

# Protecting Tropical Forests through Public Procurement of Emission Reductions

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## Abstract

The rate of destruction of tropical forests continues to accelerate at an alarming rate contributing to an important fraction of overall greenhouse gas emissions. In recent years, much hope has been vested in the emerging REDD+ framework under the UN Framework Convention on Climate Change (UNFCCC), which aims at creating an international incentive system to reduce emissions from deforestation and forest degradation. This paper argues that in the absence of an international consensus on the design of results-based payments, “bottom-up” initiatives should take the lead and explore new avenues. It suggests that a call for tender for REDD+ credits might both assist in leveraging private investments and spending scarce public funds in a cost-efficient manner. The paper discusses the pros and cons of results-based approaches, provides an overview of the goals and principles that govern public procurement and discusses their relevance for the purchase of REDD+ credits, in particular within the ambit of the European Union.

Research for this paper was funded by the Swiss National Science Foundation under a grant to the National Centre of Competence in Research on Trade Regulation, based at the World Trade Institute of the University of Bern, Switzerland.

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\*The valuable contribution made to this paper by Charlotte Streck is gratefully acknowledged.

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## I. Introduction

Tropical forests provide medicines, wood, water and livelihoods to billions of people. Forests also play an important role for the climate; they regulate the local and micro-climate, and serve as vast reservoirs for sequestering carbon dioxide (CO<sub>2</sub>).<sup>1</sup> Notwithstanding their importance, they have rapidly declined in recent decades, in particular due to the expansion of agricultural activities, unsustainable logging and forest fires.<sup>2</sup> As a result, deforestation and forest degradation are responsible for nearly 20% of all global greenhouse gas (GHG) emissions, exceeding thereby the emissions of the global transportation sector.<sup>3</sup>

In the past, many initiatives have been taken by the international community to address deforestation, but success has been elusive so far. Increased demand for wood and for agricultural products, along with population pressures, weak governance, and other institutional factors continue to constrain the reduction of deforestation and degradation. In

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<sup>1</sup> Parrotta et al. (2012).

<sup>2</sup> IPCC (2007).

<sup>3</sup> Available at <http://www.un-redd.org/aboutredd/tabid/102614/default.aspx> .

recent years, much hope has been vested in the emerging REDD+ framework under the UN Framework Convention on Climate Change (UNFCCC). Such a framework would create an international incentive system for developing countries to reduce emissions from deforestation and forest degradation, and promote conservation and sustainable management of forests and enhancement of forest carbon stocks (REDD+).

REDD+ entered the international stage in 2005, when – on the occasion of the 11<sup>th</sup> conference of the parties to the UNFCCC – Papua New Guinea and Costa Rica signalled that they would be willing to consider curbing deforestation provided that appropriate financial incentives were offered. Many more developing countries joined Papua New Guinea and Costa Rica in this initiative, which was welcomed by the global community as one of the first internationally publicized efforts by developing countries to make a quantifiable contribution to scaled-up mitigation efforts under the UNFCCC. Subsequent UNFCCC decisions have reemphasized the importance of REDD+ and formulated initial guidance for the development of accounting and measurement systems, safeguards, and financial support.

A major milestone was achieved in Cancun in 2010, where Parties decided that REDD+ would most likely be implemented in three phases, starting with national planning and “readiness”, followed by demonstration activities, and, finally, leading to the implementation of results-based actions that correspond to emission reductions that are measured against national baseline or reference (emission) levels.<sup>4</sup> For all phases, developed countries promised to provide significant financial support.

In Doha at COP-17, countries agreed that “appropriate market-based approaches” could be considered “to support the results-based actions by developing country Parties”. It suggests that such finance “may come from a variety of sources, public and private, bilateral and multilateral, including alternative sources” and that “appropriate market-based approaches [ . . . ] to support results-based actions by developing countries” could be developed.<sup>5</sup> Parties further adopted guidance on reference emission levels and/or reference levels to establish benchmarks that would serve to account for emission reductions from REDD+ activities.<sup>6</sup> While it remains unclear if and how these reference levels might be tied to ‘results-based’ payments in the future, consensus has emerged that international finance would be linked to concrete results in achieving climate benefits through REDD+.<sup>7</sup>

Strategies to mobilize finance for REDD+ can be divided into those applicable in the short term and those generating sustained investment in REDD+ over the long term. They can also be divided into private and public sector driven opportunities. In the long term a connection between investments in sustainable land use and REDD+ is one of the most promising options for mobilizing sustained funding for REDD+.

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<sup>4</sup> Sterk (2012: 20).

<sup>5</sup> UNFCCC (2011). Decision 2/CP.17. Par. 66. U.N. Doc. FCCC/CP/2011/9/Add.1.

<sup>6</sup> UNFCCC (2011). Decision 12/CP.17 U.N. Doc. FCCC/CP/2011/9/Add.2 (15 Mar 2012).

<sup>7</sup> Streck and Costenbader (2012: 7).

In the short- and medium-term, REDD+ is likely to be supported mainly by public funds. While the private sector has made great strides in fostering and refining results-based approaches within the ambit of the voluntary carbon market, public money is essentially spent on REDD-“readiness” activities. While it is clear that results-based payments may not replace payments for REDD+ readiness (phase 1 and 2), a “wait and see” approach to the challenges they pose is probably not an appropriate way to make progress. Failing a more pro-active stance, there is a substantial risk that the great potential of forests for climate mitigation will remain underfunded.<sup>8</sup>

A pragmatic and yet possibly effective option that would not pre-empt a decision at the international level on the adoption of market-based approaches<sup>9</sup> would be the setup of public purchase programmes for carbon credits resulting from REDD+ projects by national or subnational public agencies in developed countries. This would help in identifying early, cost-efficient and accessible GHG emission reduction strategies while pushing the development of implementation and monitoring capacities on the ground. The greater the mandate and flexibility of such programmes (e.g. by providing advance payments) the more they would also encourage private initiatives to engage in REDD+ activities.

With the goal of facilitating early investments in REDD+ that would provide a pathway to scaled-up REDD+ finance in the future, the main objective of this paper is hence to examine how public procurement of GHG reductions from REDD+ by public agencies could be shaped to support results-based REDD+ activities and facilitate the development of robust accounting frameworks. Particular emphasis will be put on the public procurement rules in the context of the European Union (EU).

The paper proceeds as follows. First, it discusses the merits and challenges of results-based payments within the ambit of REDD+. Second, it provides an overview of the goals and principles that govern public procurement and discusses their relevance for a tender for REDD+ credits. Third, it explores the legal boundaries set by European law for tendering processes carried out by public agencies in the European Union and section 4 draws conclusions.

## **II. Results-based Finance for REDD+**

### **A. Defining Results-based Payments for REDD+**

Results-based payments for REDD+ fall into a category of relatively new approaches towards Official Development Assistance (ODA), such as “cash-on-delivery” (COD) and “outcome-based aid”, which condition donor payments on the achievement of particular results. Outcome-based systems link payments to the implementation of targeted, performance-related schemes within the national context. In some cases, donors link their payments to measurable and verifiable progress towards specific outcomes.

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<sup>8</sup> Diaz et al. (2011).

