

Labelling requirements in public procurement

Report for Ecolabelling Sweden and
the Swedish Society for Nature
Conservation



Ecolabelling Sweden represents the Nordic Swan Ecolabel
and EU Ecolabel. The Swedish Society for Nature

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The report is translated from Swedish by AI.

¹ Ecolabelling Sweden represents both the Nordic Swan Ecolabel and the EU Ecolabel

1. The assignment

Ecolabelling Sweden (MISAB), which is responsible for the official Nordic Swan Ecolabel, as well as the EU's official EU Ecolabel in Sweden, and The Swedish Society for Nature Conservation, which is responsible for the Good Environmental Choice ecolabel, has commissioned the author to analyse the possibilities for contracting authorities to require labels, for example that cleaning products/chemical products carry the Nordic Swan Ecolabel, EU Ecolabel or Good Environmental Choice ecolabel.

The background to the assignment is that the National Agency for Public Procurement (UHM) has removed the reference to the Nordic Swan Ecolabel, EU Ecolabel and Good Environmental Choice ecolabels in its new sustainability criteria for cleaning chemicals. This, in turn, is probably due to a memo from Moll Wendén Law firm (Moll Wendén) which claims that RSPO certification² of palm oil contains requirements that are unrelated to what is to be procured. All the above-mentioned labels include references to RSPO³.

According to Moll Wendén, a certification that includes general corporate requirements does not meet the subject-matter of the contract requirement in Chapter 9, Section 13 of the national Public Procurement Act. Moll Wendén has also identified several such general corporate requirements in RSPO certifications⁴.

2. The provisions on labelling in the national Public Procurement Act

The national Public Procurement Act (2016:1145) contains provisions on the use of labels. According to Chapter 9, 13 §, first paragraph of the national Public Procurement Act, contracting authorities may require that goods, services or works are provided with a label as proof that what is being procured meets certain requirements. According to the same provision, labelling requirements may be included in the technical specifications, the award criteria or the conditions for performance of the contract.

The provisions of Chapter 9, 12 – 15 §§ of the national Public Procurement Act is an implementation of Article 43 of DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Directive 2014/24/EU). These provisions represent a simplification, as it is now possible to require a specific label instead of, as previously, listing all the underlying labelling requirements (referred to in the national Public Procurement Act as "the requirements for the label").

According to Chapter 9, 13 § of the national Public Procurement Act, the contracting

² RSPO stands for Roundtable on Sustainable Palm Oil.

³ In the criteria for the Nordic Swan Ecolabel of cleaning products, version 6.15, there is the following requirement: *"Palm oil, palm kernel oil and palm oil derivatives must be certified according to RSPO. Mass Balance, Segregated, or Identity Preserved are accepted as traceability systems."* The criteria for Good Environmental Choice's labelling of chemical products, 2018:2, include the following requirements: *"Ingredients containing raw material extracted from oil palm (Elaeis guineensis), and which are not covered by requirement 1.24, must be certified according to RSPO Mass Balance, Segregated or Identity Preserved."*

⁴ Moll Wendén Law firm, PM Labelling in public procurement, 28 December 2021 and updated 21 March 2022.

authority must accept labels that are equivalent to the one referred to in the procurement. However, the contracting authority is not – as a general rule – required to accept other forms of evidence in place of a label. This also represents a simplification compared to previous rules, under which contracting authorities had to examine alternative evidence, such as technical documentation.

However, not all labels are accepted. To require a particular label, the label must meet the following six conditions:

1. the requirements for the label may only relate to criteria that are linked to the subject matter of the contract,
2. the requirements for the label must be appropriate to define the characteristics of the product, service or work to be procured,
3. the requirements for the label must be based on objectively verifiable and non-discriminatory criteria,
4. the label must have been established in an open and transparent procedure in which all interested stakeholders can participate,
5. the label must be accessible to all interested parties, and
6. the requirements for the label must have been determined by a body over which the applicant for the label does not have a decisive influence.

A contracting authority that does not require the subject of the procurement to meet all the underlying labelling requirements may, according to Chapter 9, 13 §, second paragraph of the national Public Procurement Act, specify which of the label's requirements must be met.

According to Chapter 9, 13 §, third paragraph of the national Public Procurement Act, a contracting authority may not require a specific label if the underlying labelling requirements include requirements that are not linked to subject matter of the contract. Instead, the contracting authority may include the relevant underlying requirements in the technical specifications but may not require the label itself. If the label contains requirements that are not linked to the subject-matter of the contract, the contracting authority must therefore proceed in the same manner as before the introduction of the current labelling provisions.

One shortcoming is that the national Public Procurement Act does not state that the labelling provisions also cover social labels or other types of labels than ecolabels. However, this follows from Article 43(1) of Directive 2014/24/EU, which states that a label may refer to "*specific environmental or social characteristics or other characteristics*".

The provisions on labelling in the national Public Procurement Act means a simplification in relation to what applied under the previous national Public Procurement Act (2007:1091) (ÄLOU), which implemented the EU's previous Directive 2004/18.

According to Chapter 6, 7 § of the ÄLOU admittedly, the contracting authority was indeed allowed to set performance or functional requirements in the technical specifications that were taken from an ecolabel that met certain criteria. In addition, the contracting authority could then accept a label as proof of compliance with those requirements. However, it was not permitted to require the label as such, and the contracting authority was required to accept all appropriate evidence of compliance with the requirements, not only a label, but also other forms of evidence such as technical documentation from the manufacturer or a test report from a recognised body. Moreover, ÄLOU referred only to ecolabels.

