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Questions regarding the use of labels in public procurement:

Dear Ms Skaksen,

Thank you very much for your letter on the issue of labels in public tenders. We welcome the initiative of the Danish Government to launch a new strategy on green public procurement. Public purchases are an essential instrument to contribute to the substantial reduction of emissions we need to implement by 2030. The Commission is committed to assist Member States in transforming public procurement in a tool to achieve environmental goals.

Labels, in particular, represent an important element of legal certainty and simplification for both public buyers and economic operators in the transition towards a systematic use of sustainability considerations in public procurement. We hope the answers below can facilitate their use at national level. This is why we are also publishing them on the Commission's Wiki webpage on public procurement, which is accessible to the representatives of all central governments of the 27 EU Member States.

Electronically signed

Katharina Knapton-Vierlich
Head of Unit

Reply to the Danish Consumer and Competition Authority's questions on labels in public procurement

Question: *Does the Commission agree that label requirements under article 43(1)(a) may contain criteria as defined in article 42 regarding technical specifications? And in that case:*

- a) May label requirements also include criteria referring to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives, cf. the definition in article 42? or*
- b) Shall requirements that are “appropriate to define characteristics” instead be understood as requirements only concerning the “material substance” of the work, product or service?*

Reply: Article 43(1) first subparagraph expressly indicates that contracting authorities may use label requirements in technical specifications. Therefore, whenever label requirements are used in technical specifications, they will also include criteria complying with Article 42(1) second subparagraph.

Question: *Does the second condition in article 43(1)(a) mean that labels must only contain criteria consistent with the definition of technical specifications in article 42?*

Reply: No. Article 43(1) first subparagraph clarifies that label requirements may be used not only as technical specifications, but also as award criteria and/or contract performance conditions. There may therefore be cases where label requirements are not suitable to be used in technical specifications, but may be used in award criteria and/or contract performance conditions.

Question: *If “no” to question 2, what is then the implication of the second condition in article 43(1)(a)? That is, how is “appropriate to define characteristics” to be understood and how does the effect from the second condition differ from the resulting effect of the first condition? And can you provide us with some examples of label requirements consistent with the second condition but which are not technical specifications as defined in article 42?*

Reply: The second condition spelled out in Article 43(1)(a) means that to be compliant with EU Law and thus be used in the tender documents label requirements must describe the characteristics of the purchase at hand. These characteristics may relate to different stages and elements of the production process, and they cannot include elements which are not consistent with the product, works or service at hand (e.g. if the subject matter is fished seafood, the label requirements used in the tender cannot impose environmental requirements related to seafood breeding).

In other words, the two conditions established in Article 43(1)(a) produce very similar effects and should be read as reinforcing each other.

Label requirements can indeed be consistent with the second (as well as the first) condition and not be fit for use as technical specifications. Requirements relating e.g. to

conditions applicable to the staff performing the contract or the trading conditions of the goods, are in fact unlikely to qualify as technical specifications, as technical specifications relate to considerations directly concerning the product characteristics and its production process. Requirements concerning the staff's treatment and trading conditions relate to how the contract needs to be performed, and as such they may be used as award criteria or contract performance conditions. For instance, fair trade label requirements for a specific product, or Ecolabel requirements aiming to ensure compliance of suppliers of the specific goods with ILO Conventions may be compliant with Article 43(1)(a) and may be used in award criteria or contract performance clauses, but not in technical specifications.