<sup>9</sup> The adoption of international standards for market-based approaches for REDD+ is a controversial topic within the international climate negotiations. See <http://carbonmarketwatch.org/what-finance-for-redd/>

In the context of climate policy, results-based finance leverages private and public investment into activities that reduce GHG emissions and promote carbon removal. Baseline-and-credit systems similar to REDD+ are discussed in broader climate policy, particularly in the context of ‘nationally appropriate mitigation actions’ (NAMAs) of developing countries. Interesting lessons can also be learnt from the “green investment schemes” (GIS) implemented in Eastern Europe, which were developed to allow countries with a significant surplus in assigned amount units (AAUs) to receive funds for additional emission reductions.<sup>10</sup>

In the case of REDD+, results that qualify for payment would be measured in terms of reductions of GHG emissions against a reference scenario or baseline. Additional benefits, such as those related to poverty reduction, water conservation, and biodiversity outcomes, could also be financially rewarded in this manner; although common metrics for these outcomes are generally less well developed. The credibility and acceptance of results-based finance frameworks depend on the rigour of the measurement methodologies applied, the conservativeness of the baseline scenario, and the transparency of the crediting scheme.<sup>11</sup>

The emerging UNFCCC REDD+ mechanism follows a national approach, but allows the development of subnational systems as an interim step towards full REDD+ implementation at the national level. Before or after the adoption of a national reference level, a government can also decide to allow the development of subnational REDD+ programmes or REDD+ projects.

Considering the challenges of building full national REDD+ systems, REDD+ is likely to be implemented in processes that move upwards taking a “step-wise approach” from project to sub-national level and eventually to national level. Given wide differences in social and environmental conditions, deforestation rates and technical capacities, sub-national-specific tailoring will indeed be important for many countries’ overall success with REDD+. It will provide an essential opportunity to test results-based payments in larger regions beyond projects and involving the public sector, but still on a smaller scale than entire national levels.

Further, as deforestation and forest degradation drivers are often quite local in nature, different regions and even micro-regions require local implementation of response measures. These allow for interventions customized to suit a particular region and often produce far more successful results than uniform implementation of a national intervention. Finally, a step-wise building of reference level and measurement, reporting and verification (MRV) systems from covering a single activity (deforestation) to the full scope of REDD+ allows for a quick start of REDD+ while building capacities for a gradual expansion.

## **B. Pro and cons of Results-based Payments for REDD+**

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<sup>10</sup> Tuerk et al. (2010).

<sup>11</sup> Streck and Costenbader (2012).

With respect to traditional funding mechanisms results-based finance has several obvious advantages. It clearly enhances the incentives of the recipient to deliver the promised results. Overall, focusing on results creates a powerful incentive to improve spending effectiveness and associated MRV systems, which maximizes the potential of overall achievable GHG emission reductions and removals. This in turn might motivate contributors to increase their levels of commitment, knowing that funds will be spent only on reductions that are actually delivered. Finally, results-based payments have, in principle, the potential to leverage significant amounts of private finance.

However, results-based finance is not without its challenges. For the recipients, it means that they have to bear the performance risk as no results means no payment. If the payments come from public sources, conflicts may arise about the strings attached to such payments, particularly if they come from ODA budgets, which have specific rules and requirements.<sup>12</sup> Also, donors may have to overcome fiscal constraints, such as the obligation to disburse approved funds during the budget year, or within a specified number of years, or the difficulty of earmarking reserve funds of unknown amounts for a certain number of years. Finally, donors may fear that the adopted design could lead to high transaction costs as well as windfall profits and/or perverse incentives as has been the case under the Kyoto Protocol (KP)'s Clean Development Mechanism (CDM).<sup>13</sup>

Within the ambit of REDD+ performance-based payments face moreover some particularly intractable challenges, namely the lack of reliable data, additionality, the non-permanence of emission reductions, and potential leakage as well as unsettled questions regarding accounting and MRV.<sup>14</sup> Many of the earlier problems plaguing forest carbon projects have, however, been progressively addressed so that, although not above criticism, many certification schemes (hereafter “standards”) have now achieved broader levels of acceptance.<sup>15</sup>

Results-based standards that lead to the issuance of REDD+ credits differ in both scale and scope.<sup>16</sup> The scale of REDD+ determines whether a standard applies to a jurisdiction or is defined by project boundaries. While national approaches are implemented at a jurisdictional (i.e. national) level, subnational approaches may be defined through a reference to a jurisdiction or at the project-level. The scope of a REDD+ programme depends on the types of activities that are included, i.e. reduced deforestation, reduced forest degradation, forest carbon enhancement, improved forest management and forest conservation.<sup>17</sup>

While payments for carbon at the project level are possible in any country, programmes at a national level may not be an option for countries with weak governance that are not able to effectively reduce emissions within their borders. These countries lack control over the resource and are not only unable to effectively implement policies but also to defend their

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<sup>12</sup> See for instance the Paris declaration on aid effectiveness.

<sup>13</sup> See de Sépibus (2011).

<sup>14</sup> European Commission (2008).

<sup>15</sup> Diaz et al. (2011: 63); Roe et al. (2013).

<sup>16</sup> Streck and Costenbader (2012).

<sup>17</sup> Idem.

forest estate against international drivers of deforestation (such as commodity prices or international leakage effects). Incentives would have to be targeted to those who are likely to respond to them, the economic agents in the field such as farmers, communities and private entities.<sup>18</sup>

### **III. Public procurement of REDD+ Credits**

The procurement of REDD+ credits can be realized through a purchase agreement with a single party or through calls for tenders, which is a process by which public sector bodies buy goods, works and services through a competitive bidding process.<sup>19</sup> Probably the most important goal of all tendering processes is that the procuring entity acquires them on the best possible terms, i.e. that it gets value for money.<sup>20</sup> Other goals, such as the prevention of corruption, accountability, fair and equal treatment of providers, implementation of so-called horizontal issues (e.g. environmental, social), and efficiency, however, are also important objectives pursued by tenders.<sup>21</sup>

#### **A. The Rationale for a Tender**

The advantages of a tender over negotiations with one single party are manifold.<sup>22</sup> The recourse to results-based payments for verified emissions reductions is indeed only “half the recipe for cost-effectiveness”.<sup>23</sup> The other half is a competitive allocation process, which allows the economically most advantageous project to be picked.

In the absence of competition, a supplier of REDD+ credits has few incentives to reduce its costs and will seek to maximize its profits at the expense of the buyer.<sup>24</sup> As the buyer has no yardstick against which it can measure the offer, he is prone to paying too much. By introducing competition, the danger that the supplier will make an unreasonable offer is less important as that supplier may lose the contract if the price is too high and/or the quality too low. Hence, the greater the number of competitors, the more the risk that the supplier may unduly exaggerate its costs to seek rents at the expense of the buyer is minimized.

Furthermore, in a transaction with one single supplier, there is a significant risk that the supplier will withhold crucial information.<sup>25</sup> Forcing suppliers to compete ensures that they will have to disclose the information they possess, namely the information regarding price, products and costs. Contestability thus assists the public buyer in the price discovering process and compels him to operate more effectively. Finally, by encouraging competition, the public buyer will have a greater choice and variety of possible options that satisfy his needs.

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<sup>18</sup> Karsenty and Ongolo (2012).