The new rules therefore means a simplification as it is now possible for contracting authorities

- 1) to require a specific label without having to specify the underlying criteria for the label, and
- 2) that, at least as a general rule (see below), only accept a label⁵ as proof that the products meet the requirement.

This also mean an extension because the new rules also cover social labels and other labels.

2.1 Other equivalent labels

According to Chapter 9, 14 § of the national Public Procurement Act, the contracting authority must admittedly accept other equivalent labels as evidence (according to UHM, however, the term "*equivalent*" should not mean "*exactly the same*", i.e. the labels "*do not necessarily have to meet exactly the same requirements in order to be considered an equivalent label*"⁶). However, the burden of proof that another label is equivalent may be considered to lie with the tenderer.

By analogy with what the Court of Justice of the European Union states in C-14/17 Var srl, the contracting authority should also be able to require the tenderer to present sufficient evidence already in the tender that the other label is equivalent. However, the contracting authority is not required, as a general rule, to accept evidence other than that required label or another equivalent label. Thus, the contracting authority is not required to examine the manufacturer's technical documentation or a test report from a recognised body, as was the case under the previous Directive 2004/18⁷.

2.2 Other appropriate information

The contracting authority's right to reject evidence other than a label is not absolute. According to Chapter 9, 15 § of the national Public Procurement Act, the contracting authority must accept "other appropriate information" if the supplier has not been given sufficient time to gain access to the label specified in the label or another equivalent

⁵ Either the label specified in the procurement document or another equivalent label.

⁶ <https://www.upphandlingsmyndigheten.se/frageportalen/1983808/eu-ecolabel-2014350eu/>.

⁷ MAX HAVELAAR, p. 65

label.

Admittedly, the lack of time must not be due to the supplier. The provision, however, provides no guidance on when the time limit should be considered too short, or when a time limit that is too short should not be regarded as being due to the supplier or any circumstance on the supplier's part. As far as is known, there is no case law that provides further clarity on these points.

A contracting authority should be able to easily avoid situations where suppliers, due to lack of time, invoke other forms of evidence instead of a label. This can be achieved by formulating the labelling requirement as a condition for the performance of the contract. The clear advantage of this approach is that conditions for contract performance do not have to be fulfilled by the supplier during the procurement process, but only at a later stage.

3. The subject-matter of the contract requirement

The provision in the national Public Procurement Act concerning when suppliers are entitled to submit evidence other than a label due to lack of time does not necessarily have to be an obstacle for contracting authorities from requiring a label. What has become an obstacle in Sweden, however, is the interpretation of the connection requirement in Chapter 9, 13 §, first paragraph, p. 1 of the national Public Procurement Act. The subject-matter of the contract requirement means that the requirements for the label must be related to what is to be procured.

Moll Wendén, who has analysed the national Public Procurement Act of labelling rules in a number of memos for UHM, interprets the subject-matter of the contract requirement just as strictly, regardless of how the labelling requirement is formulated in the individual procurement. According to Moll Wendén, a label must not contain requirements that are "*general corporate*"⁸ (see further below). By "*company general requirements*", Moll Wendén refers to requirements that are imposed on the company as a whole rather than on the subject matter of the contract⁹.

Moll Wendén, who has developed a "*repeatable methodology*" for analysing whether labels meet the requirements of Chapter 9, 13 § of the national Public Procurement Act, does not consider where in the procurement process the requirement for a label is set. Moll Wendén argues that:

*"Everything in the national Public Procurement Act means... that a reference to labelling in the conditions of performance shall also comply with the same rules as for reference in the technical specifications and in the award criteria"*¹⁰.

According to Moll Wendén, the conditions set out in Chapter 9, 13 § of the national Public Procurement Act apply equally strictly, regardless of whether the labelling requirement is formulated as a technical specification, an award criteria or a condition for the performance of the contract. This applies particularly to the subject-matter of

⁸ Moll Wendén Law firm, PM Labelling in public procurement – Analysis of labelling, 28 December 2021 (updated 21 March 2022).

⁹ See Moll Wendén, PM Labelling in public procurement – Analysis of labels, 30 December 2020, p. 2.

¹⁰ Moll Wendén, PM Labelling in public procurement – Part 2, 31 January 2019, p. 19.

the contract requirement and the appropriateness requirement in Chapter 9, 13 §. Moll Wendén bases this on a reading of the rules in the national Public Procurement Act.

As shown in the discussion below, this is an inadequate method. Since the national Public Procurement Act is an implementation of Directive 2014/24/EU, the provisions of the national Public Procurement Act shall be interpreted in the light of what is stated in this Directive. For example, recital 97 of Directive 2014/24/EU states that the possibilities for setting requirements is greater in the award criteria and in the conditions for the performance of the contract than in the technical specifications (see further below). Requirements that may not be included in the technical specifications can often be set as award criteria or as conditions for the contract performance.

Recital 97 also states that this applies to the requirement for products to bear a label. The possibility to require a label is therefore greater when the requirement is set as an award criteria or as a condition for the performance of the contract.

According to the Court of Justice of the European Union in *MAX HAVELAAR*, requirements relating to the commercial process of a product could not be included in the technical specifications (see below). It is true that the Court of Justice of the European Union's case *MAX HAVELAAR* concerned the provisions of the previous Directive. However, the same should also apply today. Thus, it is not possible according to Directive 2014/24/EU to have technical specifications that relate to a product's trade process. It is therefore also not possible to have a technical specification that goods must be Fair Trade labelled because Fair Trade contains criteria that relate to the trade process of goods.

