be excluded from participating in the tendering procedure. In this field, there are not many possibilities to introduce environmental criteria apart from indicating in the tender notice that candidates who have been judged guilty of non-compliance with environmental legislation during the exercise of their profession will be excluded from participation. This may be the case for instance in the light of a contract for waste management services where a bidder has been convicted for non-compliance with certain environmental legislation.

The exclusion criteria are complemented by a series of proper selection criteria aimed at assessing the financial and technical capacity of the bidders to execute the contract. The Handbook makes clear that the authorities can, where relevant, ask for specific environmental capacities. For example, if a waste treatment contract is to be awarded, the authorities can insist that bidders must use environmentally sound waste treatment methods.

The chapter on selection criteria also addresses the issue of environmental management schemes and their relationship to environmental public procurement. In some cases - when services and works contracts call for the adoption of specific environmental management measures during the execution of the contract (for instance certain cleaning contracts or waste management contracts) - the contracting authority can, by way of a selection criterion, ask bidders to demonstrate their capacity to apply environmental management measures for the duration of the contract. In such cases, registration under the EU's Environmental Management and Audit Scheme (EMAS), under which companies evaluate, report and seek to improve their environmental performance, or under a comparable environmental management scheme (for example EN/ISO 14001), should be recognised as sufficient proof of compliance with this specific and exceptional selection criterion.

However, this possibility does not exist for supply contracts: here contracting authorities are not allowed to ask potential suppliers to prove their environmental credentials through registration under an environmental management scheme. The reason is that any requirement that contracting authorities impose on the bidders and their bids must be linked to the contract itself. Registration under an environmental management scheme may say something about the general environmental performance of the company, but not necessarily about the environmentally sound characteristics of the products that are the subject of the tender.

Step 3: To whom do we give the contract? The award criteria

At the award stage, the Handbook describes how the contracting authorities can insert environmental considerations into the award criteria - which need to be published with the tender - to determine which offer represents the "best value for money" or "the economically most advantageous offer." Since the criterion of "the economically most advantageous offer" always consists of a few sub-criteria, these can be environmental. So, even if the contracting authority has not asked for any specific environmental technical specifications, the authority can still achieve a similar result, at the award stage, by giving a certain weighting to the environmental quality of the bids. In doing so, the contracting authority will be able to choose between environmental and non environmental bids, on the basis of the pre-established award criteria. The more weight is given to the award criterion, the higher the chance of ending up with a green contract. The advantage for the public authority of including environmental considerations at the award stage only (and not yet at the stage of the technical specifications which are minimum specifications) may lie in the fact that, in case he is not certain about the price of the environmental product/service to be purchased, he will be able to decide not to buy the more environmental friendly product in case its price would outweigh the other criteria.

The award criteria have to be sufficiently clear and objectively verifiable in order to enable bidders to present balanced offers and to allow contracting authorities to verify and compare bids on an objective basis. For example, it would be possible for a contracting authority to purchase electricity to award extra points to a bidder who is able to prove that 20 % of the electricity supplied is from renewable energy sources.

Step 4: How do we make sure that the execution of the contract is environmentally sound? Performance clauses

Lastly, a chapter of the Handbook covers the inclusion of environmental considerations in the conditions relating to performance of a contract. For environmental contract clauses to be acceptable, they must be non-discriminatory, they must be objectively verifiable, and they must not be disguised technical specifications or selection criteria. They must be made public from the beginning of the procurement procedure, and all bidders should in principle be able to comply with them after conclusion of the contract.

One possible environmental contract clause might be for instance to ask that the successful bidder transports the goods supplied by rail and not by lorry. It may also be possible to ask from bidders that they start putting into practice environmental management measures during the performance of the contract, if this would be relevant for the contract.

The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.

The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

The Environmental Law Division of the Öko-Institut:

The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:

- Undertaking projects in developing countries
- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

Main areas of research:

- **European environmental policy**
 - Research on implementation of European law
 - Effectiveness of legal and economic instruments
 - European governance
- **Environmental advice in developing countries**
 - Advice for legislation and institution development
 - Know-how-transfer
- **Companies and environment**
 - Environmental management
 - Risk management

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of *homo oeconomicus institutionalis*, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover

- Product policy/REACH
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conservation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

sofia is working on behalf of the

- VolkswagenStiftung
- German Federal Ministry of Education and Research
- Hessian Ministry of Economics
- German Institute for Standardization (DIN)
- German Federal Environmental Agency (UBA)
- German Federal Agency for Nature Conservation (BfN)
- Federal Ministry of Consumer Protection, Food and Agriculture

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elni

In many countries lawyers are working on aspects of environmental law often with environmental initiatives and organisations or as legislators, but have limited contact with other lawyers abroad, although such contact and communication is vital for the successful and effective implementation of environmental law.

In 1990 a group of lawyers from various countries therefore decided to initiate the Environmental Law Network International (elni) to promote international communication and cooperation worldwide. Since then elni has grown to a network of about 350 individuals and organisations from throughout the world.

Since 2005 elni is a registered non-profit association under German Law.

elni coordinates a number of different activities:

Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by the Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit making research institute. The Bureau is currently hosted by the University of Applied Sciences in Bingen. The Bureau acts as an information centre where members can obtain information about others working in certain areas thus promoting the development of international projects and cooperation.

elni Review

The elni Coordinating Bureau produces and sends to each member the elni Review twice a year containing members' reports on projects, legal cases and developments in environmental law. elni therefore encourages its members to submit such articles to be published in the Review in order to allow the exchange and sharing of experiences with other members.

elni Conferences and Fora

elni conferences and Fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to bring together scientists, policy makers and young researchers, giving the opportunity to exchange views and information as well as developing new perspectives.

Publication Series

The elni publications series contains 12 volumes on different topics of environmental law.

- Environmental Law and Policy at the Turn to the 21st Century, Liber amicorum, Betty Gebers, Ormond/Führ/Barth (eds.) Lexxion 2006.
- Access to Justice in Environmental Matters and the Role of NGOs, de

Sadeleer/Roller/Dross, Europa Law Publishing 2005.

- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant 2002.
- Voluntary Agreements - The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London 1998.
- Environmental Impact Assessment - European and Comparative; Law and Practical Experience, elni (ed.), Cameron May Ltd. London 1997.
- Environmental Rights: Law, Litigation and Access to Justice, Deimann / Dyssli (eds.), Cameron May Ltd. London 1995.
- Environmental Control of Products and Substances: Legal Concepts in Europe and the United States, Gebers/Jendroska (eds.), Peter Lang, 1994.
- Dynamic International Regimes: Institutions of International Environmental Governance, Thomas Gehring; Peter Lang, 1994.
- Environmentally Sound Waste Management? Current Legal Situation and Practical Experience in Europe, Sander/ Küppers (eds.), P. Lang, 1993
- Licensing Procedures for Industrial Plants and the Influence of EC Directives, Gebers/Robensin (eds.), P. Lang, 1993.
- Civil Liability for Waste, v. Wil-mowsky/Roller, P. Lang 1992.
- Participation and Litigation Rights of Environmental Associations in Europe, Führ/ Roller (eds.), P. Lang, 1991.

elni Website: elni.org

The elni website at <http://www.elni.org> contains news about the network and an index of elni articles, gives an overview of elni activities, and informs about elni publications. Internships for young lawyers/law students at the Öko-Instituts environmental law division are also offered on the web.