<sup>19</sup> Many public procurement laws are based on the UNCITRAL Model Law on Public Procurement, which contains procedures and principles aimed at achieving value for money and avoiding abuses in the procurement process. See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/2011Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html).

<sup>20</sup> Arrowsmith (2010a: 14).

<sup>21</sup> Arrowsmith (2010a: 13).

<sup>22</sup> See on the merits of a call for tender for CDM credits with sustainability benefits Gantenbein (2012).

<sup>23</sup> Gosh et al. (2012: 6).

<sup>24</sup> Trepte (2006: 115).

<sup>25</sup> Idem.

The benefits of competitive bidding, however, are not limited to the optimization of the suppliers' offers. A government buyer is not a buyer in the market like any other individual buyer, motivated purely by self-interest and acting to maximize utility.<sup>26</sup> The purchasing activity is generally carried out by a bureaucratic entity whose self-interest may diverge from the government's interests and whose primary objective may not be to maximize profits. There is thus a tendency towards inefficiency and, in the worst cases, even a risk of corrupt practices. The recourse to a transparent bidding process that obliges the procurement authority to specify its objectives in a transparent and objective way will thus help the government to control its purchasing agent and thereby limit its discretionary power. Potential abuses may further be reduced if competitors are entitled to take judicial action if the criteria underlying the tendering process are violated.

A selection process based on competitive bidding, however, will not automatically lead to the optimal purchase decision by the public buyer. Indeed, contestability is only as effective as the competitive forces at work in the market and assumes that the suppliers compete on fair terms. The outcome will also very much depend on the type of rules that regulate the government procurement. Also, it is important to be aware that the recourse to competitive bidding is clearly not without costs. It often entails substantial transaction costs, both for the public buyer who conducts the search and for the potential suppliers who submit responses.<sup>27</sup> The tendering process will hence have to be designed in such a way that its costs do not exceed its benefits.

## **B. Particularities of Tenders for REDD+ Credits**

The idea of a tendering procedure for the purchase of carbon credits is not entirely new. In 2000, the Dutch government was the first to make a call for tenders for Joint Implementation (JI) and CDM credits. Its example was followed by the Austrian, the Danish, the Swedish, the Finnish and eventually the Belgian governments. While all tenders were primarily intended to allow countries to comply with their mitigation targets under the KP, the Belgian government placed a particular emphasis on the purchase of credits that would contribute to the sustainable development of host countries.<sup>28</sup>

A tender for REDD+ credits may thus build upon the experience that has been gained from the past tenders for JI and CDM credits. While similar with respect to the nature of the object, the tender for REDD+ credits differs from past procedures in several respects. The earlier tenders were all undertaken in the context of the KP, which allowed developed countries to use the credits to comply with their mitigation targets thereunder.

The situation is different in the case of tenders for REDD+ credits. So far, the KP does not allow the use of CDM credits from the forestry sector, other than with respect to afforestation

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<sup>26</sup> Trepte (2006: 84 ff).

<sup>27</sup> Trepte (2006: 123).

<sup>28</sup> See [http://www.climatechange.be/jicdmtender/article.php?id\\_article=47#proc](http://www.climatechange.be/jicdmtender/article.php?id_article=47#proc).



and reforestation projects. In the absence of a new international climate agreement laying down rules for GHG accounting and new market mechanisms<sup>29</sup> countries which have not adopted post-2012 targets under the KP may however possibly use REDD+ credits for compliance with their mitigation pledges made under the Cancun Agreements.<sup>30</sup>

Another difference from the previous tenders is that a call for tenders for REDD+ credits cannot refer to UN standards, but has to refer to standards developed by the voluntary markets or to define its own standards. Also, REDD+ credits are not only project-related but may be defined at both the subnational and national jurisdictional levels. This implies that the contracting parties of procuring entities may, for certain tenders, be exclusively public entities. Finally, while REDD+ credits resemble other carbon credits in that they are construed with respect to a counterfactual baseline, their design requires that specific risks related the forestry sector are addressed, such as the non-permanence of emission reductions and particularly complex MRV issues.<sup>31</sup>

### **C. Tendering Procedures**

Tendering procedures usually conform to a similar pattern. The procurement entity issues a request for tenders, in which it outlines what is required and/or what its needs are. It provides detailed instructions on the requirements of the bid as well as on the award criteria according to which the bids will be evaluated. It is generally widely advertised to encourage competition and provide a significant pool of offers to select from. The party whose offer best meets the outlined requirements is offered a contract.

#### **1. Different Types of Procedures**

Depending on the objectives that are pursued by the procuring entity, different procedures are possible. The standard procedure is the open procedure, which ensures the maximum contestability between suppliers.<sup>32</sup> It is generally a one-stage procedure, also called one envelope, because the tender document contains all the elements necessary for the bid on which the contract will be based. In many circumstances, however, an open procedure may prove too inflexible and/or too costly as the procurement entity might have to make a selection from too vast a pool of offers. Thus, very often, the procedure will be preceded by a pre-qualification procedure, which sets out certain conditions that must be fulfilled before a bid can be made. Another possible way to restrict the number of bidders is to follow a procedure where only a limited number of competitors are invited to submit an offer.<sup>33</sup> This type of procedure is usually called a restricted procedure.

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<sup>29</sup> See for a discussion on new market mechanisms de Sépibus et al. (2011, 2012).

<sup>30</sup> See FCCC/CP/2010/7/Add.1, 1/CP.16, available at <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=2>

<sup>31</sup> See Sullivan et al. (2012: 20).

<sup>32</sup> Trepte (2006: 280).

<sup>33</sup> Contrary to the prequalification procedure where participation in the tendering process depends on whether or not the candidates meet the qualification criteria set out by the procuring entity, in the so-called selective tendering process the procuring entity chooses those it invites to bid. See Trepte (2006: 275).

In the two-stage tenders the process is divided up in two distinct tendering phases. This option is usually used for procedures where it is not possible to define precisely the object of the tender at the outset.<sup>34</sup> The procuring entity first invites the bidders to present a proposal, which will serve as the basis for negotiations between the bidders and the procuring entity.<sup>35</sup> Based on a revised request for tender, bidders that have been qualified in the first stage present a second and final tender.<sup>36</sup>

A special tendering technique, which was progressively introduced by many countries with the start of the new millennium, is the electronic reverse auction. This enables bidders to adjust their tenders in the light of the information submitted in the tenders by other bidders.<sup>37</sup> Electronic auctions are not another type of procedure, but rather a particular way of conducting the award process. They may be used as part of open, restricted or negotiated procedures.<sup>38</sup>

The type of procedure that tenders follow markedly influences their outcome. When selecting the procedure used in the call of tenders for REDD+ credits, the public authorities have to carefully evaluate the advantages and trade-offs of the various modalities. While an open procedure with few or no prequalification criteria promotes choice and variety, it may easily overburden the logistic and personnel resources of a procuring entity. Conversely, a restricted procedure will be able to target potentially interesting projects and participants and reduce transaction costs, but may unduly limit the benefits of competition.