However, *according to MAX HAVELAAR, the award criteria and conditions for the performance of the contract had to relate to the commercial process of a product*¹¹. Requirements which were not permitted in the technical specifications were permitted as award criteria or conditions for the performance of the contract. Recital 97 states that this also applies under Directive 2014/24/EU. The difference is that it is now also permitted to require labelling of goods commercial process, such as fair trade, if the requirement is an award criteria or a condition for the performance of the contract.

3.1 Are general corporate requirements contrary to the principle of proportionality?

Moll Wendén's main assumption is that the subject-matter of the contract requirement in Chapter 9, 13 § of the national Public Procurement Act excludes any form of corporate general requirements¹². Thus, *by "corporate general requirements"*, Moll Wendén refers to *"requirements relating to the company as a whole"*¹³. According to Moll Wendén,

¹¹ *MAX HAVELAAR*, p. 75 and p. 91.

¹² "In relation to environmental and social requirements, it should be of particular importance to analyse the requirements that can and may be set against the connection requirement in Chapter 9, 13 § LOU, first paragraph, first paragraph and against Proportionality. The requirements must be related to the subject matter of the Contract... The obstacle that may arise is when the labels contain general requirements for companies' actions, even without for the future contractual relationship" (Moll Wendén, PM Labelling in public procurement – Part 1, 31 January 2019, p. 14).

¹³ Moll Wendén, PM Labelling in public procurement – Analysis of labels, 30 December 2020, p. 2.

claims against the company as a whole are contrary to the principle of proportionality. Moll Wendén justifies this by arguing that general corporate requirements go beyond the scope of the procured contract. According to Moll Wendén, setting requirements concerning a *"supplier's actions, its policies or the policies it pursues... are not requirements permitted under current legislation."*¹⁴

Moll Wendén's conclusion that general corporate requirements are contrary to the principle of proportionality is not without objection. According to Chapter 15, 14-15 §§ of the national Public Procurement Act contracting authorities may require suppliers to comply with certain quality and environmental management standards. The provisions of the national Public Procurement Act are an implementation of Article 62 of Directive 2014/24/EU. Requirements for suppliers to comply with certain quality or environmental management standards are general corporate requirements. They are not limited to the procurement contract, either in scope (as they apply to the company as a whole and not just the part that constitutes the contract) or in time (not limited to the duration of the contract).

The principle of proportionality applies in particular to the requirements that may be imposed on the supplier. According to Chapter 14, 1 §, second paragraph of the national Public Procurement Act, supplier requirements must *"be linked to the subject-matter of the contract and be proportionate to it"*. However, supplier requirements can be corporate general without this coming into conflict with the principle of proportionality.

In case 5914-20, the Administrative Court of Appeal in Stockholm found that a requirement for the supplier should be certified according to a certain standard, ISO 9001:2015 and ISO 14001:2015, was contrary to the principle of proportionality, as *"nothing has emerged to indicate that other certifications could not fulfil the same function"*. However, the Administrative Court of Appeal saw no objection in principle to *"setting a mandatory requirement that the supplier must have a system for quality and environmental management"* since the requirement was deemed *"to be an appropriate and effective measure to achieve the desired purpose"*¹⁵.

Moll Wendén's basic assumption that general corporate requirements are contrary to the principle of proportionality is thus not consistent with provisions in the national Public Procurement Act, in the Directive or with case law. Moll Wendén also admits that *"there is a lack of practice"* that confirms the law firm's interpretation¹⁶.

In the *Max Havelaar* case (below), the Court of Justice of the European Union held that the requirement imposed by the Dutch province – that the tenderer should comply with *"criteria of sustainable purchasing and corporate social responsibility"* – was contrary to the provisions of Directive 2004/18 in force at the time. The reason was that the corporate social responsibility requirement was not included in the Directive's list of permitted supplier requirements. The EU Court noted that the requirement concerned

¹⁴ Moll Wendén, Memo Labelling in public procurement – Part 1, 31 January 2019, pp. 14-15.

¹⁵ Administrative Court of Appeal in Stockholm, judgment of 21 January 2021, case 5914-20, p. 3-4.

¹⁶ Moll Wendén, PM Labelling in public procurement – Part 1, 31 January 2019, p. 15.

the technical and professional capacity of the supplier, but was not included in the exhaustive list of requirements that may be required in that regard, under Directive 2004/18.

Article 60 and Annex XII to Directive 2014/24/EU are also to be interpreted as an exhaustive list of the evidence, and thus the requirements, that a contracting authority may impose regarding a tenderer's technical and professional capacity. It should therefore still not be permissible to require a tenderer to have a social responsibility policy. This applies at least if it is a directive-driven procurement¹⁷.

It should be noted, however, that this refers to the requirements that may be imposed on *the tenderer* in a procurement. It does not concern the link to the subject-matter that must apply to product requirements set out in the procurement, such as requirements for products to bear a label.

4. The appropriateness requirement

According to Chapter 9, 13 § of the national Public Procurement Act, the requirements for the label must also be "*appropriate for defining the characteristics of the product, service or work to be procured*" (the appropriateness requirement). The appropriateness requirement is central to determining which requirements may be included in the technical specifications. Technical specifications must be appropriate for defining the characteristics of what is being procured. These characteristics must relate either to the manufacture, packaging or use of a product. The appropriateness requirement could be described as a strengthened version of the subject-matter of the contract requirement, as it only covers characteristics that are directly related to the product.

Examples of labelling requirements that are not appropriate to include in the technical specifications are fair trade labels. This is because the fair trade criteria relate to the commercial process behind the products, i.e. the commercial conditions under which the supplier procured the goods from the manufacturer. Requirements concerning a product's commercial process do not relate to its manufacture, packaging or use of the product. Neither Article 42, nor Annex VII, which specifies the requirements that may be laid down in the technical specifications, includes the commercial process of a product in the list of possible technical specifications.

A label based on the fair trade criteria can therefore not be included as a technical specification. However, according to recital 97 of Directive 2014/24/EU, a commercial process, or a label referring to the commercial process of a commodity, such as fair trade labelling may be used as an award criteria or a condition for the performance of the contract.

¹⁷ See Proposition 201%/16:195, p. 775. "Directive-driven" procurement normally refers to procurements that are subject to the rules of the Directive (except for those that apply to the procurement of social services and other special services), i.e. the procurement of supplies, services and works above the threshold values.

The distinction between which requirements may be included in the technical specifications and which may be award criteria or conditions for the performance of the contract is central to the Court of Justice of the European Union judgment in the *MAX HAVELLAR* case. Even though *MAX HAVELAAR* is a few years old, the court case is still relevant.

5. MAX HAVELAAR

The judgment of the Court of Justice of the European Union in Case C-368/10 Commission v Netherlands, *MAX HAVELAAR*, although concerned the application of the previous Directive 2004/18, is still relevant. In recital 97 of Directive 2014/24/EU, the EU refers to *"the case law of the Court of Justice of the European Union"*¹⁸. An answer to the question of what possibility contracting authorities have to require labels should therefore be based on this case and then move on to the provisions on labelling in Directive 2014/24/EU.

MAX HAVELAAR concerned a procurement of coffee machines made by the Dutch province of North Holland. The procurement included that the supplier would also refill the coffee machines with coffee, tea, milk, sugar and cocoa.

In the procurement, the province had set requirements that, according to the Commission, were contrary to the directive at the time. These requirements were:

1. That coffee and tea should bear 1) the EKO label, which is a label run by a Dutch foundation whose purpose is to promote organic farming, and 2) the *MAX HAVELAAR* label, which in Sweden corresponds to Fairtrade (formerly Fair Trade label), which labels products that meet four trade criteria: cost-covering minimum price, mark-up on the world market price, pre-financing and long-term trade relations between the producer and the importer.
2. That sugar, cocoa and milk powder should also be provided with these labels, which in that case gave plus points in the evaluation.
3. That the tenderers should *"comply with the criteria of sustainable sourcing and corporate social responsibility, including by contributing to a more sustainable coffee market and ecologically, socially and economically responsible coffee production."*

According to the Court of Justice of the European Union, the requirement that coffee and tea should bear the EKO label was contrary to the contracting authority's obligation under the rules laid down in Article 23(3)(b) of the Directive 2004/18 to set out in detail all the underlying requirements that a product must meet to obtain the EKO label. The Dutch province had formulated that requirement as a technical specification. According to the Court of Justice of the European Union, technical specifications must be *"so specific that tenderers can form a definite opinion about the subject matter of the procurement"*. It was therefore not allowed to refer only to the label and leave it to the suppliers themselves to find out what it contained. By referring only to the EKO label without

¹⁸ This certainly refers to *MAX HAVELAAR*

specifying in detail the criteria that a product must meet to be eligible for the province had violated Article 23(6) of Directive 2004/18 and the principle of transparency¹⁹.

The way in which environmental requirements had to be formulated in procurements under Directive 2004/18 meant that the requirements became challenging. The criteria behind a particular label can be very extensive. As an example, the criteria for the Nordic Swan Ecolabel for cleaning products is a document of about 40 pages. The change that Directive 2014/24/EU means in this regard is therefore welcome. Unlike Directive 2004/18, Directive 2014/24/EU allows contracting authorities to require a label as such without also having to list all the underlying labelling requirements.

The European Court of Justice also ruled that the province had required coffee and tea to be labelled with the MAX HAVELAAR label. This requirement was also contrary to Directive 2004/18 because it was designed as a technical specification. Technical specifications must relate to *“the characteristics of the goods as such, their manufacture, packaging and use”*. The criteria for fair trade did not relate to the characteristics of the coffee or tea as such, but *“to the conditions under which the supplier procured the goods from the manufacturer”*²⁰. A requirement relating to a fair trade label was therefore not an appropriate requirement of the technical specifications.

Fair trade requirements were therefore not allowed to be included in the technical specifications. However, according to the EU Court, the same strict rules did not apply to requirements formulated as award criteria or conditions for the performance of the contract. In these cases, it was possible to require goods to be financed in accordance with the fair trade criteria, as award criteria and conditions for the performance of contracts do not need to have the same connection to the product²¹.

The Advocate General²² noted that the criteria for fair trade did indeed relate to the tenderers' *“purchasing policy”*²³. However, the fact that the fair trade criteria related to the company, that is, that they constituted a general corporate requirement, did not mean that the fair trade criteria were unrelated to the product in the sense required for establishing the necessary link when applied as award criteria or conditions for the performance of the contract.