The advantage of the two-stage tendering procedure is that it allows the procuring entity to engage in negotiations with some of the bidders to gain a more in-depth understanding of the merits of a specific proposal. This is particularly important for tendering procedures where the procuring entity does not know exactly which solutions best meet its needs. This type of procedure, which is usually used for particularly complex tenders, provides more flexibility to the parties but also increases the risks that the procedure may be misused for other purposes.

## 2. Lessons from Past Tenders for Carbon Credits

The tenders for CDM and JI credits undertaken by the Dutch, Austrian, Danish, Swedish, Finnish and Belgian governments followed different procedural modalities. The Dutch authorities, for instance, opted for the so-called “restricted procedure”,<sup>39</sup> which consisted of a pre-selection and a contract awarding phase. Potential bidders were asked to send an expression of interest, in which they had to disclose their financial and economic standing as

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<sup>34</sup> Arrowsmith (2010a: 37). According to Art. 30 of the UNCITRAL model law the procuring entity may have recourse to these procedures in particular if “discussions with suppliers or contractors are needed to refine aspects of the description of the subject matter of the procurement .... and in order to allow the procuring entity to obtain the most satisfactory solution to its procurement needed”.

<sup>35</sup> Under the UNCITRAL Model law the first tender does not include the price. See Article 30 of the UNCITRAL Model law 2011.

<sup>36</sup> Trepte (2006: 295).

<sup>37</sup> Arrowsmith (2010b: 253).

<sup>38</sup> Idem.

<sup>39</sup> Dutch State (2000).

well as their technical capacity.<sup>40</sup> These expressions of interests were then assessed according to qualitative selection criteria,<sup>41</sup> based on which a ranking of the projects was established. The parties with the highest ranking were invited to submit a tender.

In the contract-awarding phase bidders were offered the opportunity to present their proposals to the assessment team personally and the staff of the procuring entity usually carried out on-site visits, where it inspected local premises and interviewed project participants as well as stakeholders in the host country. The assessment made by the staff was then submitted to a committee of independent experts whose assent was mandatory.

Projects that were assessed positively were offered a contract. Overall, the Dutch government organised five tenders that led to the conclusion of about twenty JI and sixteen CDM credit purchase agreements. The average price per unit of CO<sub>2</sub> equivalent was about ten euros for JI projects and between three and five dollars for CDM projects.<sup>42</sup> Based on the fulfilment of certain conditions, prepayments were granted to project developers from JI tenders.

The Belgian procurement entity applied in its three tenders<sup>43</sup> the so-called “negotiation procedure with public announcement”, which may be chosen if the nature of the services that have to be delivered are not of a nature that the requirements of the contract can be specified with sufficient accuracy.<sup>44</sup> Although the Belgian authorities followed the same procedure for all tenders, the modalities of the first two tenders differed substantially from the third tender.

The first two Belgian tenders show many similarities to the Dutch tenders. Project developers were invited to send an expression of interest – including a project idea note – in which the personal qualifications and the technical capacity of the candidates were examined. Based on this first screening of the projects, some candidates were invited to submit a tender, including in particular a project development document (PDD). In contrast to the Dutch tender, which directly concluded a purchase agreement if the bid was assessed positively, the Belgian authorities engaged in negotiations regarding the financial modalities if a project was selected based on the award criteria set out in the bidding documents. The upper limit of a so-called “Emission Reduction Purchase Agreement” (ERPA) was a 2.3 million euros per project.<sup>45</sup> A financial contribution of 40,000 Euros was offered to every complete and compliant project proposal and an additional financial contribution of 10,000 Euros to candidates from least developed countries to support feasibility studies. Pre-payments of up to 50% were made conditional on the meeting of certain milestones.

The third Belgian tender differed from the two first tenders mainly with respect to its scope. Instead of issuing a call for tenders for individual projects, the Belgian state issued a call for

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<sup>40</sup> The selection criteria relate to three particular points: the project definition, the operational plan and the experience of the bidder.

<sup>41</sup> The criteria related to the definition of the project, the operational plan and the experience of the proponents. See Dutch State (2001).

<sup>42</sup> This information was provided to the author by former staff of the Dutch procuring entity.

<sup>43</sup> The three tenders were launched in 2005, 2007 and 2009.

<sup>44</sup> See [http://www.climatechange.be/jicdmtender/article.php3?id\\_article=47#proc](http://www.climatechange.be/jicdmtender/article.php3?id_article=47#proc).

<sup>45</sup> See [http://www.climatechange.be/jicdmtender/article.php3?id\\_article=47#proc](http://www.climatechange.be/jicdmtender/article.php3?id_article=47#proc).

tenders for the purchase of a portfolio of projects. This choice meant that instead of project developers, financial intermediaries were the principal contracting parties of the procuring entity. The main reason for narrowing down the scope of the tender was the rationalization of the work of the procuring entity. Whereas in the first two calls for tenders the procuring entity had to assess the merits of hundreds of individual projects, the portfolio approach allowed it to concentrate on the assessment of a few proposals whose projects had been previously screened and selected by financial intermediaries. In contrast to the first tenders, no financial contributions nor pre-payments were offered to bidders.

### 3. What Tender Modalities for REDD+ Credits?

The question of what type of procedure should be followed when organizing a tendering procedure for REDD+ credits may not receive a straightforward answer. It will, among other criteria, depend on the type of credits that are being tendered for as well as the scope of the tender.

If the purchasing state aims at purchasing REDD+ credits with a subnational or national scope, it is important that the selected procedure provides sufficient flexibility. A rigid procedure that is based exclusively on paperwork evaluation will not guarantee an appropriate outcome. Only if the procuring entities are offered the opportunity to engage in an in-depth dialogue with bidders, to interview stakeholders and carry out on-site assessments will they be able to make a sufficiently well-founded judgment on the merits of a proposal.

Moreover, a two-stage procedure that provides ample room for iterative biddings will in this case probably offer the best guarantees for tailor-made solutions. Discussions can be led with the bidders and their initial offer may be subsequently adjusted. While such a procedure may be warranted for REDD+ credits with a national or subnational scope, it is important to keep in mind that this type of procedure comes with substantial transaction costs that may possibly only be kept in check if the number of proposals examined is limited. Accordingly, the benefits normally entailed by a competitive bidding process are reduced and the procedure may not offer much added-value in comparison to a purchase agreement with one single supplier.

A distinction should also be drawn between a call for credits from individual projects or programmes and a call related to a portfolio of projects or programmes. While in the first case, a thorough assessment of the merits of each project, including on-site assessments and personal interviews with stakeholders, is essential to ensure the integrity of the purchased credits, this may neither be necessary nor possible under a portfolio approach. As in the latter case the assessment of the individual projects is carried out by the intermediary, the main objective of the authorities will be to check its reputation and background and its compliance with the criteria set out by the bidding instrument. While allowing a lower degree of scrutiny of the individual projects, the principal advantage of the portfolio approach is clearly its reduced transaction costs.

Finally, cost-efficiency concerns may be addressed by the introduction of an electronic reverse auction. As this technique allows a dynamic adjustment of the bids with respect to other offers, it may, if used in an appropriate manner, significantly improve the chances of getting better value for money.<sup>46</sup> When used in a tendering procedure for REDD+ credits, it may constitute an effective tool to help in the discovery of cheap abatement opportunities. Sufficient safeguards will however have to be established to prevent it from leading to the promotion of proposals that promote emission reductions at the expense of other valuable goals.