Admittedly, the Advocate General noted that the fair trade criteria related to the tenderers' *“purchasing policy”*²⁴. However, according to the Advocate General, such a requirement was permissible, even though it concerned the company, if it was limited to:

“The subject matter of the public goods contract and... not... the purchasing policy of the economic operator in general. The contracting authority may therefore not

¹⁹ MAX HAVELAAR, p. 62 and p. 70.

²⁰ MAX HAVELAAR, p. 74.

²¹ MAX HAVELAAR, p. 75-76 and p. 91.

²² Advocates-General of the Court of Justice of the European Union have a special role in which they deliver impartial and independent opinions in the cases assigned to them. However, the Advocate General does not participate in the actual judgment. Their task is to propose a solution to the legal issues raised by the case, which the judges then can consider when making their decisions.

²³ MAX HAVELAAR, Opinion, p. 79.

²⁴ MAX HAVELAAR, Opinion, p. 79.

*require potential tenderers to exclusively have fair traded products in its range, but only that the products that are specifically to be delivered within the framework of a public contract are fair trade. However, the Province of North Holland has not provided otherwise in the present case.*²⁵

The Court of Justice of the European Union also ruled that *"in principle, there [is] no obstacle to using a criteria that a product must come from fair trade"*²⁶.

Both the judgment of the Court of Justice of the European Union and the Advocate General's Opinion in *MAX HAVELAAR* suggest that Moll Wendén's analysis is too far-reaching in two respects. This concerns:

- 1) that the same strict assessment must be made regardless of where in the procurement a requirement for labelling is imposed, and
- 2) that no general corporate requirements may be included in requirements for what is to be procured, even if the requirement is an award criteria or a condition for the performance of the contract.

According to the European Court of Justice in *MAX HAVELAAR*, there were *"in principle, no obstacles to using a criteria that means that a product must come from fair trade"* for as long as the award criteria *"relates only to the ingredients to be supplied under the contract and does not in any way affect the general purchasing policy of the tenderers"*²⁷.

Under the previous directive, there was a clear dividing line depending on where in the procurement a product requirement was placed. The subject-matter and appropriateness requirements did not apply as strictly to award criteria and conditions for the performance of the contract as they did to technical specifications.

Moll Wendén's analysis means that the subject-matter and appropriateness requirements are now to be applied just as strictly, even if the requirement for a label is an award criteria or a condition for the performance of the contract. In that case, this would entail a tightening in relation to the approach that applied in Directive 2004/18, which is hardly in line with the EU's aim to make it easier and more permissive to require labelling.

In *MAX HAVELAAR*, the Court of Justice of the European Union also ruled that the province's requirement that the supplier should *"comply with the criteria of sustainable sourcing and corporate social responsibility..."* contrary to Directive 2004/18. According to the Court of Justice of the European Union, the requirement constituted a supplier's requirement, i.e. it related to the supplier's technical and professional capacity and was not included in the exhaustive list of requirements that may be imposed on the tenderer/supplier. The EU Court also noted that the requirement was unclear and thus also contrary to the principle of transparency.

²⁵ *MAX HAVELAAR*, Opinion, p. 88.

²⁶ *MAX HAVELAAR*, p. 91.

²⁷ *MAX HAVELAAR*, p. 90-92.

6. Labelling according to Directive 2014/24/EU

It is apparent from *MAX HAVELAAR* that the subject-matter and appropriateness requirements would not be interpreted as strictly for the award criteria and conditions for the performance of the contract as for the technical specifications. *MAX HAVELAAR* was certainly referring to the previous directive on public procurement. However, there is no indication that the principles for which requirements may be included in a technical specification have been changed in Directive 2014/24/EU. Article 42 of, and Annex VII to, Directive 2014/24/EU states that technical specifications must relate to *the product*, such as the product's performance or function.

According to Chapter 9, 1 § of the national Public Procurement Act and Article 42(1) of Directive 2014/24/EU, technical specifications may also refer to "*the process or method of producing or providing the product, service or work*". This applies even if the production process or method does not give rise to any visible characteristics of the subject matter of the contract.

A technical specification may therefore relate to the manufacture of a product. For example, it may require that the environment and waterways in the nearby area of the factory where the product is produced are not polluted, even if this does not provide any visible or measurable characteristic of the final product. The preparatory works also allow for requirements such as chlorine-free production of paper or the exclusion of certain environmentally hazardous substances in the manufacture of textiles²⁸.

It is probably also a permissible technical specification that the workers who manufacture the goods to be procured have sufficient protective equipment and a satisfactory work environment in general, as they are social requirements related to the production process. Other social requirements are also possible in the technical specifications, such as that a product or service must be accessible to people with disabilities as it relates to the use of the product²⁹.

According to the author, it cannot be ruled out that technical specifications relating to the manufacture of goods may also be formulated as general corporate requirements, for example, that a company's or a factory's production of paper pulp must be chlorine-free, or that the company complies with the core ILO conventions in its production. The EU Ecolabel criteria for hygiene products suggest that technical specifications may indeed be formulated as general corporate requirements (see below).

That said, general corporate requirements should be used with caution in the technical specifications. This also applies to technical specifications for labels where the label contains general corporate label criteria. To avoid legal complications, technical specifications should not apply to such labels.

However, Directive 2014/24/EU states that the subject-matter requirement is not the same for the award criteria and conditions for the performance of the contract as for the technical specifications³⁰. This also applies to labels. The scope for requiring labels is

²⁸ National bill 2015/16:195, p. 1041

²⁹ Article 42(1) of Directive 2014/24/EU.

³⁰ See Articles 67(3) and 70

therefore greater if it is used as an award criteria or a condition for the performance of the contract.

The Swedish legislator has substantially implemented the provisions on labels in accordance with the content of Article 43 of Directive 2014/24/EU. The purpose of these rules is, as mentioned, to make it easier to take sustainability considerations into account in procurements. This is also confirmed by Moll Wendén. According to Moll Wendén, the aim is *"to emphasise the consideration of environmental and social aspects, to make it easier for contracting authorities to take such considerations into account and to reduce the administrative burden on contracting authorities in these Contexts."*³¹

However, Moll Wendén's interpretation of the subject-matter requirement means that this purpose is missed. According to Moll Wendén, the subject-matter requirement in Chapter 9, 13 § of the national Public Procurement Act applies just as strictly if the requirement for labelling is an award criteria, a condition for the performance of the contract, as if it is a technical specification. This assumption is contradicted not only by the EU's purpose, but also by the content of the provisions of Directive 2014/24/EU.

Proof that the subject-matter requirement does not apply equally is Article 70, which provides that conditions for the performance of the contract must be *"linked to the subject-matter of the contract within the meaning of Article 67(3) [emphasis added]"*. Thus, under Article 70, the degree of subject-matter connection for the conditions for the performance of the contract must be the same as that which applies to award criteria under Article 67(3). Article 70 does not make a reference to Article 42 relating to technical specifications.

Moll Wendén's view that the requirement for the subject-matter requirement should be the same regardless of where in a procurement the requirement for label is imposed is also contradicted by recital 97, which concerns award criteria and conditions for the performance of the contract (the technical specifications are discussed in recitals 74-81). Fair trade labels may not be included in the technical specifications because fair trade labels are not related to the product as such.

However, according to recital 97, it is possible to require fair trade label as an award criteria or a condition for the performance of the contract:

"... In accordance with the case law of the Court of Justice of the European Union, this also includes award criteria or conditions for the performance of a contract relating to the supply or use of fair trade goods for the performance of the contract to be awarded..."

Fair trade labels include general corporate requirements, such as the requirement for long-term trade relationships between producers and importers.

Recital 97 also states, to the contrary, that general corporate requirements may be

³¹ Moll Wendén, Labelling in public procurement, Part 1: The provisions of procurement legislation on labelling in relation to other relevant provisions and case-law, 31 January 2019, p. 5.

included in the award criteria or as a condition for the performance of the contract, if they relate to factors *"which characterises the specific production or supply process"*³².

7. RSPO Certification

According to Moll Wendén, it is not possible to require any of the RSPO's three certifications in public procurements because the label *"contains general corporate requirements that go beyond what appears to be permitted under the national Public Procurement Act, as these requirements are not related to possible subjects of contracts."*³³

UHM seems to share Moll Wendén's analysis.

As can be seen from the discussion above, Moll Wendén's view is contradicted by provisions of Directive 2014/24/EU. Moll Wendén's and UHM's interpretation means that the simplification intended by the provisions on labelling in Directive 2014/24/EU is missed. Contracting authorities cannot require labels, but must use the same complicated working methods that applied under the previous directive.

According to the author, the subject-matter and appropriate requirement in Chapter 9, 13 § of the national Public Procurement Act does not apply as strictly to labels used as award criteria or conditions for the performance of the contract. This also seems to be the Commission's view.

In a letter dated 6 July 2021, the Danish Competition Authority³⁴ submitted questions to the Commission regarding the interpretation of the suitability requirement in Article 43 of Directive 2014/24/EU. In its reply, the Commission argues that the suitability requirement should not be interpreted in the same way when a labelling requirement is used as a technical specification, an award criteria or a condition for the performance of the contract. According to the Commission, there are situations in which *"label requirements are not suitable to be used in technical specifications but may be used in award criteria and/or contract performance conditions"*.³⁵

The Commission's reply to the Danish Competition and Consumer Authority indicates that it does not share Moll Wendén's view that the requirements of Chapter 9, 13 § of the national Public Procurement Act should be applied in the same way when a labelling requirement is used as an award criteria or a condition for the performance of the contract as when it is used as a technical specification.

8. EU Ecolabel

On the Commission's website for green procurement, there is information about the EU's own ecolabel, the EU Ecolabel, which, according to the Commission, *"meets the conditions for being used as means of proof outlined in European Union legislation"*

³² Recital 97, second paragraph.

³³ The RSPO has a producer label, a small farmer's label and a trade mark.

³⁴ Danish Competition and Consumer Authority

³⁵ The Commission replied on 17 September 2021 to the Danish Competition and Consumers' Authority, Questions regarding the use of labels in public procurement.

([Article 43 of Directive 2014/24](#) and [Article 61 of Directive 2014/25](#))³⁶".

One of the product groups covered by the EU Ecolabel is hard surface cleaning products under Commission Decision 2017/1217. Among the EU Ecolabel's criteria for cleaning products, there is a requirement that cleaning products containing substances produced from palm oil must:

"Come from crops that meet the requirements of a certification scheme for sustainable production, based on multi-stakeholder organisations with broad membership, such as NGOs, industry and the state, and which focuses on environmental impacts on, inter alia, the environment, soil, biodiversity, organic carbon stocks and the conservation of natural resources."

This must further be confirmed by a third-party certificate. Examples of certificates are, according to the EU Ecolabel, RSPO's certification:

"The certificates accepted shall include the RSPO (Roundtable for Sustainable Palm Oil) (in accordance with the method based on the preservation of identity, segregation or mass balance) or an equivalent or stricter sustainable production regime."