#### **D. The Object of the Tender**

The objects of calls for tenders are usually goods, services and/or works, which are defined through reference to their technical specifications or in terms of performance or functional requirements. REDD+ credits are not goods, services or works in a classical sense. When defining the object of the tender the procuring entity may thus not refer to their technical characteristics, but rather to the procedures and modalities that lead to their issuance.

With the exception of the first Dutch call for tender, reference could be made in all previous calls for tenders for carbon credits to the carbon standards established under the KP.<sup>47</sup> Failing UN standards for REDD+ credits,<sup>48</sup> the procuring entity, in the case of the purchase of this type of credits, may not refer to procedures and modalities recognized by the international community.

This resembles the situation of the first Dutch call for tenders launched in 2000. Although the JI credits could potentially be used for compliance under the KP, the Parties had not yet formally adopted the procedures and modalities for this type of credits.<sup>49</sup> Hence, for the sake of the first “ERU-PT Emission Reduction Unit Procurement Tender” the Netherlands had, based on the guidelines under discussion in the ambit of the international climate negotiations, formulated a practical calculation method for emission reductions.<sup>50</sup> It had, in particular, laid down the procedures that project developers would have to follow when executing their baseline study, given instructions for monitoring studies and clarified that they would have to be validated by an independent validation body recognized by the Parties to the KP. While the Dutch procuring entity expected that, at the time of the issuance of the first credits in the first year of the commitment period of the KP, the Parties would have adopted international rules, it clarified that if this was not the case, the Netherlands would take care of these issues.

The call for REDD+ differs from the first Dutch tendering procedure insofar as the KP excludes (so far) the use of new types of carbon credits for compliance purposes. Also, no consensus has yet emerged in the climate negotiations with respect to the establishment of

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<sup>46</sup> Idem.

<sup>47</sup> The modalities and procedures for the CDM and the JI were adopted by Parties to the Kyoto Protocol in 2001 in the framework of the so-called Marrakesh Accords of the UNFCCC.

<sup>48</sup> The only standards that exist for the forestry sector are the standards established for reforestation and afforestation under the CDM and the JI.

<sup>49</sup> This occurred only in 2001 under the Marrakesh Accords.

<sup>50</sup> See Dutch government (2000).

international standards for new market mechanisms in the post-2020 period. In contrast to the situation in 2000, however, there exist numerous voluntary carbon certification schemes which have been developed by civil society. They include project-level certificates as well as sub-national and national certification schemes.<sup>51</sup> Some are “pure” carbon standards such as the Verified Carbon Standard (VCS) others include rewards for co-benefits, such as the preservation of biodiversity.

When describing the object of a call for REDD+ credits, procuring entities may hence either refer to existing voluntary certification standards or provide guidance on substantial and procedural criteria that any standard would have to meet. The advantage of referring to existing standards is that authorities can refer to existing structures which have already proven their robustness within the ambit of the voluntary carbon market. Moreover, the reference to a particular standard does not prevent the procuring entities from formulating additional “sustainability” requirements, taking the example on the Belgian tenders.

### **E. The Definition of Award Criteria**

A tender may be awarded either on the basis of the criterion of the lowest price or the economically most advantageous offer. The lowest price basis is usually only used for simple purchases where the quality of the items purchased does not matter. When considering the most economically advantageous tender, the procuring entity may therefore consider all relevant factors, including social and environmental aspects. Usually, it will indicate in the bidding document to what extent these factors will be taken into account. This can in particular be done through the “relative weighting” of the award criteria. The procuring entity can for instance assign a certain percentage to the price factor and another to the quality of the items offered, e.g. 70% for the price and 30% for the quality.

In contrast to the Dutch tenders, the award of the Belgian tenders made allowance for “sustainability” criteria and for indicators providing “certainty of delivery” of credits. The first two tenders proposed a four-step assessment, starting with a classification of the projects in six categories.<sup>52</sup> In the second step, each proposal was assessed according to the criteria set out in the bidding documents. The projects were then ranked according to a ratio set out in the bidding documents. Finally, proposals were selected for further negotiation by choosing, in a descending ranking order, the top-ranked projects out of each of the six categories until the budget was exhausted.

In the third Belgian tender, the procuring entity made the ranking of projects dependent on sustainability scores. The adopted “sustainability” criteria are interesting in several respects. They were based on an overall assessment of three categories of criteria, outlining environmental, social and developmental aspects of a portfolio, which were weighted equally

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<sup>51</sup> See for a list of schemes Chapas et al. (2013).

<sup>52</sup> The categories were 1. energy efficiency projects; 2. renewable energy projects; 3. energy production by using clean, sustainably grown biomass; 4. small scale projects; 5. projects in Africa, in a least developed country (LDC) or in a partner country from the Belgian Development Cooperation; 6. others. See [http://www.climatechange.be/jicdmtender/article.php3?id\\_article=47#proc](http://www.climatechange.be/jicdmtender/article.php3?id_article=47#proc).

(30 points out of a hundred). Moreover, an extra ten points could be awarded depending on the potential of a project to contribute to the saving of non-renewable energy sources. While providing an equal weight to each of the three components of sustainable development, this approach allowed the Belgian authorities to put the emphasis on an element it particularly wanted to foster.

To strike a balance between cost-efficiency and sustainability criteria the Belgian authorities decided to rank the projects according to a so-called “Coefficient Price”. The maximum number of points (100) was allocated to the projects with the lowest Coefficient Price/unit of emission reduction. The latter was the result of the offered price minus a “discount” if the project was assessed positively with respect to its contribution to the sustainable development of the host country. For instance, projects with a “very high” sustainability score were granted a higher discount than projects with only a high score. Projects with a low or no sustainability score did not benefit from any discount. As a result, projects with high sustainability scores were paid a premium.

The formulation of award criteria for the purchase of REDD+ credits deserves special attention. If the aim of the tender is to reward co-benefits concurrently with the achievement of GHG emission reductions, the award criteria will have to reflect this preference. This may be done by assigning a certain percentage to the price factor and another to the type of projects or programmes it wants to favour. The procuring entity could for instance privilege proposals that aim at protecting forests with a high level of biodiversity or at promoting the livelihoods of indigenous people. Another option is to follow one of the examples provided by the Belgian tenders, which formulated sustainability criteria against which the projects were assessed and ranked. Yet another possibility is to rank REDD+ standards with respect to their inclusion of environmental and social co-benefits and attribute them different “weights”. Projects or programmes fulfilling standards that are ranked higher with respect to their contribution to sustainability could for instance be rewarded with a premium price.

## **F. Positive and Negative Lists of Eligible Projects or Programmes**

Other than setting prequalification conditions with respect to the personal qualifications and technical capacity of applicants, a procuring entity may want to exclude certain types of REDD+ credits. This option was chosen by the Belgian authorities, which ruled out any projects related to land-use and forest projects as well as projects involving nuclear energy and large hydro dams. Another possibility for narrowing down the scope of the tender is to limit the tender to a positive list of eligible projects. For instance, public authorities may wish exclusively to buy credits from avoided deforestation in areas of high biodiversity and with a high social added value. Such a tender would clearly target some projects at the expense of others. While the public authorities may have valid grounds for choosing such an option, the full potential of the tender to promote a process of discovery of cheap abatement opportunities would be limited accordingly.