According to the Commission, the EU Ecolabel can thus be used in procurements even though the EU Ecolabel contains requirements for RSPO certification.

The EU Ecolabel's label for absorbent hygiene products and reusable menstrual cups requires that the production at the "*final assembly plant*" (absorbent hygiene products) or "*final manufacturing facility*" (menstrual cups) must comply with the requirements of several ILO Conventions³⁷ concerning, for example, child labour, forced labour, working hours, minimum wage, etc. These labelling requirements have also been formulated as general corporate requirements. "[*The Company*]... for example, must not "*prevent workers from developing alternative mechanisms to express their dissatisfaction and to protect their rights in relation to working conditions and conditions of employment*". Compliance with those requirements shall be demonstrated by the submission by the applicant of the latest version of its Code of Conduct³⁸.

It may be added that these requirements relate to the producer of the final product and not to a supplier of raw materials further down the supply chain.

The information on the Commission's Green Procurement website is a clear indication that UHM should have had a dialogue with the Commission before changing the criteria for cleaning services.

9. The subject-matter of the contract requirement laid down in Articles 42, 67 and 70 respectively

Requirements relating to the subject matter of the contract (or product requirements)

³⁶ [Green Procurement - European Commission](#)

³⁷ The ILO stands for International Labour Organization.

³⁸ COMMISSION DECISION (EU) 2023/1809 of 14 September 2023 establishing criteria for the EU Ecolabel for absorbent hygiene products and reusable menstrual cups, Annex I, criterion 11, and Annex II, criterion 9

can be set as a technical specification, but also as an award criteria or a condition for the performance of the contract. Regardless of how the contracting authority chooses to formulate the requirement, it must be related to what is to be procured. The degree of connecting to the subject-matter that should apply depends on how the product requirement is formulated. If it is formulated as a technical specification, Article 42 and Annex VII to Directive 2014/24/EU apply. If, on the other hand, it is formulated as an award criteria or a condition for the performance of the contract, then Articles 67 and 70 of Directive 2014/24/EU respectively apply.

The degree of connection to the subject-matter that should apply to product requirements in general should reasonably also apply to requirements for the product to bear a label.

It is clear from the discussion above that the principle of proportionality does not imply an absolute prohibition against product requirements relating to the company as a whole. Requirements that have been formulated as a general corporate requirement may also be compatible with the principle of proportionality.

Moll Wendén's view that the requirement of connection to the subject-matter excludes any form of general corporate requirements may be due to a misinterpretation of *MAX HAVELAAR*. In *MAX HAVELAAR*, the Court of Justice of the European Union states that requirements for *the tenderer* must not mean that the tenderer must have established certain policies for corporate social and environmental responsibility. However, the reason such supplier requirements may not be imposed is not that they would in themselves have no connection with the subject matter of the contract. The reason is that there are no requirements for social responsibility included in the exhaustive list of the requirements that may be imposed on the supplier's technical and professional capacity.

It cannot be concluded from this that a label must not contain any requirements whatsoever that can be described as general corporate requirements. The EU Ecolabel for absorbent hygiene products and reusable menstrual cups, to name one example, includes requirements for the company to act in a socially responsible manner. Moll Wendén is, so to speak, comparing apples and oranges.

It is true that the award criteria and conditions for the performance of the contract must also be "*linked to the subject-matter of the public contract*"³⁹. This also applies to the requirements of any label used as an award criteria or a condition for the performance of the contract. This means, for example, that the contracting authority may not require that goods purchased by others, such as private customers or other contracting authorities/entities, must also bear the label. The requirements may relate only to the products "*to be provided under the public contract*"⁴⁰. It is therefore permitted to require that goods delivered to the municipality be fair trade labelled, but not to require that goods delivered to other municipalities, public authorities and even private customers be labelled as well.

³⁹ Directive 2014/24/EU, Article 67(3).

⁴⁰ Directive 2014/24/EU, recital 97.

The requirement of connection to the subject matter is stricter for the technical specifications. *MAX HAVELAAR* and Article 42 and Annex VII to Directive 2014/24/EU state that the technical specifications must relate to the characteristics of the product as such, their manufacture, packaging or use (function, performance, etc.). The scope for imposing technical specifications on the company that manufactures or sells the product is likely to be more limited, at least if the general corporate requirements concern the terms of trade under which the supplier procured the products from the manufacturer⁴¹. However, this does not mean that technical specifications cannot relate to social considerations, for example in the production of the goods covered by the contract.

Nor is it excluded that technical specifications may be formulated as general corporate requirements.

However, if the contracting authority chooses to formulate the product requirement as an award criteria or a condition for the performance of the contract, the same restriction does not apply. It follows from Articles 67(3) and 70 that the connection to the subject-matter requirement is not the same for award criteria and conditions for the performance of the contract as to the technical specifications. According to recital 97, product requirements that are award criteria or conditions for the performance of the contract may also relate to the *"production, supply or trading process of the product"*. According to *MAX HAVELAAR*, the award criteria and conditions for the performance of the contract may relate to goods *"coming from fair trade"*⁴². Recital 97 in the Directive 2014/24/EU states that it is now possible to require *"fair trade goods"*.

Moll Wendén's conclusion that the requirements of Chapter 9, 13 § of the national Public Procurement Act shall be applied equally strictly also when the requirement for a label is an award criteria or a condition for the performance of the contract is therefore incorrect.