## **G. Host Country Eligibility Criteria**

Under the CDM, the host country must approve the project and confirm that the project activity assists it in achieving sustainable development.<sup>53</sup> The rationale of these requirements goes back to the double goal of the CDM, which is to allow developed countries to contribute to reducing atmospheric concentrations of GHGs, while promoting sustainable development in developing countries.

Furthermore, only countries that are a Party to the KP and have established a national authority are entitled to host CDM projects. The establishment of a national institution is important to ensure efficient and transparent treatment of project applications and to assess local sustainability benefits and costs. It may however also assume other roles, such as providing guidelines on project approval criteria and information about projects and financial opportunities for local projects.<sup>54</sup>

Mirroring the conditions set by the KP for CDM projects, a call for REDD+ credits could make the tender conditional on the approval by the host country. In addition to the approval of the host country, procuring entities may wish to limit the tender to projects or programmes where the host country has entered into an agreement with the “purchasing” state. Such an agreement may serve several purposes. The purchasing state may want to make sure that there is a national institution responsible for the approval of a project or programme. Furthermore, an agreement might specify that the host country will support its successful implementation. Finally, the purchasing country may wish to ensure that the emission reductions achieved through the project or programme will not lead to double counting in the international context of climate change negotiations.

## **H. Payment Conditions**

Contracting parties may agree that payments shall be made against delivery of the certificate that attests that purchased emission reductions have been realized. While in conformity with the idea of results-based payments, this mode of payment may be quite unattractive given that emission reductions projects and programmes generally entail large upfront investments that may take place over long periods of time. To provide for a more balanced allocation of risks between the purchaser and the tenderers, the possibility of making pre-payments should thus be considered. For instance, the Dutch, as well as the Belgian authorities in the first two tenders, agreed to make pre-payments if certain clearly verifiable milestones were achieved.<sup>55</sup>

## **IV. Tenders for REDD+ Credits in the Context of the European Union**

### **A. The case for calls for REDD+ Credits by the EU and its Member States**

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<sup>53</sup> See 3/CMP.1, Annex, paragraph 40(a).

<sup>54</sup> See for more information [http://www.cdmcapacity.org/how\\_prepare\\_CDM/encourage\\_land\\_use.html](http://www.cdmcapacity.org/how_prepare_CDM/encourage_land_use.html).

<sup>55</sup> See Belgian state (2005).



Pilot schemes that help to establish the environmental credibility of REDD+ and inform policy makers in donor and recipient countries greatly contribute to accelerating the transition from “readiness” towards the implementation of results-based actions.<sup>56</sup> While California under its “Governor’s initiative”<sup>57</sup> and Norway<sup>58</sup> through its bilateral agreements with Brazil, Guyana and Indonesia are actively exploring new avenues, the EU has provided little leadership.

Although the EU has been a frontrunner in recognizing CDM credits in its emission trading scheme (ETS), it has remained very cautious when it comes to accepting carbon credits from the forestry sector. This is notably motivated by its fear that the acceptance of REDD+ credits would further undermine the functioning of its ETS, which already faces a massive oversupply of credits. Hence, while not rejecting the idea of forestry credits altogether, it has posited that they should first be tested for government compliance before they can be recognized within the EU ETS.<sup>59</sup> So far, however, the EU has not proposed any follow-up action. This is unfortunate, as the success of REDD+ will crucially depend on the more active involvement of the EU.

It is suggested here that the EU and its Member States could increase their contribution to REDD+ by embracing a two-pronged approach. The EU could, on the one hand, take a unilateral commitment to increase its current mitigation target for 2020 from 20% to 30%<sup>60</sup> under the UNFCCC, without submitting this supplementary commitment to the rules of the KP. This would allow its Member States to meet some of their new obligations by procuring emission reductions from REDD+. On the other hand, or in the case that no consensus emerges regarding a more ambitious mitigation target, the EU and/or its Member States could create a REDD+ fund which would allocate part of its budget to the acquisition of REDD+ credits to support pilots for results-based payment schemes.

## **B. EU Public procurement rules**

Public procurement in the Member States of the EU is regulated both by national and European law and, in specific cases, also by the Global Procurement Agreement (GPA).<sup>61</sup> In this section we will examine whether and to what extent EU law applies to the purchase of REDD+ credits by public agencies of its Member States.

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<sup>56</sup> Sterk (2012: 20).

<sup>57</sup> California concluded an agreement in 2009 with 19 states and provinces from Indonesia to Peru to assist the creation of sub-national programmes that reduce GHG emissions from deforestation and degradation using the carbon market as a financial incentive. It has yet to decide whether the credits that these schemes might deliver will be accepted under its emission trading scheme. See <http://stateredd.org/group-advises-california-on-accepting-redd-credits/>.

<sup>58</sup> See for more information on the Norwegian initiative

<http://www.regjeringen.no/templates/RedaksjonellArtikkel.aspx?id=547202&epslanguage=EN-GB>.

<sup>59</sup> European Commission (2008).

<sup>60</sup> The EU has committed to reduce its greenhouse gas emissions by 20% in 2020 with respect to the baseline in 1990 under the second commitment period of the KP.

<sup>61</sup> The GPA has been adopted within the framework of the World Trade Organization (WTO).

The EU has adopted several directives whose prerequisites have to be fulfilled when public authorities seek to acquire supplies, services, or works that exceed certain thresholds. Their purpose is to open up the national public procurement markets to all economic actors and ensure a level playing field within the EU. Furthermore, EU primary law, in particular its principles of non-discrimination, equal treatment and transparency, applies.<sup>62</sup>

### **C. The Public Sector Directive**

The Public Sector Directive (hereafter the “Directive”) is the principal legal instrument governing the purchase of works, products and/or services by public authorities of Member States of the EU.<sup>63</sup> For the Directive to apply, the tender for REDD+ credits must be issued by one of the public authorities<sup>64</sup> mentioned therein, exceed the indicated thresholds and be covered by its material and geographical scope.

#### **1. The material scope of the Directive**

The Directive sets out rules for tenders for works, products and/or services.<sup>65</sup> As a work is defined as “the outcome of building or civil engineering works”, only the meaning of the terms “product” and “service” deserve further scrutiny. Whereas the term “product” is not further defined by the Directive, Annex II contains a list of services, notably a heading entitled “other services”.

So far, the Court of Justice of the European Union (CJEU) has not clarified whether the supply of carbon credits may be qualified as a service or as a product or good in the sense of the Directive. According to its jurisprudence “goods are products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions”.<sup>66</sup> REDD+ credits are traded like commodities in the voluntary market and thus clearly have a monetary value. This suggests that they may be qualified as goods. The Belgian authorities considered in their tender that the supply of CDM credits constitutes a service.<sup>67</sup> This interpretation is supported by the fact that the credits were used to fulfil the Belgian mitigation commitments under the KP.

In the absence of further guidance by the CJEU, the legal nature of carbon credits may be explored in the light of the doctrine. The question has in particular been addressed by legal scholars in the framework of the World Trade Organization (WTO). While some authors argue that carbon credits have no intrinsic value and may not be qualified as goods under WTO law others qualify them as intangible investment goods.<sup>68</sup> Other authors support the

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<sup>62</sup> The EU public procurement rules apply to all its 27 Member States as well as to countries that have ratified the GPA.

<sup>63</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, O.J. L 134, 3.4.2004, pp.114–240.

<sup>64</sup> See Annex III of the Directive.

<sup>65</sup> See Article 1.2 (a) of the Directive.

<sup>66</sup> Case of the European Court of Justice, *Commission v Italy*, “Italian Art”, 7/68, ECR 1968, p. 4

<sup>67</sup> See [http://www.climatechange.be/jicdmtender/article.php3?id\\_article=47#proc](http://www.climatechange.be/jicdmtender/article.php3?id_article=47#proc).

<sup>68</sup> Kulovesi (2011: 241)

view that, rather than goods, carbon credits resemble securities and thus have to be considered as financial services in the sense of the General Agreement on Trade in Services (GATS).<sup>69</sup>

It may safely be said that no consensus has so far emerged regarding the legal nature of carbon credits. Strong arguments however militate in favour of their qualification as goods or services in the sense of the Directive. Given the aim of the Directive to allow public entities to achieve a goal on the best economic terms, there are good reasons to apply its rules also to credits, which are used to achieve cost-efficient emission reductions.

## 2. The territorial scope of the Directive

Another issue that needs to be examined is whether the Directive applies to tenders for REDD+ credits that are defined by a jurisdictional baseline, be it national or sub-national. This type of tender is distinct from others, as only public entities from third countries may submit them. This raises two questions. The first is whether public entities can qualify as “economic operators” in the sense of the Directive and the second is, if the answer to the first question is in the affirmative, whether the tenders are covered by the territorial scope of the Directive.

Parties to public procurement contracts are usually undertakings pursuing economic objectives. The CJEU has so far not clarified whether the Directive may also apply to public entities. In analogy to the jurisprudence developed in the ambit of European competition law one may argue that public entities may well pursue economic objectives on the same terms as private undertakings and thus qualify as “economic operators”. This argument is supported by the overriding goal of EU procurement law which is to open up government markets to free trade. Accordingly, there are no compelling reasons to exclude in principle public entities which pursue economic interests as this is the case for the sale of carbon credits.

The final question is whether a call to which only public entities from third countries may respond falls under the territorial scope of the Directive. So far none of the traditional rainforest countries<sup>70</sup> has ratified the GPA,<sup>71</sup> which extends the geographical scope of the Directive to the operators of those countries. It is thus safe to say that calls for tenders for REDD+ credits that are exclusively defined by jurisdictional baselines from rainforest countries are not covered by the territorial scope of the Directive.

## 3. Four types of procedures

Procuring entities have the choice between four types of procedures: an open, a restricted, a negotiated and a competitive dialogue procedure. The open and restricted procedures represent the standard procedures and follow the same pattern. The procuring entity defines in

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<sup>69</sup> *Idem*.

<sup>70</sup> The rainforest nations are Brazil, Congo, Peru, Indonesia, Columbia, Bolivia, Cameroon, Central African Republic, Ecuador, Gabon, Guyana, India, Laos, Malaysia, Mexico, Myanmar, Papua New Guinea, Republic of Congo, Suriname, and Venezuela.

<sup>71</sup> The GPA has notably been signed by all the EU Member States, Hong Kong, China, Iceland, Israel, Japan, Korea, Liechtenstein, Norway, Switzerland, Chinese Taipei and the United States.

the bidding document the prequalification that must be met, sets up the technical specifications of the bid<sup>72</sup> and formulates the award criteria, according to which the bids will be evaluated. The conditions for the bid are then made public through a public notice in the Official Journal of the European Union. The tenderers that fulfil the prequalification criteria are allowed to submit their bids within the defined time frame. The procuring entity then assesses them according to the award criteria set out in the bidding document and awards the contract.

In contrast to the standard procedure, the negotiated procedure allows the procuring entity to engage in negotiations with the tenderers with respect to their initial offer. In this phase, the procuring entity enjoys significant freedom to structure the procedure.<sup>73</sup> It is for instance empowered to make a selection of preferred bidders, to take recourse to iterative tendering and/or to phase out participants progressively. At the same time, bidders have significant possibilities to amend their offers after negotiations. In all phases, however, the principles of transparency and equal treatment will have to be given due regard.<sup>74</sup>

In the competitive dialogue procedure, the basic structure changes. Instead of requiring tender specifications, it suffices if the procuring entity provides a “descriptive document” that informs bidders about its needs and requirements.<sup>75</sup> Based on the information received, the procuring authority selects from among the participants that meet the prequalification criteria<sup>76</sup> the ones it deems the most suitable.<sup>77</sup> The award phase starts with a “dialogue” phase, for which the Directive provides significant flexibility.

All aspects of the contract can be discussed with the chosen candidates during this dialogue.<sup>78</sup> For example, the authority can ask for initial outline tenders that set out the tendering firm’s proposed solutions and key terms, can discuss these outlines with the firms, and then ask them to revise them to make them better meet the authority’s needs in light of the discussions, prior to the final tender.<sup>79</sup> During the dialogue, the procuring entity has to ensure equality of treatment among all bidders and may not reveal confidential information disclosed by one participant to the others without his/her agreement.<sup>80</sup> At the end of the dialogue the authority may specify a single solution against which all tenderers submit their final bids or it may ask each tenderer to submit a bid that includes its own solution. After the formal closing of this phase, a call for “final tenders” is put out to the remaining participants. Based on these bids, the procuring entity must then choose the most economically advantageous tender.<sup>81</sup>

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<sup>72</sup> See Article 23 of the Directive.

<sup>73</sup> Arrowsmith (2010b: 197).

<sup>74</sup> Arrowsmith (2010b: 197).

<sup>75</sup> Art. 1 11 (c) of the Directive : “...a procedure in which any economic operator may request to participate and whereby the Contracting Authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender”.

<sup>76</sup> The Directive limits the prequalification criteria to the following characteristics: economic and financial standing; technical and professional ability.

<sup>77</sup> The minimum number of tenderers to be invited is 3.

<sup>78</sup> Burnett (2009: 19).

<sup>79</sup> Arrowsmith (2010b: 186 ff.).

<sup>80</sup> Burnett (2009: 19).

<sup>81</sup> Article 29 (7) of the Directive.

As discussed above, the choice of the appropriate procedure for tenders for REDD+ credits, depends on various criteria. Suffice it to say here that the negotiated procedure and the competitive dialogue procedure can only be used in well-defined circumstances. The recourse to the negotiated procedure is for instance allowed in the case of services if “the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision”<sup>82</sup> or, more generally, if the nature of the tender object, or the risks attached to performance, are such “as not to permit prior overall pricing”.<sup>83</sup> The competitive dialogue is reserved for particularly complex contracts, where “Member States consider that the use of the open or restricted procedure will not allow the award of the contract”.