The criteria for fair trade clearly relate to the company. That there must be long-term trade relations between producer and importer is clearly a general corporate requirement. According to the EU Court of Justice, it may still be set if it is formulated as an award criteria or a condition for the performance of the contract. It is therefore permitted to require labels containing general corporate requirements if the labelling requirement relates only to the products to be supplied under the contract.

Moll Wendén's conclusion that it is not allowed for a contracting authority to require a label containing general corporate requirements is therefore also incorrect. It is allowed, at least, if the requirement for the label is an award criteria or a condition for the performance of the contract.

In the previous Directive 2004/18, which was in force when the Dutch province was awarding a contract in *MAX HAVELAAR*, there was no express possibilities in the provisions of the directive to require a label, such as fair trade, as an award criteria or a

⁴¹ *MAX HAVELAAR*, p. 74.

⁴² *MAX HAVELAAR*, p. 75 and p. 91.

condition for the performance of the contract. Article 43 of Directive 2014/24/EU now contains such a provision.

According to recital 97, the contracting authority may not require the tenderer to *“have established a specific policy on corporate social or environmental responsibility”*⁴³.

However, this is not a clarification of what is meant by a product requirements is linked to the subject-matter of the contract. The reason the province was not permitted to impose this requirement was that it was not included in the exhaustive list of permissible requirements relating to the supplier's technical or professional capacity⁴⁴.

10. Closing comments

UHM's decision to no longer recommend that requirements for cleaning products and chemical products be fulfilled by the Nordic Swan Ecolabel or Good Environmental Choice label deserves criticism for several reasons. The decision appears to rely heavily on Moll Wendén's analysis, particularly in a memo dated 28 December 2021 concerning RSPO certifications. However, Moll Wendén's analysis has several shortcomings.

These shortcomings consist of:

1. The connection to the subject-matter and appropriate requirements in Chapter 9, 13 § of the national Public Procurement Act shall be interpreted in the same way regardless of whether the requirement for labelling is a technical specification, an award criteria or a condition for the performance of the contract.
2. No requirements relating to the company as a whole may be included in a label.

According to Moll Wendén , *“... all in the national Public Procurement Act”* states that *“a reference to labels in the conditions of performance must also follow the same rules as for a reference in the technical specifications and in the award criteria”*⁴⁵. That assumption is contradicted by provisions of the Directive. Recital 97 states that the scope for requiring labels as an award criteria or a condition for the performance of the contract is greater than if the label requirement is contained in the technical specifications.

Recital 97 further states that requirements may take the form of general corporate obligations if they are established as award criteria or conditions for the performance of the contract. Such requirements may relate to the *“production, supply or trading process”*.

However, such requirements must not be so general that they apply to the companies' entire range of products. It is therefore permissible to require that goods offered are produced in accordance with fair trade criteria or bear a fair trade label. However, it is not permissible to require that the tenderer only sells goods produced in accordance with the fair trade criteria or bearing the fair trade label.

⁴³ Directive 2014/24/EU, recital 97.

⁴⁴ In any event, that is not a permissible requirement in a contract governed by directives.

⁴⁵ Moll Wendén, PM Ecolabelling in procurement – Part 2, 31 January 2019, p. 19.

In public procurements in Sweden, there is generally no requirement that the supplier's entire product range must consist solely of products bearing a specific label. Labelling requirements typically apply only to the products covered by the contract. Nor is it common for procuring authorities to require that tenderers or manufacturers hold RSPO certification, as the procurement usually concerns cleaning services or cleaning chemicals – not palm oil.

It is clear from the discussion above that the appropriateness requirement should not be applied in the same manner when a labelling requirement is used as an award criteria or a condition for the performance of the contract, rather than as a technical specification. The Commission's response to the Danish Competition Authority illustrates this point. According to the Commission, a label that is not appropriate as a technical specification may nonetheless be appropriate when used as an award criteria or condition for the performance of the contract.

Finally, the way in which UHM has chosen to handle the new sustainability criteria for cleaning services also warrants criticism. In the new sustainability criteria, several possible means of proof are accepted, marking a return to the approach used under the previous directive. As a result, the simplification that the EU sought to achieve through the labelling rules in Article 43 of Directive 2014/24/EU has not been realised.

Of the 13 labels examined by Moll Wendén, only one was deemed to meet all the requirements set out in of Chapter 9, 13 § of the national Public Procurement Act. Almost all the labels were disqualified by Moll Wendén on the grounds that they have lacked a sufficient connection to the subject matter. Moll Wendén also rejected Fairtrade, arguing that it *"contains general requirements that go beyond what appears to be permitted under the Public Procurement Act⁴⁶"*, despite recital 97 of Directive 2014/24/EU explicitly stating that award criteria or conditions for the performance of the contract may include *"fair trade goods"*.

Therefore, before taking such a drastic and regressive step, UHM should have engaged in dialogue with the Commission. The information available on the Commission's website regarding green procurement, the content of the EU Ecolabel criteria for cleaning and hygiene products and the Commission's responses to the Danish Competition Authority all indicate that the Commission interprets the labelling provisions of the Directive in a different and more permissive manner than UHM. No such dialogue has taken place. Instead, UHM has relied solely on the analysis of a domestic law firm.

Stockholm, February 28, 2025.
Mathias Sylvan

⁴⁶ Moll Wendén, PM of 30 December 2020, p. 8.