When defining the award criteria procuring entities may refer to a list of factors, including inter alia the quality the price, the technical merit, aesthetic and functional characteristics, environmental characteristics, running costs and cost-effectiveness.<sup>84</sup> All criteria must however be related to the subject matter<sup>85</sup> of the contract and may not be “essentially linked to the tenderer’s ability to perform the contract in question”.<sup>86</sup> Moreover, they may not confer an unrestricted freedom of choice on the procuring entity and have to comply with the fundamental principles of Community law, in particular the principle of non-discrimination.<sup>87</sup> The principle of equal treatment implies notably “an obligation of transparency in order to enable compliance with it to be verified”.<sup>88</sup>

Procuring entities enjoy wide discretion as to how to weigh the different award criteria.<sup>89</sup> For instance, the CJEU posited that nothing prevented a procuring entity from attributing a weighting of 45% for environmental criteria.<sup>90</sup> They do, however, have to be formulated in such a way “as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way”.<sup>91</sup> If sub-criteria and weightings are developed, they must be disclosed as well.<sup>92</sup> In the case *Concordia Buses* the CJEU further stated that environmental criteria must be “specific” and “quantifiable”.<sup>93</sup>

In the case of a competitive dialogue procedure, the procuring entity must specify the award criteria in the descriptive document and indicate how they will be weighted. This can be

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<sup>82</sup> Article 30 (1) (c) of the Directive.

<sup>83</sup> Article 30 (1) (b) of the Directive.

<sup>84</sup> Art. 53 par. 1 (a) of the Directive .

<sup>85</sup> See Case C-513/99, *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne*, 2002 I-07213.

<sup>86</sup> See Case C-532/06, *Emm. G. Lianakis AE v Dimos Alexandroupolis and others*, 2008 I-251.

<sup>87</sup> See Case C-513/99, *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne*, ECR 2002 I-07213, Bovis (2012: 417).

<sup>88</sup> Case C-19/00, *SIAC Construction*, ECR 2001 I-7725, par. 41.

<sup>89</sup> Case C-448/01, *EVN AG and Wienstrom GmbH v Austria (“EVN”)* ECR 2003 I-14527, *Arrowsmith* (2010b: 170).

<sup>90</sup> *Arrowsmith* (2010b: 170).

<sup>91</sup> Case C-19/00, *SIAC Construction*, ECR 2001 I-7725, par. 42.

<sup>92</sup> Case C-331/04, *ATI EAC Srl e Viaggi di Maio Snc*, ECR 2005 I-10109 and *others v ACTV Venezia Spa and others (“ATI EAC”)*.

<sup>93</sup> See Case C-513/99, *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne*, ECR 2002 I-7213.

“expressed by providing for a range with an appropriate maximum spread”<sup>94</sup> or, where weighting is not possible “for demonstrable reasons”, through the indication of their importance, following a descending order so that tenderers can clearly ascertain the relative weight of the different factors for the evaluation process.

Overall, the principal goal of the rules on the award criteria is to ensure that they are applied in a transparent way to avoid the concealment of discriminatory decisions.<sup>95</sup> Some rules, however, also pursue other goals, such as the requirement that environmental criteria have to be specific and quantifiable. For the definition of award criteria of REDD+ credits this means that if co-benefits are to be rewarded the criteria for doing so must be defined with sufficient precision.

## V. Conclusions

Despite numerous initiatives aimed to halt deforestation of rainforests, the rate of destruction continues to accelerate at an alarming rate.<sup>96</sup> Many hope that the emerging REDD+ framework which encourages developing countries to reduce emissions from deforestation and forest degradation will assist in reversing that trend, contributing to climate change mitigation while also improving the livelihoods of millions of people.

So far, it remains unclear what the final legal architecture of REDD+ will look like. While substantial efforts have been made to sustain “readiness” activities that aim at strengthening governance and supporting capacity-building, the international community is split as to how support may best be linked to the achievement of measurable emission reductions. Many fear that market-based approaches would exacerbate environmental concerns and social inequities in rainforest states and fail to address the underlying causes of deforestation and forest degradation.

This paper argues that while in the long term a combination of measures addressing the drivers of deforestation and encouraging investments in sustainable land use offers the best prospects for success, it is important that best practices for results-based payments, which provide an effective tool to incentivize recipients to achieve promised results, are identified. In the absence of an agreement at the international level on the design of market-based approaches, “bottom-up” initiatives should step in and take the lead.

One possibility for fostering result-based support would be to organise a call for tenders for REDD+ credits. Such an approach would have several advantages. By putting a price on carbon, it leverages private investments and favours the early discovery of cost-efficient abatement options. It allows the testing of standards that have been developed in the voluntary market and may thus contribute to laying the groundwork for the adoption of international standards recognized by the UNFCCC. Finally, concurrently with the discovery of cost-

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<sup>94</sup> Art. 53 par. 2 of the Directive.

<sup>95</sup> Arrowsmith (2010b: 168).

<sup>96</sup> The IPCC estimated emissions from deforestation in the 1990s to be 5.8 GtCO<sub>2</sub>/yr. See [http://unfccc.int/methods/redd/methodological\\_guidance/items/4123.php](http://unfccc.int/methods/redd/methodological_guidance/items/4123.php)

efficient abatement, other goals, such as the protection of the livelihood of indigenous people and environmental co-benefits, can be pursued.

It is important that the standards a tendering process promotes are robust and provide strong guarantees of environmental integrity of the credits it generates. It should, however, also allow a learning process that grants sufficient space for experimentation and the testing of different standards. Building on the experience gained, a progressive tightening of the standards may be envisaged over time.

The successful outcome of a tendering procedure very much depends on the choice of the procedure and the definition of the tender. An adequate balance will have to be struck between a procedure that makes allowances for sufficient competition and a process that is flexible enough to accommodate different local and regional circumstances and provide tailor-made solutions. Within the ambit of the EU both European and national public procurement laws will have to be given due consideration.

An aspect that deserves special consideration is the transaction costs of a tendering procedure. The scrutiny of a great number of individual projects or programmes may indeed be very onerous for procuring entities with limited personnel resources. An interesting option to reduce transaction costs is represented by the “portfolio approach” developed by the Belgian authorities for their call for CDM and JI credits, which allows the procuring entity to delegate the examination of single projects to professionals, while remaining responsible for the definition of the tender and the global oversight of the procedure.

Overall, a call for tender for REDD+ credits represents a novel approach that breaks new ground. It does not substitute efforts for REDD+ readiness, but complements them by putting a price on carbon, which is desperately needed to provide the right incentives in the forestry sector. The funding sources may come either from public budgets or from special funds set up for that purpose.<sup>97</sup> Dependent on public money, it does not, of course, solve the problem of strained budgets, but helps to spend funds in a cost-efficient manner. Twisting somewhat Neil Armstrong’s famous quote,<sup>98</sup> we might like to conclude that reversing and halting deforestation would be “a giant leap for mankind”, but will, eventually, only be achieved by thousands of small steps of men and women. “Protecting tropical forests through public procurement of emission reductions” represents one of them.

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<sup>97</sup> The funds for the call for tenders for JI and CDM credits by the Belgian government came from the Kyoto fund, which was financed by consumers’ contributions through their electricity bills. See van Hecke and Zgajewski (2008).

<sup>98</sup> When Neil Armstrong took the first steps on the moon he allegedly said: “that’s one small step for a man, one giant leap for mankind”.

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